

**City of Leawood
Board of Zoning Appeals Minutes
December 18, 2019 – 5:30 p.m.
Leawood City Hall Council Chambers
4800 Town Center Drive
Leawood, KS 66211**

CALL TO ORDER/ROLL CALL:

Chairman Clawson: I'd like to call to order the December 18, 2019 Board of Zoning Appeals Meeting. Could I have roll call, please?

MEMBERS PRESENT: Dunn, Dr. Peppes, Clawson, and Farrington

MEMBERS ABSENT: Munson, Hawk, and Bussing

STAFF PRESENT: Thompson, Tomasic

APPROVAL OF MINUTES:

Approval of minutes from the November 20, 2019 Board of Zoning Appeals meeting.

A motion to approve the minutes from the November 20, 2019 Board of Zoning Appeals meeting was made by Dunn; seconded by Dr. Peppes. Motion carried with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Farrington, and Clawson.

Chairman Clawson: We have three cases tonight: two with Old Business and one with New Business. I think there are going to be a number of people who wish to speak for or against a case tonight. I would like to impose a time limit of five minutes on the applicants on their initial presentations, and for those who wish to speak on behalf of or opposed to the application, please limit your remarks to three minutes.

OLD BUSINESS:

Case 46-2019 Philip & Stacy Kneibert Owners - Request to consider an Appeal of Administrative Decision relating to a Detached Structure in accordance with the LDO, Section 16-4-2.2 in an RP-1 District for property commonly known as 11345 Brookwood Street.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The applicants would like to construct a pool pavilion in the rear yard. The pool pavilion is a roofed structure with open sides and is required to meet the rear yard setback. Ordinance 16-9-209 defines a pool cabana as a shelter located near a swimming pool, used as a bathhouse accessory to the swimming pool.

Chairman Clawson: The reason this is an appeal for an administrative decision is what?

Mr. Coleman: They're appealing the interpretation of what is meant by bathhouse or pool cabana. In your packet, we've included a definition of cabana from Merriam Webster Dictionary and articles that talk about the origination of pool houses. That is in line with our interpretation. For over a decade, all of the pool houses that we have approved have had a bathroom associated with them. As is stated in the article that was included in the packet, the main reason for the pool houses is so that people can change in and out and use the restroom. Some how showers; some don't. The idea is that you don't have people going in through the main house, tracking water and dirt into the house. Prior to my ever being here, the City of Leawood determined they did not want to have a detached accessory structure in the rear yards of houses because they might include storage barns and the like. The LDO is fairly restrictive about detached accessory uses. It allows small, detached structures like a gazebo up to 64 square feet and garden structures. They have to conform with the setbacks in the rear and side yards. Those are the only ones that are allowed to be entirely detached. They do allow other accessory structures that are required to be attached to the main house with a small breezeway connection that has to be within 15 feet of the main house and should be about 10 feet wide. It is a small connection to an accessory structure. In this case, if this had such a structure, it would be allowed. Since it is completely freestanding, we don't consider it a pool house, but rather a freestanding accessory structure, which is not allowed under the LDO. The applicant is talking about a pavilion, which is limited to 64 square feet. This is much larger with a fireplace and storage rooms. Under the LDO, it would not be allowed.

Chairman Clawson: The LDO lists accessory structures that are permitted, including bathhouses, pool houses, and cabanas.

Mr. Coleman: Yes, if they are associated with a pool.

Chairman Clawson: The city's position is to qualify under that requirement of the LDO, a bathhouse, pool house, or cabana must have a bathroom.

Mr. Coleman: If one of the storage rooms was a changing room with a bath, it would be allowed, or it could be allowed as it is if it were architecturally attached to the main structure. Since it is neither, it is not allowed.

Chairman Clawson: In the information provided, you showed cases with pool houses, and virtually all of them had a full or half bath.

Mr. Coleman: Yes.

Mr. Dunn: I thought I heard you say that, as far as you know, the city has never approved a bathhouse, pool house, or cabana in association with a swimming pool that didn't have a bathroom. Is that correct?

Mr. Coleman: In my duration, it hasn't happened, but it's possible that there are some out there.

Mr. Dunn: You're not aware of any of those that were approved before?

Mr. Coleman: The applicant said a house across the street has a pool house that doesn't have a bathroom. I don't know if it has one or not. It did get a plumbing permit. It's enclosed on three sides, and it has some kind of door or curtain on the front. That all took place in the '90s.

Chairman Clawson: If we uphold the decision by the city, they must have a bathroom in order to have a pool house. If we deny their appeal, their courses of action would be to request a variance or put a bathroom.

Mr. Dunn: They wouldn't need a variance if they put a bathroom in it, correct?

Mr. Coleman: That is correct. With a bathroom and changing room, it is fine. If it is architecturally attached to the main structure, it would also be fine without a bathroom. Without either of those, it is just a large accessory structure in the rear yard that is not allowed under the LDO.

Mr. Dunn: As I recall with the breezeways, the way it is interpreted is they have to be wired before they're approved.

Mr. Coleman: I don't know. I don't think so. Some people have wanted an extra garage, and I believe those just had a covered roof with a breezeway that connected. I don't know that they had electricity.

Mr. Dunn: But what is not allowed is a roof-looking thing that connects the structure to the house with nothing beneath.

Mr. Coleman: It has to be 10 feet wide. I'd have to look it up.

Chairman Clawson: The maximum distance from the main structure would be what?

Mr. Coleman: Maximum is 15 feet.

Chairman Clawson: Are there other questions for staff? Is the applicant here?

Applicant Presentation:

Bruce Wendlandt, architect, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Wendlandt: Back on November 20th, we went through two hearings: the setback issue and what we're continuing on tonight. What's important in my mind to recall is the language and discussion on the setback issue. It was looked upon and approved that this was naturally a pool cabana structure associated with a pool. I think that's important to bring up. Because time is of the essence, I'm not going to get into all the debate in terms

of hardship in terms of an architecturally detached structure because that's not possible. The last time we were here, we discussed definitions, and it's going to be a huge discussion tonight on definitions. Merriam Webster defines it as a lightweight structure with living facilities, a tent-like shelter, usually with an open side facing a beach or swimming pool. Vocabulary.com defines a cabana as a small, sometimes portable changing room near a swimming pool or beach. A traditional cabana is a tent that can be moved from one spot to another on the beach. The Free Dictionary defines it as a light structure on a beach or swimming pool used for shelter from the sun or as a dressing room, a cabin or hut. We can find numerous definitions. I apologize that I even put the word *pavilion* on the title blocks. It's a nice euphemism, and I think it sounds more eloquent than *cabana*. We call finished basements a lower level. Moving on from that, we also discussed our structure in terms of the feasibility of putting in a toilet. We could if we moved a wall 4 inches. It's not going to change anything with respect to the exterior presentation to the community. I would argue the structure as it stands does meet the spirit and intent of the LDO. I guess where it really gets tricky is when we look at the LDO. The definition of a pool cabana in the LDO is a shelter located near the swimming pool used as a bathhouse accessory to the swimming pool. I did not find language in the LDO that said it has to have a toilet. I looked in the LDO for a definition of bathhouse. I could not find a definition of bathhouse in the LDO. I looked into supplemental provisions, which is where it says things that can be accepted. No. 15 said, bathhouse, pool house, and cabana only in conjunction with swimming pools." We have a clearly defined structure in conjunction with the swimming pool. We went through that last month. Now, I go back to pool house and its definition. I feel like what we have is a pool house. I'd say the major function of a pool house or cabana is to have a place where people gather. Not everybody can be out in the sun. They can be under that area. We're talking about a bathroom that is unperceivable in the public domain. The floor space we're talking about is the tail wagging the dog, in my opinion. We're talking about a closet that could be converted to a stool closet. It's 7% of the square footage of this otherwise acceptable structure. I believe the Kneiberts are in the spirit and intent of what is going on here.

Chairman Clawson: Since this bathhouse is close to the pool, I'm assuming water is readily available, and you're probably close to a sewer line. Would this be an unreasonable thing to put a bathroom in it?

Mr. Wendlandt: It's doable, yes, but obviously, they've got to pay for water service to it. They've got to pay for DWV, etc. Again, it doesn't change anything in terms of the presentation to the public domain.

Chairman Clawson: Does the board have questions for the applicant? Thank you.

Mr. Wendlandt: There is a pool cabana that exists across the intersection without a bathroom. Roger Banks couldn't be here. He built and installed it.

Chairman Clawson: Thank you. Is there anyone here who wishes to speak for or against this application? As such, this is not a variance, so we don't have to go through the five factors. One person on the board needs to make a motion.

Dr. Peppes: Our motion is whether to accept the appeal of the administration or what?

Mr. Coleman: The applicant is appealing the administrative interpretation of the LDO that their pool pavilion is not a bathhouse or pool house. That's why we included those definitions.

Ms. Farrington: The Supplemental Provisions were brought up in Article 4, Page 8 of the packet, Item 15, defining bathhouse, pool house, and cabana only in conjunction with a swimming pool. The requested action is asking to define this as a pool pavilion; however, in the presentation, it was pointed out that this is more like a pool house. The definitions we were given were of cabanas and bathhouses. I'm having trouble understanding. Are we voting on it being called a pool pavilion, or would it fall under this Item 15 where it is actually a pool house without a bath or the definition of a cabana?

Mr. Coleman: Under the LDO, we would consider it a freestanding accessory structure and not allowed. We wouldn't consider it a bathhouse, cabana, or pool house. They're saying it is. That's why I included the common understanding of pool house and the definition of cabana. I think a bathhouse is self-defined. That is why we have always included at least a half bath. Most of them have showers to rinse off after using the pool. That's been my standard since I've been here and before. Your ruling would allow structures that don't have them anywhere in the rear yard, essentially.

Chairman Clawson: The motion could be that we are upholding the city's decision that this structure as a pool house would need a bathroom facility to be a detached structure under the LDO.

Ms. Tomasic: If I may, from the statute 12-759, when discussing administrative appeals, the board may reverse or affirm the order, requirement, decision, or determination of the officer. The decision has been made that this structure is not a bathhouse, pool house, or cabana. I think your motion could be as simple as either reverse or affirm the decision of the city official that this is or is not a bathhouse, pool house, cabana that would meet Item 15. If you reverse the city's decision, you're saying it does meet No. 15; if you affirm the decision, you're saying it does not and would therefore be prohibited.

Ms. Farrington: I'm still having trouble. I understand what the city has determined. When I look at Supplemental Provisions and the architectural plan, the spirit of the LDO is to prevent outlying structures, storage structures, and all the things listed in the LDO. The function of this is to be used by a pool. Whether that's a bathhouse, cabana, or pool house, the function is to be used by the pool. To me, it is some sort of structure used by a pool, whether it's a pool house or pool pavilion.

Dr. Peppes: But it has to have a bathroom.

Ms. Farrington: A bathhouse has to have a bathroom. Where does it say that the pool house or cabana has to have one?

Chairman Clawson: I don't think it says anywhere in the LDO.

Mr. Coleman: It doesn't say it in the LDO; that's why I provided all those examples. That's my interpretation. If you don't agree with my interpretation, you vote it down; if you agree, you vote it up.

Mr. Dunn: You've outlined the same problem I had when we talked about this before. My inclination is to agree with and uphold staff's decision because they're much more experienced at this than we are. In another sense, I'm kind of a strict constructionist when it comes to language. Bathhouse, pool house, and cabana does not say bathroom; it says it's a building used in conjunction with a pool, basically. That's where I'm struggling with this. I don't see any other use for this than in conjunction with a pool.

Ms. Farrington: I agree. You have garden structures, trellises, and arbors. It's an open-sided structure on the architectural plans. To me, the function is a pool-related space.

Mr. Dunn: Not to nitpick, but if Governing Body had deemed that a bathroom was required to make a pool structure a bathhouse, pool house, or cabana, it could easily have been inserted in here.

Chairman Clawson: It could have noted that, in order for a bathhouse, pool house, or cabana to be considered as an allowable detached structure, it must have a bathroom.

Mr. Coleman: It could have, but I think they were just talking in understood terms. If you look at the definition of a cabana, the first defines it as a habitable living structure, and under our code, that would require plumbing facilities and a bathroom. That's why I included the pool house examples because it's common understanding. It shows the history from 50-60 years ago and what pool houses were. That's the basis of our interpretation. Otherwise, it could be any structure as long as it's near a pool.

Chairman Clawson: You could build a garage next to a pool and call it a pool house.

Mr. Coleman: Exactly.

Mr. Dunn: I think I'd see a distinction there if it was actually a garage because its primary use would be parking cars, not as a pool house.

Mr. Coleman: There's nothing in the LDO that says that, so you have to have some interpretation because not every word is defined in the LDO.

Mr. Dunn: I just want to say that I don't think staff did anything wrong. It's being interpreted in accordance with the history under which it's been interpreted up to this point, but I don't think I agree with that. That's where I am now.

Ms. Farrington: I'm having trouble, too, because I'm looking at the language, and if a bath is required, I think it needs to be stated in the LDO. This structure clearly doesn't have a bath in it, according to the plans. It would be considered a pool house, so I'm having trouble. It needs to be clearer.

Chairman Clawson: Again, is there a motion?

Mr. Dunn: None of us wants to make it, but I'll go ahead and do it.

A motion to reverse the administrative decision in Case 46-2019 Philip & Stacy Kneibert Owners - Request to consider an Appeal of Administrative Decision relating to a Detached Structure in accordance with the LDO, Section 16-4-2.2 in an RP-1 District for property commonly known as 11345 Brookwood Street – was made by Dunn; seconded by Farrington. Motion carried with a vote of 3-1. For: Dunn, Farrington, and Clawson. Opposed: Dr. Peppes.

Case 49-2019 Leawood Hills Development, LLC/Owner - Request for a Variance to the minimum Lot size requirements for new lots in accordance with the LDO, Section 16-2-5.4 (D) in an RP-1 District for the properties located in the Hills of Leawood Villas at 151st Street and Mission Road.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The property owners would like to develop the parcel, which is 13.5 acres, into single-family homes. Per the applicant, a variance to the average lot size is needed to make the property viable for development.

Chairman Clawson: This is currently zoned RP-1.

Mr. Coleman: I believe it's still R-1. There's an application, but it's R-1 zoning.

Chairman Clawson: Are there questions for staff?

Mr. Dunn: I read staff's thoughts on Uniqueness of the Property, and I'm not following it very closely. Can you describe what that means? It's an elongated 13-acre parcel that contains a 160' easement on the entire length of the east side. To the west and south, there are a number of large lots, and ¾-2 acres to the east is newly planted R-1 single-family residential subdivision. These lots tend to skew the average lot sizes, compared with average R-1 single-family residential lots. What you're saying there is that because of the large sizes of surrounding lots, the size of these R-1 lots, which is a moveable

number based on surrounding lots, is particularly large. How much larger are these than average R-1 lots?

Mr. Coleman: There are a couple that are over 2 acres. The minimum in R-1 is 15,000 square feet, and the minimum in RP-1 is 12,000 square feet. Many years ago in the '60s and '70s, there was a rural development created prior to the City of Leawood annexing it. The houses were faced onto Mission and 151st Street. Many of them were narrow, deep, and 1-2 acres. There are a few on the Mission Road side that are smaller, but there are a couple that are very large that increase that. If you go across Mission, just outside the boundary, there's one, but the lots are RP-1. If you go the west, it's the new development, and it's R-1.

Mr. Dunn: If we were to approve this as RP-1 –

Mr. Coleman: You don't approve the RP-1. They're just asking for a variance to the average lot size, which was granted previously to the development to the east on a similar basis.

Mr. Dunn: Could this not be rezoned to RP-1?

Mr. Coleman: If the variance is approved, they're planning to rezone it to RP-1.

Mr. Dunn: And would these RP-1 lots in this location be larger than other RP-1 lots because of the size of surrounding lots?

Mr. Coleman: Yes, they would.

Chairman Clawson: You said there are other RP-1 lots in this area.

Mr. Coleman: West of Mission.

Ms. Farrington: Is that The Pavilions?

Mr. Coleman: Yes.

Mr. Dunn: That is 151st and Mission.

Mr. Coleman: These very large lots are now kind of an anomaly in the area.

Mr. Dunn: What does the drawing show (*refers to plan*)?

Mr. Coleman: It shows the proposed development.

Mr. Dunn: So, those lots are in the middle of the proposed development?

Mr. Thompson: The lots that are darkest are the new lots.

Chairman Clawson: The proposed lots, and the easement is on the east side.

Mr. Coleman: The power line easement is on the east side of the development.

Chairman Clawson: There are current power lines through there?

Mr. Coleman: They are transmission lines.

Dr. Peppes: And it's part of this R-1 district?

Mr. Coleman: Yes.

Dr. Peppes: So, they can't build on that?

Mr. Coleman: No.

Dr. Peppes: And the big circle that's there is the area in which you take the dimensions to figure?

Mr. Coleman: Yes.

Chairman Clawson: How many lots are shown here? Is it 24?

Mr. Coleman: I believe that's correct.

Chairman Clawson: And that's based on a reduced lot size of 12,000 square feet; is that correct?

Mr. Coleman: The minimum is 12,000 for RP-1. For example, Lot 24 is 15,400 square feet.

Chairman Coleman: But the smallest would be at least 12,000.

Mr. Coleman: Correct; none can be less than 12,000.

Chairman Coleman: If the requirements of R-1 are upheld, they would obviously have fewer lots that they could build on.

Mr. Coleman: Correct.

Ms. Farrington: When you refer to the large area to the east, it has already been rezoned as RP-1?

Mr. Coleman: No, it was rezoned as R-1, but the average lot size at that time would have required lot sizes of $\frac{3}{4}$ acre or more. The applicant can probably talk about it, but I think they average about 20,000 square feet or so.

Ms. Farrington: So, the same development has larger lots on the east side under R-1, and then this area that we're looking at is just on the west side?

Mr. Coleman: There's the power line easement, so they were looking at RP-1, which is the 12,000. Some of it is based on density. For detached homes, we have a series of zonings from R-1, RP-1, and RP-2. RP-2 is the densest, and the minimum lot size is 6,000 square feet. RP-1 is 12,000 minimum; R-1 is 15,000 minimum lot size. RPA-5, a rural lot, is a minimum of 5 acres.

Ms. Farrington: So, we're looking at a variance to allow these lots to meet a minimum of 12,000 square feet, and if that is passed, it could be rezoned.

Mr. Coleman: What you would be approving is a variance from the average lot size calculation. When these come in, we draw the line around, calculate the average lot size for all the lots surrounding.

Mr. Dunn: What's the main purpose of the average lot size calculation?

Mr. Coleman: It's to make sure there's not too great a change in the lot size between developments.

Chairman Clawson: Within the circle, you would look at lots within the circle?

Mr. Coleman: Yes, everything that is not the development's property.

Chairman Clawson: And you would calculate the average lot size?

Mr. Coleman: Correct.

Chairman Clawson: That would be applied how?

Mr. Coleman: That's what the applicant is asking for a variance from because, under the LDO, they'd be required to meet those minimum lot sizes.

Chairman Clawson: There are lot sizes that are 1-2 acres.

Mr. Coleman: Yes, but some of them are smaller at about 15,000-16,000 square feet. A lot that is 2 acres is 86,000 square feet. That skews the lot sizes quite a bit. That's why they're here for a variance.

Chairman Clawson: If you did that calculation and came up with $\frac{3}{4}$ acre for the average lot size, they would be forced to have an average lot size within that land mass of $\frac{3}{4}$ acre.

Mr. Coleman: That would be the minimum lot size they could have.

Mr. Dunn: How many spots would that limit it to?

Mr. Coleman: It's not based on the number of lots; it's based on the size of the lots.

Chairman Clawson: But has that analysis been done?

Mr. Coleman: You'll have to ask the applicant. We don't design subdivisions.

Chairman Clawson: You're allowing the applicant to do the calculation?

Mr. Coleman: We do the calculation of the average lot size, but that's just a number; we don't go in and design the project for them.

Chairman Clawson: Have you done that in this case?

Mr. Coleman: No, but the applicant could probably tell you.

Ms. Farrington: If these are, on average, 12,000-15,000 square feet, they could be doubled. Then it would be close to 3/4 – 1 acre.

Mr. Dunn: I don't want to make this more confusing, but I'm still confused; I'm sorry. If we approve this variance, are we approving a variance to allow the lots as proposed?

Mr. Coleman: You'd have to ask the applicant, but I would assume so.

Mr. Dunn: The reason I'm asking that is, even if this were RP-1, the minimum lot size is 12,000 for RP-1, but the minimum might not apply because of the surrounding lots, even in an RP-1.

Mr. Coleman: No, the applicant can speak to that, but the minimum is 12,000 square feet, so all the lots would be 12,000 square feet or larger. There would be none less than 12,000 square feet. The average lot size will end up being considerably larger than 12,000 square feet.

Ms. Farrington: If we approve it, it could be lower? This tract land is representational, so whatever they submit, they could change if we submit.

Mr. Coleman: You're just looking at the average lot size. This just shows the plan, but the lots could change.

Chairman Clawson: Any other questions for staff? Is the applicant here?

Applicant Presentation:

Greg Musil, Rouse Frets, 5250 W. 116th Place, Suite 400, Leawood, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Musil: You've all asked good questions. I think three of you were here when we obtained a variance for the east side of the power line easement in October, 2017. The bubble you saw that reflected 300 feet from the boundary of this 13.5-acre property that has a 160' wide KCP&L easement on the west side resulted in an average lot size of 30,000 square feet. The average lot size would have to be 30,000 square feet. We've got a hypothetical that shows you can draw a subdivision of ten lots that meet 30,000 square feet. It is a purely theoretical possibility because it would never happen.

Chairman Clawson: It would be a 30,000 sq. ft. average, right? Some could be 15,000.

Mr. Musil: It could be that way. I want to clarify why we're here. We filed an application for rezoning for RP-2. Under RP-2, we don't look at the 300 feet around to get an average lot size. Nonetheless, in that application, we met all the RP-1 lot size averages, but City Council was concerned because RP-2 was a higher density. The neighbors didn't want RP-2. We stepped back and considered RP-1. We'll still be subject to front lot widths, setbacks, rear yard lot widths, absent deviations, and a rezoning process. That's not part of tonight, but I wanted to explain it. We're trying to build 30,000 sq. ft lots on average. That is not possible, and the owner won't be able to utilize his land. Our requested variance is for an average size of 14,000 square feet because the subdivision you saw, which is kind of a rough representation of what we can do, has lot sizes that are over 14,000 square feet on average. All of the lots that back up to the neighbors that you hear from have a 100' wide lot, just as RP-1 requires, and have the setbacks required by RP-1. Even with this variance, we will be building larger lots than required by the RP-1 minimum. Richard mentioned that this is how this developed in the 1970s. People built houses on the major thoroughfares because the only cost was a driveway. Unfortunately for our development, we have to build all the internal streets, all the internal sidewalks, all the storm drains, which are all costly. If we obtain the variance, we will go back and file a new rezoning application for RP-1 that would be something very similar to this with approximately 24 lots. You'll notice that with this application, it is 1.5 units per acre, so it is not a high-density development. In fact, it's lower density than The Pavilions and some other ones. The Pavilions is 2.67 acres on the west side of Mission Road. Mission Reserve is 2.5 acres. We would be at 1.85 acres. None of that can be done if we have to build 30,000 sq. ft. average-size lots. I presented some information that staff has in their report on Uniqueness. This is 13.5 acres. It is what I described to the Planning Commission and City Council in the rezoning as a screwy lot. It's a remainder or a remnant. It is bounded by a transmission line that can be developed into bigger transmission lines in the future. It has large infrastructure. They're going to be \$750,000-\$1 million homes. All the protections we've heard about and the impact on neighbors, we will meet. We will meet everything in the LDO. We've already done a preliminary stormwater study. Your staff will make sure we comply with all of those. We also bring sanitary sewers closer to these neighbors if they wanted to try to hook onto them. It would make it more feasible. It would still be expensive but more feasible than today. Hardship, we know that this hasn't been developed. Dr. Reddy bought it in 1994 before

the 300' ordinance was adopted by the city. He will not be able to develop it if the average of 30,000 square feet remains. All the LDO standards will apply. We think it is consistent with the spirit of the LDO. Staff is supportive of the application. There are two other precedents where you've done the exact same thing: 103rd and Mission and also to the lots to the east. At that time, they would have required 27,000 sq. ft. lots, and you gave a variance to allow 19,000 sq. ft. average lot size. This is 4,000 square feet bigger than the R-1 minimum. In both cases, the variance doesn't result in tiny lots; it results in lots bigger than the minimums in the LDO. We received something from staff today from a neighbor, who submitted legal articles on Hardship. I'd be pleased to talk about that after the other folks in the audience speak. I'd appreciate the opportunity to respond if possible. We're seeking a variance from that section, and we would be pleased to limit it to a 14,000 sq. ft. minimum. We will not go below that. I'd be happy to answer any questions.

Mr. Dunn: I assume if you could propose lots at a minimum of 15,000 square feet, you would be doing that.

Mr. Musil: If we could meet the minimum for R-1, yes. If you look at the site and consider putting a street down the middle, you see that there are limitations on both sides of the street because it's so narrow. We tried not to get closer to the neighbors to the west than we have to. We're meeting all the setbacks there. We're going to 14,000 instead of 15,000 but still larger than the RP-1 minimums.

Mr. Dunn: That extra 1,000 makes it a little more difficult; that's why I was asking.

Mr. Musil: If it were a nice square or rectangular piece of property with the right dimensions, it could probably be done.

Chairman Clawson: You're asking for 14,000?

Mr. Musil: We're asking for a variance that would allow us to have a minimum lot size of 14,000 square feet. It's a variance from the code provision, but as we did last time, we'll commit to a certain minimum lot size that's still larger than the RP-1 minimum.

Chairman Clawson: You would like this property to not be required to meet the average from 300 feet.

Mr. Musil: Strict application of the LDO will make it undevelopable.

Chairman Clawson: Thank you. Is there anyone here who wishes to speak for or against this application?

Shannon Maise, 14913 Mission, appeared before the Board of Zoning Appeals and made the following comments:

Ms. Maise: I am against this variance request. I have something I want to put on the monitor (*Places display on monitor*). I just want to speak about some of the criteria required when a variance is requested. In 2017, Mark and his team asked for a variance on the exact same thing: lot size. At that time, he was presenting The Hills of Leawood and these Villas of Leawood. When we heard that villas were going in behind us, we did not like that. We started letters around our neighborhood, and then Mark Simpson said he carved that out and was only focusing on The Hills of Leawood. He sent us a letter that clearly states that they have identified this weird-shaped lot as 9 acres. They are not figuring the power lines into their math when they talk about the 9 acres. When they're presenting to you and every little committee, they use 13 acres. Jamming 25 houses in 13 acres has a lot fewer homes per acre than using the 9 acres that he clearly states on this letter. When you talk about Uniqueness as one of the criteria, he has created it by taking the entire property and carving it out in sections. Regarding impact to neighbors, one thing I keep bringing up is a traffic study. They now have 73 homes with The Hills of Leawood with 2-4 cars per home, driving up and down the street. Now, this will add maybe 25 homes with 2-3 more cars. This makes hundreds of cars coming out onto Mission Road with a very undefined street with a stop sign at the end. I have been asking for a traffic study, and so far, no one has cared too much about the children riding their bikes. The other impact to neighbors involves the trees. There is a councilmember named Lisa who supports the Tree Committee. If we let this development go in with these 25 homes, every single tree behind us is going to be cut down. I'm sure they'll have to put up small little trees as part of their plan, but every tree already there, taking that carbon dioxide out of the air, soaking up that stormwater, and offering shade, is going to be gone. The other criterion I'd like to discuss is Hardship. Years ago, Mark reached out to Dr. Reddy, asking to buy property. Dr. Reddy said he's not interested because he is holding it for the development. It is not like Dr. Reddy couldn't use this property in 20 years. He chose to hold on to it, which he has. Mark is paying for it. I think he has a monthly rate for Dr. Reddy to hold it, but Dr. Reddy bought this land for \$300,000, and he sold the property to The Hills of Leawood for over \$3 million. He has made 12% on his money, so I don't think it should be considered a hardship on Dr. Reddy. I just think Leawood is growing with distinction and integrity. Thank you.

Connie Krupko, 15005 Mission Road, appeared before the Board of Zoning Appeals and made the following comments:

Ms. Krupko: As you can see on the overhead, I am one of the existing adjoining homes to the west of the proposed development. All the ones highlighted in the circle are the Mission Heights residents. I'm going to address the requirement related to whether or not the granting of the variance will oppose the general intent and spirit of the LDO. The development's application correctly states that the 300' requirement in the LDO is intended to ensure that a new home's average lot size would be equivalent to those lot sizes surrounding it; however, the application erroneously states that there is no evidence indicating that the Governing Body intended to strictly apply the LDO criteria to undeveloped land effectively surrounded by large home sites. The Mission Heights residents contend that this situation is exactly the reason the Governing Body put this requirement in place. The purpose of the 300' requirement is to protect homeowners like

us, situated on low-density lots from having lots developed adjacent to them that are proportionally smaller. The intent is to ensure that new development will be compatible with the existing neighborhood. The Mission Heights residents are the existing neighborhood, and our lots are what defines the character of the neighborhood. The developer is asking to put 24 lots on 13.5 acres adjacent to us. As Shannon said, if you subtract the power line easement, which can't be developed, 24 lots are going on 9 acres next to our 9 homes on 9 acres. This concept is highly contrary to the spirit of the LDO to maintain compatibility and character of the neighborhood. The Staff Report states that this application is similar to the previous application for The Hills of Leawood, but that development had an approval from this board for an average lot size of 19,000 square feet, which is significantly larger than the 12,000 they would get if they go to RP-1 zoning. The developer is not only asking the board to grant a variance from the minimum lot size requirement, but if the variance is granted, he'll ask to change the RP-1 zoning. The Staff Report states under Spirit and Intent that the proposed zoning is in compliance with the Leawood Comprehensive Plan. The fact is that this parcel has been zoned R-1 on the Master Plan ever since the neighborhood was created. The suitability of the R-1 zoning has been reviewed annually by the city and has remained in place all that time. In fact, it was recently approved in April, 2019. The spirit and intent of the LDO is to ensure that a project maintains the aesthetics of the surrounding area. Granting these variances and removing the restrictions would result in a less economically suitable development, which would have a detrimental effect on the Mission Heights residents. The developer argues that the Governing Body did not intend to strictly apply this requirement to surrounding large-home lots. The comparisons they're providing you are for surrounding neighborhoods, which are well outside the 300' area. We believe that Governing Body did intend to strictly apply the 300' requirement, or they would never have implemented it in the first place. We respectfully request that you adhere to the true spirit and intent of the LDO and deny the variance. Thank you.

Lori Hall, 15007 Mission Road, appeared before the Board of Zoning Appeals and made the following comments:

Ms. Hall: I'd like to start October 25, 2017. I read in the minutes from another of our Mission Heights homeowners who wasn't able to be here this evening. This was the meeting where you approved the variance for The Hills of Leawood. He said he was concerned that a bait-and-switch situation was occurring. He was concerned that a self-imposed hardship was being created by the owner and that ultimately, at a later date, he would be putting the BZA on the spot to approve a variance for this parcel, that this parcel to the west was being left out of this second go-around proposal. It was previously denied because of this exact parcel and the small lots being proposed behind our properties. It was denied out of the spirit of fairness. It's interesting that his prediction, in fact, came true, and here we are today. I agree with Shannon and Connie. I was going to speak on the fact that Dr. Reddy talked about buying this as investment property, and the developer recently actually told the Planning Commission that he has made multiple offers to purchase this land since 1999. In fact, the developer purchased The Hills of Leawood from the owner in 2017 but left the parcel to the west out only after the previous proposal was denied. The applicant has the burden to provide convincing proof

to support the claim of hardship. From *Hecker vs. Sedgwick County, Kansas Court of Appeals*, economics are not a factor in the determination of rezoning, and the potential profit alone does not establish unnecessary hardship as a basis for granting a variance. Also, *Stice vs. Gribben* established that the criterion of unnecessary hardship is that the use restriction, viewing the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property or that there is convincing proof that it is impossible to use the property for conforming purpose or that there are factors sufficient to constitute such a hardship that would in fact deprive the owner of his property without compensation. An unnecessary hardship exists when all relevant factors taken together convince that the plight of the location concerned is so unique in that it cannot be put to a conforming use because of the limitations imposed on the property by reason of its classification in a specific zone. I think those two cases say it all. The bottom line is this property can be developed under the current LDO, so where is the hardship?

Theresa Enriken, 15009 Mission Road, appeared before the Board of Zoning Appeals and made the following comments:

Ms. Enriken: I live just directly west of the proposed development with my husband, Cory, who couldn't be here tonight. My neighbors Dianne Teal and Ken Murdoch at 15015 Mission Road couldn't be here tonight, either. They asked me to state for the record their opposition to the proposed zoning as RP-1 with request for variance. I'd like to address briefly conditions 2, 4, and 5 of the request for the variance. With regard to No. 2, we believe granting the variance will adversely affect the rights of adjacent property owners. The density, as you've heard already, that is proposed without the easement of the power lines ends up being about 2.7 units per acre, which is in strict contrast to the surrounding lots of one unit per acre. Granting this variance negates the stipulations of the Leawood Master Plan and the rights and expectations that we adjacent property owners held with regard to future development of the property east of us. We're not asking that villas not be built. Villas can be built in accord with the Master Plan that we relied on, and they can be built on R-1-sized lots that are consistent with the lot sizes within 300 feet. We recommend patiently waiting for the right developer who can design this land in accordance with the Leawood Master Plan so that you may protect the rights of the adjacent property owners and Leawood residents. With regard to No. 4, we believe that granting the variance will affect public health, welfare, and safety. Granting the variance would allow a higher density of residents and thus adversely affect public health, safety, and general welfare by further reducing green space, increasing traffic, and generating additional noise and light pollution. Higher density also adversely affects the property values of the adjacent residents. With regard to No. 5, we believe granting the variance is opposed to the general intent and spirit of the LDO. When we moved here, we didn't blame the size of our large legacy lot, which is actually one of the smaller ones of the whole piece of property around, on the septic system. We didn't wish for a smaller lot. We moved to this house on this large lot in Leawood because of the character of the neighborhood and the assurance that the lots, consistent with the size of ours, would one day be developed on the property adjacent to us to the east in accordance with the Leawood Master Plan and its stipulations. We heartily disagree that any supposed

economic disadvantages claimed by the developer and the owners of the property to be developed outweigh the disadvantages that would be imposed on us, the adjacent property owners. We respectfully request denial of the requested variance and instead ask that you please adhere to the Leawood Master Plan and its stipulations.

Mr. Coleman: I just wanted to clarify one thing. That is that if an application is made for RP-1 zoning, it is in conformance with the Comprehensive Plan of Leawood. RP-1 is considered low-density residential. I know there is some misunderstanding about that. RP-2 is considered medium-density residential because it's much denser.

Chairman Clawson: With RP-1, will they still have to conform to the average lot size within 300 feet?

Mr. Coleman: Yes.

Chairman Clawson: Please give us your name and address.

Mark Maise, 14913 Mission Road, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Maise: I'm here speaking on behalf of Robert and Suzanne McQuain, who could not be here. I speak for myself and eight other residents on Mission Road that share common property lines with the proposed development. The Mission Road residences represent 100% of the residences that will have common property lines with the proposed residential lots. Regarding the Uniqueness criterion, I've read the application several times, and the clear theme is that this developer has a profit model. The developer wants you to approve by the modification of the applicable LDO. Throughout the application, the concept of economic viability is stated by the applicant as the reason for the application. There are no facts given by the developer to demonstrate unnecessary hardship to the landowner. Kansas case law is abundantly clear that the profit or loss of a developer is not a factor in determining zoning changes when the property can be developed under current LDO. The applicant wants 24 lots on a tract that, if the LDO was applied and by their own admission, will allow ten lots or fewer. Mr. Thompson's report says seven lots will fit. We retained a noted landscape architect and land planner, Pete Opperman, to assess the previous 25-lot RP-2 application of this developer. You will see in the attachment that he believes the maximum of 12 lots can be built, complying with the current LDO. Bottom line is that this property can be built under current LDO, and the application of the developer must be rejected because, under current law, there is nothing unique about this property that is not found in the same zone or district. There are no graphic problems with the development of the ground. The developer set this tract aside from the original plan in 2017 because they have always wanted to build high-density villas. The developer calls this tract an infill remnant. It is a remnant only because the developer chose to set it aside when developing The Hills of Leawood. Further, the developer chose to leave the power line easement out of The Hills of Leawood so when added to this tract, they could mask the true density of their plan. Using the power line easement ground, the developer says density is 1.7. The density of the ground used for

the development and the ground that shares a common boundary line with the Mission Road residences is 2.7, three times the density of the Mission Road residences. Regarding No. 2, the plan requests that you approve lots smaller than every surrounding residential tract within 300 feet, smaller than The Hills of Leawood and substantially smaller than the Mission Heights adjoining residential lots. The developer has argued in the past hearings, and you undoubtedly have heard the argument this evening, that there is ample spacing from the Mission Road residences. The fact is that they are using our own property to justify this special separation. Imagine this plan is approved, and within 150 feet is finished. You turn off Mission Road and pass by two nice homes that are on 1.5 acres – 65,340 square feet, and then the proposed villas at 2.7 per acre. There is no natural barrier to buffer the density change; however, on the east side of the power line easement is a significant buffer to The Hills of Leawood, built by this same developer. Density does matter. Leawood is noted for its protection of the character of neighborhoods. You won't find that type of dramatic density change traveling through other Leawood neighborhoods or likely in this county. In conclusion, based upon the above comments and the comments you will hear from other Mission Road residences that you did tonight, the applicant has failed to meet the first two criteria of Uniqueness of the Property and Rights of Adjacent Property Owners. The proposed density will adversely affect the value of the adjoining Mission Road residences. Thank you.

Ms. Tomasic: Just so the record is clear, the statement he just read was included in your packets, so all board members can review it, along with pertinent case law on economics and unnecessary hardship in a letter from Peter Opperman.

Chairman Clawson: Is anyone else here who wishes to speak for or against this application? In that case, this is a variance, and we must evaluate the five factors. The first is Uniqueness of the Property.

Mr. Musil: Could I please respond to the legal argument about Hardship? The argument that Mr. McQuain made and that Mr. Maise just read says that you have to make it impossible to develop the land in any way to be a hardship. That's not what Kansas law says. If there are sufficient factors to demonstrate a hardship in your opinion, economic or otherwise, you do not have to eliminate every use on this property in order to have an unnecessary hardship. That's the implication in Mr. McQuain's statement: as long as you can build one house on here, there is no unnecessary hardship. That's not the law in the State of Kansas.

Chairman Clawson: Thank you. The first factor is Uniqueness of the Property. Discussion?

Dr. Peppes: Let me start off. The neighbors have tried to explain how this property isn't unique, but in all the years that I've been involved in this process with parcels that are the last to be developed, the reason for that is usually that there are issues involved that didn't make it the easiest to do at the very beginning. What is left is a parcel of property that isn't the typical parcel that we see throughout the city. As much as I heard this

evening, I can't agree because I do think this piece of property is unique and meets this requirement.

Mr. Dunn: I am troubled by the argument that it's unique. As defined by our KSA and LDO, Uniqueness is something that is not ordinarily found in the same zoning district and is not created by the action or actions of the property owner or agents. I do see a strong argument to be made that the development plan has resulted in this unusually shaped piece of property being left. While 14,000 feet sounds like a lot of square footage, it is significantly smaller than the large lots which surround it and which define the character of the neighborhood. I'm struggling and am still open to be persuaded.

Uniqueness criterion received a vote of 2-2. For: Dr. Peppes, Farrington. Opposed: Dunn and Clawson.

Mr. Dunn: We don't have a tiebreaker.

Ms. Tomasic: Ultimately, what matters is the overall motion. This is just for consideration throughout. You can tie on each factor, and it will be the overall vote which will have to be 3-1. If it is 2-2, it would fail.

Chairman Clawson: Rights of Adjacent Property Owners.

Mr. Dunn: Just as we've seen no concrete evidence that nothing else could be built here, I've seen no concrete evidence that building lots that are large compared to most of the city would adversely affect the adjoining property owners. On the other hand, the adjoining property owners bought very large lots because that's what they wanted, and our LDO says if you want to build in an area with very large lots, you have to meet the square foot requirements that are revealed by the 300' area. In that sense, I do see that there is an adverse effect on the surrounding property owners. Once again, I could be persuaded otherwise, but I am inclined to believe it would have an adverse impact.

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

Chairman Clawson: Hardship.

Mr. Dunn: I've got to say that this is a fairly complicated case. Based on the information we have in front of us, I do feel like the hardship demonstrated goes to what can be done with this plot of land rather than whether something can be done at all or not. I don't have anything to indicate to me that nothing can be done with this plot of land if this isn't granted.

Dr. Peppes: I see it a little differently. The way I understand it, we have a plan before us, and there are certain restrictions with it because of certain things that are happening on the property itself. With the certain things on the property that are limiting it to certain-sized lots because of part of the transmission lines that they can't build on. This creates a

problem. There is a restriction. I'm a believer that restrictions mean Hardship has been met.

Ms. Farrington: I tend to question as well. My viewpoint skew more to a parcel of land that has always had that easement with the utility line, so that was known. It took a long time for it to get developed because of that. I don't view that as creating a new issue. The development can occur. Can it occur with 26 lots, with 12 lots, with 9 lots? It certainly can. I'm not sure there is a real hardship because it can be developed.

Chairman Clawson: I'd like to point out that the utility easement was included with this parcel. It wasn't included with The Hills of Leawood.

Mr. Coleman: Part of it was included with the other one.

Chairman Clawson: Other comments?

Hardship criterion not satisfied with a vote of 1-3. For: Dr. Peppes. Opposed: Dunn, Farrington, and Clawson.

Chairman Clawson: Public Safety and General Welfare. Staff feels that it shouldn't be adversely affected.

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

Chairman Clawson: Spirit and Intent.

Mr. Dunn: On the one hand, 14,000 sq. ft. lots can hardly be deemed to be contrary to the spirit and intent of the LDO. On the other hand, the LDO also requires that proposed development have lot sizes that are comparable to the surrounding lots, and in that sense, it doesn't comply. It is opposed to the spirit and intent of that portion of the LDO.

Spirit and Intent criterion not satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Farrington, and Clawson.

Chairman Clawson: We have completed our analysis on the five factors. Uniqueness had a tie vote. On the second and third factor, we felt they had not been met. We felt the fourth and fifth had been met. Therefore, we must support a motion for denial in this case.

A motion to deny Case 49-2019 Leawood Hills Development, LLC/Owner - Request for a Variance to the minimum Lot size requirements for new lots in accordance with the LDO, Section 16-2-5.4 (D) in an RP-1 District for the properties located in the Hills of Leawood Villas at 151st Street and Mission Road – was made by Dunn; seconded by Farrington. Motion carried with a vote of 3-1. For: Farrington, Dunn, and Clawson. Opposed: Dr. Peppes.

NEW BUSINESS:

Case 51-2019 Terry Dunn/Owner - Request for a Variance to the rear yard 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 RP-2 District for property commonly known as 11400 Cambridge Road.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The property owner would like to enclose the rear yard with a 4' tall wrought iron fence. Due to the location of the lot and its odd shape, the rear yard is extremely small. A variance of 16 feet is needed to place the fence as shown on the plan.

Chairman Clawson: Are there any questions for staff?

Dr. Peppes: It's been said I did an in-depth study of this. If I'm right, the fence would have to go inside their back door if it were to meet the setback requirements.

Mr. Thompson: Very close. It would probably be where the chimney is. You can see there's not much room there. They couldn't enclose the rear yard at all.

Dr. Peppes: To the right of that sidewalk is where the easement is that made the sidewalk come in so far.

Mr. Thompson: Correct. Just on the other side of that sidewalk is a gas line. That's the reason they had to move the sidewalk.

Chairman Clawson: Other questions for staff? Is the applicant here?

Applicant Presentation:

Terrance Dunn, 12008 Ensley Lane, Leawood, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Dunn: I want to address the five criteria and thank all of you for the opportunity to present. Our RP-2 lot is extremely small with streets on three sides and is considered a through lot. Strict compliance with the code would place the fence in the middle of our patio. In addition, half of the 5' wide sidewalk which abuts our patio actually encroaches our property, which is extremely unique. The second item is Rights of Adjacent Property Owners. Certified letters have been mailed. No other residential properties abut our patio, which is the only part of our yard that we desire to fence. Just along the perimeter of the patio, we are requesting a 4' wrought iron fence. I'd like to say the fence is similar to the fence that will surround the entire development. There has been one letter of support that we can confirm. I would ask staff if any others have come in.

Mr. Thompson: That is what we have received, and it is included in the packet.

Mr. Dunn: The third item is Hardship. Without the variance, the fence placement would cut off 2/3 of our patio. Not having the fence would be a safety and security concern since the sidewalks and street are so close to the patio. The fourth criterion is Public Safety and General Welfare. Being located on a corner with an adjacent curve in the street that abuts the patio, there would be cause for concern when our 14 grandchildren want to play on our patio if the fence is not allowed. The fence would provide a barrier and some level of desired security. I've already noted that the yard has been farmed, so it is a concern from a true security standpoint. Regarding Spirit and Intent, we are proposing a 4' wrought iron fence in order to preserve the openness that Leawood values. It will blend in with the abutting junipers and help to provide for the safety and security we are trying to achieve. That concludes the five issues that need to be addressed.

Chairman Clawson: Are there questions for Mr. Dunn? Thank you. Is there anyone here who wishes to speak for or against this application? This is a variance, so we must evaluate the five factors. The first is Uniqueness of the Property.

Ms. Farrington: This is a little denser than the average lot in Leawood because it is in RP-2. There are two factors: the gas line and city sidewalks located so close to the property and the position of the home because it is a through lot. Those make the property unique.

Uniqueness criterion satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Farrington, and Clawson.

Chairman Clawson: Rights of Adjacent Property Owners. No comments except one of support.

Mr. Thompson: No calls against the project, and the one letter of support that is included.

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

Chairman Clawson: Hardship.

Dr. Peppes: Like I said before, when there are restrictions like the ones involved here with the gas line and the sidewalk proximity, the Hardship criterion has been met.

Mr. Dunn: This is a case in which it just couldn't be constructed if this isn't granted.

Hardship criterion satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Farrington, and Clawson.

Chairman Clawson: Public Safety and General Welfare.

Mr. Dunn: We'd be doing more harm than good by denying it. I think the fence provides more benefit than not.

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

Chairman Clawson: Spirit and Intent.

Ms. Farrington: I think it meets it. The fence that is being proposed is wrought iron and in the same spirit of the rest of the neighborhood.

Spirit and Intent criterion satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Farrington, and Clawson.

Chairman Clawson: We have evaluated all five factors and have voted in the affirmative on all five; therefore, we can support a motion for approval.

A motion to approve Case 51-2019 Terry Dunn/Owner - Request for a Variance to the rear yard 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 RP-2 District for property commonly known as 11400 Cambridge Road – was made by Farrington; seconded by Dr. Peppes. Motion carried with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Farrington, and Clawson.

MEETING ADJOURNED.