

**City of Leawood
Board of Zoning Appeals Minutes
December 15, 2021 – 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 15, 2021 Board of Zoning Appeals Meeting. Could I have roll call, please?

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

MEMBERS ABSENT: Munson, Farrington

STAFF PRESENT: Thompson, Tomasic

APPROVAL OF MINUTES: Approval of the minutes from the October 27, 2021 Board of Zoning Appeals meeting.

Chairman Clawson: The minutes from the last meeting were apparently not finished, so we are going to continue approval of those until the next meeting.

Chairman Clawson: We have one case in Old Business that is being continued to some point in the future. We have several cases of New Business. We have a fairly long agenda tonight, so I'd ask that applicants limit their remarks to 5 minutes.

Mr. Bussing: Mr. Chairman, I am going to recuse myself from the first 3 cases.

Chairman Clawson: Alright. I should point out that even with Mr. Bussing leaving, we still have a quorum. We will proceed with the first case.

NEW BUSINESS:

Case 59-2021 Tom Sullivan/Owner-Request for a Variance to the side yard setback for the placement of a hot tub in accordance with the LDO, Section 16-2-5.5(D) in an RP-4 District for property commonly known as 12619 Cedar Street.

Staff Presentation: Wade Thompson made the following presentation:

Mr. Thompson: The applicant has installed a hot tub without a permit. The hot tub was placed 8 feet 6 inches from the south property line. A variance for 1 foot 6 inches is necessary to keep the hot tub in its current location.

Chairman Clawson: Are there any questions for staff?

Applicant Presentation: Tom Sullivan, 12619 Cedar Street, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Sullivan: I have Pat Kelley, co-owner, with me today. I wanted to start by saying that we didn't intentionally try to evade the City's permit requirement. We were given bad information from the spa company regarding location and the necessity for a permit, so we are here to try and rectify that. As Mr. Thompson stated, the spa is located 8 feet 6 inches from the side property line. However, when our house was built, apparently the code only required an 8-foot setback because our house only sits 8 feet 2 inches from the property line. This spa is located entirely behind the house and is not visible from the street. Moving it 18 inches would not only be very expensive, but it would block our access to and from the bedroom that it sits outside. That would create a safety issue if we had to move it. I don't see how moving it 18 inches would satisfy any particular city interest. Do you want to address each of these 3 separately?

Chairman Clawson: You can. Typically, we have issues with Uniqueness and Hardship.

Mr. Sullivan: Okay. This is unique because the house itself doesn't comply with the 10-foot setback requirement. I feel that having to move the spa to satisfy the current setback requirement would create undue hardship, especially when it doesn't violate any safety or aesthetic standards at this point since it's not even visible from the street. Do you wish to go on to the second and third variances being requested?

Chairman Clawson: I was saying that you could discuss each of the 5 factors for this case.

Mr. Sullivan: I'm sorry, I misunderstood. I was talking about the 3 different cases that are listed on your docket. With respect to the first factor, it would create a hardship if we were not able to have the spa as it is used for therapeutic purposes. I will address that further in our other cases about the fence. I think it could create a safety hazard in the event of a fire if we were to have to move it in front of our bedroom door.

Chairman Clawson: I have a question for staff. It says in the case description that this is in an RP-4 district, but on the last page it says the setback is under an RP-2.

Mr. Thompson: We don't have RP-4 anymore, so they use the RP-2 bulk regulations for an RP-4. I did go back and pull information from the Leawood Development Ordinances (LDO) about what the bulk regulations of an RP-4 were at the time the home was built. The side setback was actually 20 feet but there's an asterisk beside it that says, "Measured from building lines and building clusters". For example, his house is located 8 feet 6 inches from the property line, but his neighbor's house is moved over a considerable distance. Using measurements from Automated Information Mapping System (AIMS), there is about a 20-foot distance between the two homes.

Mr. Sullivan: Yet there was a permit issued for our home to be built 8 feet 2 inches from the property line.

Chairman Clawson: Are there any questions for the applicant?

Dr. Peppes: This may be a question for Wade. I went and looked at all of the back yards all along Roe, but it would be easier for me if I could see a photo. Do we have any pictures of adjacent structures?

Mr. Thompson: This is from AIMS. *Aerial photo displayed on screen*

Chairman Clawson: Wade, I have another picture here that I copied out of AIMS that you may want to show. *Map drawing displayed* The house in question is on top. The one south of that appears to have that 20-foot distance that you were referring to. Roe is pretty far away.

Mr. Sullivan: On Roe, there is a stone retaining wall that varies in height from a few feet to 5 feet along the back of our property. You can't see the spa from Roe.

Chairman Clawson: Is that retaining wall on your property line, or close to it?

Mr. Sullivan: I think it is on the City's right-of-way.

Mr. Kelley: There's a big berm.

Mr. Sullivan: Roe is sort of above where our property sits. There's the stone retaining wall, then there's a berm that slopes down to our property. Then there's another rock wall that sits right by our spa. The spa barely fits between that rock wall and the porch of our house.

Mr. Dunn: Wade, just to clarify, was this house lawfully built where it is at the time it was built?

Mr. Thompson: Yes.

Chairman Clawson: Are there any other questions for the applicant? Is there anyone here that wishes to speak for or against this application? It appears that there are some folks here in the back. If you wish to speak on this case, please come forward and give us your name and address.

Mr. Thompson: It appears that they don't want to add to the case.

Chairman Clawson: Okay. This is a variance request and as such, we will have to evaluate the five factors. We will vote, as a Board, on each of the factors. If we vote in the affirmative on all 5 factors, then we can support a motion to approve the variance. If we feel that one or more of the factors haven't been satisfied, we have to support a

motion for denial. The first factor is Uniqueness of the property. Discussion by the Board.

Dr. Peppes: Mr. Chairman, as I look at this neighborhood itself being in a gated community and walled off there by Roe, a lot of the back yards look the same. A lot of the houses are the same. I don't think that there's anything that makes this property any more unique than their neighbor's. I don't feel that Uniqueness has been met.

Mr. Dunn: Echoing the comments of my fellow Board Member, we're not given the discretion to approve something because it looks like a good idea. It has to follow the law. With my understanding of Uniqueness under the law, this doesn't meet the criteria.

Uniqueness criterion unsatisfied with a unanimous vote of 0-4. Against: Dunn, Dr. Peppes, Clawson, Hawk.

Chairman Clawson: The second factor is Rights of Adjacent Property Owners. All of the letters were sent out.

Mr. Thompson: Letters were mailed and you've got the information I put in the packet. I did receive one phone call from Mr. Chuck Madden who lives at 12619. This project was not approved by the Homeowner's Association (HOA).

Mr. Kelley: I'm Pat Kelley, co-owner, 12619 Cedar Street. It was approved by the HOA. I have an email from the HOA. We requested placement of the spa from the HOA and were granted such permission. It's in the Minutes of the HOA meeting. I didn't read the minutes until recently. When they told me it was approved, I bought the spa. It wasn't until a couple of months ago, when this all started, that I knew it was approved only with the obtaining of a permit. The spa was approved and I can provide that email.

Chairman Clawson: That's fine. Thank you. The second criterion we have to evaluate is Rights of Adjacent Property Owners. Notifications were sent to everyone and you received negative comments?

Mr. Thompson: Just the information I've included in your packets. They were concerned about the inherent noise that a hot tub produces when the pumps are on with it being that close to the property line. They were also concerned by the noise typically produced by the ones using the hot tub talking louder to hear one another over the pumps.

Mr. Kelley: The hot tub was installed April 28 and since that time, no one has provided any information to us that it is noisy or offensive. It is behind barriers that are on the north and south ends of the patio system. Just FYI, we were not notified of any noise complaints or anything like that. Usually, it's just me using it and that's in the morning time.

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

Chairman Clawson: The third criterion is Hardship.

Mr. Dunn: Once again, Mr. Chairman, I would simply point out that the laws are very clear that Hardship cannot be met based solely on the fact that denying the variance will cause trouble and expense because it's already built. That's been pounded into me because I see lots of these cases where a variance seems like a good idea, but if it doesn't meet the legal requirements then it simply doesn't meet them, and I don't think this case does.

Hardship criterion unsatisfied with a unanimous vote of 0-4. Against: Dunn, Dr. Peppes, Hawk, Clawson.

Chairman Clawson: The fourth factor that we have to vote on is Public Safety and General Welfare.

Mr. Dunn: Mr. Chairman, I have no doubt that if this were allowed to remain it would not become a danger to the public or general welfare.

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

Chairman Clawson: The last factor is Spirit and Intent. Comments by the Board?

Mr. Dunn: This is a difficult one, because certainly from the appearance of this it meets the Spirit and Intent of many installations that I've seen around the city. However, the intent of the Ordinance is to provide reasonable separation from the neighbors and it doesn't appear to do that. I'm having difficulty with Spirit and Intent, quite frankly.

Spirit and Intent criterion unsatisfied with a vote of 1-3. For: Hawk. Against: Dunn, Dr. Peppes, Clawson.

A motion to deny Case 59-2021 Tom Sullivan/Owner-Request for a Variance to the side yard setback for the placement of a hot tub in accordance with the LDO, Section 16-2-5.5(D) in an RP-4 District for property commonly known as 12619 Cedar Street, was made by Dunn; seconded by Dr. Peppes. Motion carried with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Clawson, Hawk.

Mr. Kelley: I have a question. Does that mean that if we move it a foot and a half, we'll be within code?

Mr. Thompson: If they come in and get a permit, I would say yes. The Plans Examiner, once the permit is applied for, can answer that for sure.

Mr. Kelley: Can you explain to me how a foot and a half will make a difference?

Chairman Clawson: Because a foot and a half puts it within that 10-foot setback requirement.

Mr. Kelley: But the house isn't even within that 10-foot requirement. I just don't understand that.

Chairman Clawson: I understand that.

Case 60-2021 Tom Sullivan/Owner-Request for a Variance to the 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-4 District for property commonly known as 12619 Cedar Street.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The applicant has installed a hot tub without a permit. A fence is necessary to comply with the barrier requirement. The applicant would like to place a 4-foot fence on top of the wall on the east side of the property and has already constructed a 6-foot tall privacy fence on the sides to enclose the entire yard. A variance for 30 feet is needed to place the fence as shown on the plan.

Chairman Clawson: The variance is required because it is a through lot?

Mr. Thompson: Correct. The house is roughly built at the 30 foot build line. If you look at the stake marks that are in the packet, you'll see how far back the fence will be. *Photo of stakes shown on screen*

Chairman Clawson: That's the location of the fence?

Applicant Presentation:

Pat Kelley, co-owner, 12619 Cedar Street, appeared and made the following comments:

Mr. Kelley: That is a flag post. We had to have the property surveyed in order to start this process. The post is set 5 feet inward because they couldn't put the stake in place due to the rock wall, according to the surveyor. The placement has to go down 2 feet for it to be legal for the stake survey and they couldn't put the stake there. I did have it staked out when Travis came out.

Chairman Clawson: Could we see a plain view that shows us the proposed location?

Mr. Thompson: *Plan drawing shown on screen* This was provided by the applicant.

Mr. Kelley: Could I help you see? *Points to areas on drawing* Right here is the north end where there's an existing fence, and over here is the south end where there's an

existing fence. Basically, here's the proposed fence with a gate. This is 7 feet from the rock wall on this end and about 12 feet on the other end. This is all landscaping through here. It's sitting right on top of the landscaping on the very edge of the berm.

Chairman Clawson: According to Code, it should be 30 feet from the property line?

Mr. Thompson: If possible. He may not be able to do it because of the extensive landscaping. I don't know if they're wanting to, but they could put it on the property line.

Mr. Kelley: *Points to drawing on screen* The property line is back here. We're wanting the fence to be right here.

Mr. Thompson: The portion that will go on that line is 4 feet tall. The sides are already at least 6 feet tall.

Chairman Clawson: There's already an exception for that one, right? Isn't that the next case?

Mr. Thompson: Correct. In order to meet the barrier requirement, it would be easier to step around the 4-foot portion. There was a note added to the staff report. There will be a section on both ends that are closer to 8 or 9 feet tall to make up for that gap.

Chairman Clawson: I'm not following that at all.

Mr. Kelley: You've got the top layer, then you've got the rock wall, then the lower level. The bottom north part goes between the house and the rock wall, which is 6 feet tall. The rock wall comes up to about 4 feet on top of that. What they're saying is that a toddler could get on the rock wall and climb over the fence, so we've got another variance requested to extend that to however high they want us to in order to prevent the thousands of toddlers in our neighborhood from being able to do so.

Mr. Hawk: There's a change of elevation, in other words.

Mr. Kelley: Yes.

Mr. Thompson: The picture that's on the monitor now is just a rough sketch to give you an idea of what it could look like.

Travis Torrez, Director of Building and Code Enforcement, appeared via Zoom and made the following statements:

Mr. Torrez: We see some of those variations in the field, but this one ends up being quite a bit more because of that retaining wall height and the distance to the lower patio. When we approve those variations as we see them, we keep safety in mind to be in compliance so that we don't have issues with pools or hot tubs. I just wanted everyone to be aware that there would be a small portion of the fence that, from a building code perspective,

we'd want to extend up so that a person couldn't just walk around it onto the retaining wall.

Chairman Clawson: Wade, for this to be a legal fence, where could they put it?

Mr. Thompson: They need a variance regardless because the back of the home is a through lot.

Chairman Clawson: Is everyone clear on that? Again, this is a variance request so we will have to go through and evaluate the five factors. If you'd like to provide comments on those, please do.

Tom Sullivan, owner, 12619 Cedar Street, appeared and made the following comments:

Mr. Sullivan: I will. The first factor, as you mentioned, is Uniqueness. As pointed out, this is unique because of the topography of it. There's a steep slope down to the house and a rock wall, so you couldn't just put a 4-foot fence like you could on this flat floor. A 4-foot fence can't go all the way around, so we have a 6-foot fence next to the hot tub. As he said, it may need to be a little bit higher to meet the safety requirements.

Chairman Clawson: Has the HOA commented on this plan?

Mr. Sullivan: When we bought the property there was initially an 8-foot fence on the north and south ends of the property, between the house and the rock wall, creating an enclosed courtyard area. It became in disrepair and when we sought to replace it, we got authorization from the HOA to replace the existing wall with the approved materials. The initial material that we selected was vinyl, which was approved by the HOA. During the pandemic we found out that vinyl became unavailable, so we talked to them and found out we could select a different material. We figured we would have to get their approval for the material, but he told us it wasn't necessary.

Chairman Clawson: That doesn't really address the issue of the location of the fence, though.

Mr. Sullivan: During the construction of the fence on the north and south sides, the HOA came over and were concerned about the height of the fence and were purported to withdraw their approval. As it stands, the HOA said to go to the City and get a permit before bringing it to them again. We have not addressed the HOA regarding the 4-foot fence because we had previously applied to the Board of Code Appeals to see whether a locked cover was as good as or a better safety measure than a fence. That was denied, so now our only option is to have the 4-foot fence. Thus, we haven't taken it back to the HOA as of yet.

Mr. Kelley: The reason we haven't taken it in front of the HOA is because they're going to want to see a permit. We're trying to get this variance approved first.

Mr. Sullivan: I addressed the Uniqueness factor. Now to address the factor of Hardship. As I alluded to, this is not a play spa, it is therapeutic. Pat suffers from a chronic back issue stemming from an injury he got several years ago. His doctor has given a prescription for a hot tub. He finds that if he uses it every morning, it relieves the stiffness and pain. Without that, it is debilitating.

Chairman Clawson: Unfortunately, those issues are not germane to our decision here.

Mr. Sullivan: I think they are and I'll tell you why. The Americans with Disability Act (ADA) requires reasonable accommodation for people with a disability and he meets that definition. The ADA says that a disability is a physical impairment that substantially limits one or more major life activities. One or more life activities includes sleeping, walking, standing, bending, and lifting-all of which his condition does relate to. It further goes on to say that the definition of disability shall be construed in favor of broad coverage of individuals under that chapter. It also provides that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. It provides that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active, which is the case here. I do think that qualifies as a hardship because, without the availability of the hot tub, he will be in pretty constant pain. The ADA recognizes that. What is the third factor?

Dr. Peppes: I have a question for Wade. This is a variance because it's a through lot, but what about the build line distance of 30 feet? It doesn't meet that criteria. Are we voting on that, too?

Mr. Torrez: In an RP-2 zoning district, it calls for a front setback of 30 feet on that through lot side, which is greater than the build line of 22½ feet. It explicitly says in the fence section that you go by the through lot setback of the zoning district, which is 30 feet.

Mr. Sullivan: And the house is only 30 feet, so.

Chairman Clawson: The through lot requirements are typically provided so that you don't have lots of people putting a fence on their back property line which, if seen from across the street, seems unsightly like a wall of fences.

Mr. Thompson: This lot is different because they do have the wall, then a large berm that slopes down. Yes, it's a through lot, but the 4-foot fence would barely be seen.

Chairman Clawson: Plus, there's a lot of vegetation back there.

Mr. Dunn: Would this fence be required regardless of where a hot tub was placed on the property?

Mr. Thompson: A fence would be required. Not necessarily this one. If they were to move the hot tub over to a legal place, then they could build a 6-foot tall fence within 3 feet as long as the hot tub is on a patio. They don't have to have this variance for a hot tub. They can build the fence inside.

Mr. Sullivan: There is no place on the property that would be 30 feet from that.

Mr. Thompson: That is correct.

Chairman Clawson: A fence is required though, to screen a hot tub from illegal entry?

Mr. Torrez: About the only place they could have legally located the hot tub is in that nook. There's kind of a horseshoe there. It may not have been an ideal location for the homeowner, but that is a place where the hot tub could've been placed and a fence could have been constructed within that 30 feet.

Mr. Sullivan: That would block access to the ingress and egress from the house. There's an egress basement window there.

Chairman Clawson: Well, the case that we have before us is for the fence located in the position in the description, so we're obliged to act on this.

Mr. Thompson: Yes, sir.

Mr. Sullivan: I've addressed Hardship and Uniqueness. What are the other factors, please?

Chairman Clawson: Rights of Adjacent Property Owners, Public Safety and General Welfare, and Spirit and Intent.

Mr. Sullivan: With respect to the public safety aspect, the whole purpose of the fence is for public safety. It's to keep kids out of the spa. Granting the variance and having the fence would meet that requirement. In the interest of the neighbors, I don't see how having a 4-foot fence would impact them. The 6-foot privacy fence actually shields the neighbors from seeing or hearing the property, so I think that satisfies that requirement. Regarding Spirit and Intent, the city has an obligation to protect the public. The only way that we can have the spa and protect the public is to have this fence. As I mentioned earlier, to not have the hot tub creates a significant medical hardship for Pat. There are other 4-foot fences on properties in the neighborhood.

Chairman Clawson: Is there anyone here that wishes to speak for or against the applicant? You may step forward.

Chuck Madden, 12617 Cedar Street, appeared before the Board and made the following comments:

Mr. Madden: I live just to the north of Pat and Tom. I'm also president of the HOA. Their fence permits have been pulled. Right now they have no authority within the HOA to build anything. I think you've seen the pictures. The fence started out to be about 9 feet tall. We saw the posts and immediately notified them of the City of Leawood's code. We told them to stop building it until you get with the city and figure out what's going on. They hadn't applied for a permit or received any code information. They continued to build the fence. Right now, they have no permission at all from the Patrician Woods Villas HOA with regards to the fences that are up. It bothers me with the variance that I might see a 6-foot solid fence, then another that will go up 8 or 9 feet, then a 4-foot fence. There are only 3 fences in the entire subdivision, and they run concurrently right up that alley. They are 4-foot high, wrought iron fences for dogs that are built within the build lines. This one has just been a quagmire from the beginning because they've never gone to the city for anything. No permits, no approvals. Right now they have no approval from the Patrician Woods Villas HOA to do this.

Chairman Clawson: Is there anyone else who wishes to speak for or against this applicant? Please make it quick, we're running out of time.

Mr. Kelley: Regarding the fences that they're talking about on the north and south ends of the property, we went through the HOA's approval process. We did not request a permit because we were just replacing the existing fence when it was in disrepair. We didn't know we needed a permit for that. It's located in the exact location as the previous fence. We were planning to build it at the fence's original height, which was apparently not within code but has since been brought down to code height. Yes, they told us to cease and desist, but they're not responsible for the hot tub to be enclosed. We took every opportunity to enclose it on the ends so that it would be safe from intruders.

Chairman Clawson: This is a variance so we will have to evaluate all 5 factors. The first is the Uniqueness of Property. Comments by the Board?

Mr. Hawk: The very topography and layout of the land makes it unique.

Mr. Dunn: With all due respect, I don't see that. There are plenty of through lots in Leawood and lots with varying topography, so that doesn't make it unique to me.

Uniqueness criterion unsatisfied with a vote of 1-3. For: Hawk. Against: Dunn, Dr. Peppes, Clawson.

Chairman Clawson: Second is Rights of Adjacent Property Owners. Letters were mailed, correct?

Mr. Thompson: Yes, sir. We received just the complaints that you heard and the information in your packets.

Rights of Adjacent Property Owners criterion unsatisfied with a unanimous vote of 0-4. Against: Dunn, Dr. Peppes, Clawson, Hawk.

Chairman Clawson: Hardship. Comments?

Mr. Dunn: Once again, we are charged with analyzing this on specific legal criteria. One of those criteria is that a personal hardship isn't what this means. It means inability to use your property, essentially. What I'm hearing is that a legally conforming hot tub could've been built, so I can't see how we'd be anything but constrained to say that Hardship hasn't been met in this case.

Hardship criterion unsatisfied with a unanimous vote of 0-4. Against: Dunn, Dr. Peppes, Clawson, Hawk.

Chairman Clawson: The fourth is Public Safety and General Welfare. Staff noted that if the request was approved, the barrier requirements would've been satisfied.

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

Chairman Clawson: The last is Spirit and Intent. Comments? Staff noted that the intent is to provide openness to the neighborhood and the streetscape. They felt that the fence probably wouldn't be noticeable due to the extensive landscaping and the walls along Roe.

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

A motion to deny Case 60-2021 Tom Sullivan/Owner-Request for a Variance to the 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-4 District for property commonly known as 12619 Cedar Street, was made by Dr. Peppes; seconded by Hawk. Motion carried with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Clawson, Hawk.

Case 61-2021 Tom Sullivan/Owner-Request for a fence height exception in accordance with the LDO, Section 16-4-9.4 in an RP-4 District for property commonly known as 12619 Cedar Street.

Staff Presentation: Wade Thompson made the following presentation:

Mr. Thompson: The applicant has replaced an existing 8-foot wall/fence with a 6-foot tall privacy fence without a permit. The exception is requested to allow the new fence to remain. This exception will only apply to the north and south sides of the property and the front, but will exclude the rear.

Chairman Clawson: They could have just built a 4-foot fence without a permit, right?

Mr. Thompson: No, not without a permit.

Chairman Clawson: Without the need for an exception?

Mr. Thompson: Correct.

Mr. Hawk: They just replaced an existing fence. It's not a new fence, correct?

Mr. Thompson: Correct. It was probably considered legal, nonconforming. I went back through all of the files and couldn't find a fence permit or a wall permit for that address, so it was probably constructed when the home was constructed.

Mr. Dunn: The prior fence was 8 feet, correct?

Mr. Thompson: Correct.

Chairman Clawson: Okay. You may present your case.

Applicant Presentation: Tom Sullivan, 12619 Cedar Street, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Sullivan: As mentioned in the staff report, this replaced an existing 8-foot wall. This is shorter and is actually in the same holes that the prior fence was located in. Initially when talking to contractors, we specifically asked if we needed a permit and were told no. Because we were just replacing an existing fence, no permit was necessary. That was obviously not correct. We did not intentionally violate the City Code, we just didn't realize that we needed a permit for that. It's my understanding from discussions with Mr. Torrez, that if a fence is within 3 feet of a patio or spa, that it can be 6 feet tall. Even if the spa goes away, we would still like to keep the privacy fence. It keeps the same atmosphere as when we bought the home and it is within 36 inches of the pad where the spa is and 39 inches from the patio where we sit. I don't know what the criteria for an exception are, versus a variance, but it helps the privacy of the neighbors. It's not visible from either street. We think that replacing the previously existing fence with one that's just 2 inches shorter is a reasonable exception to the City Ordinance.

Chairman Clawson: Are there any questions for the applicant? Is there anyone here that would like to speak for or against the applicant?

Chuck Madden, 12617 Cedar Street, appeared before the Board and made the following comments:

Mr. Madden: I couldn't hear very well back there, so I'm not sure exactly what they were asking for. A variance?

Chairman Clawson: Not a variance, an exception.

Mr. Madden: An exception on the fence height and location?

Chairman Clawson: If it's a legal fence, they can usually build a 4-foot fence. If there's a pool, they can build a 6-foot fence. They're just asking for an exception so they can build it 2 feet higher.

Mr. Madden: Even on the north side, which is probably 50 feet from the hot tub? I thought there was something about having 3 feet around whatever. I might have misunderstood. We're just unhappy.

Chairman Clawson: Wade, could you address that?

Mr. Thompson: If they're asking for an exception, you can approve it as long as they meet the criteria. It doesn't have to be within 3 feet from the hot tub. A 6-foot fence could be built if it's within 3 feet of the hot tub without needing an exception.

Mr. Madden: Okay, so they're asking for an exception to build a 6-foot fence on both ends?

Mr. Thompson: Correct, on the north and south. The front would be allowed as well, where they're currently at.

Mr. Madden: Okay. If that meets the City of Leawood's compliance requirements for hot tubs, I'm not going to be against that at all. Safety is important. Again, they have no permission from the HOA to build it in the first place. They'll have to come back to us as far as what the fence looks like. We have no fort-type fences in the whole subdivision. We only have 3 fences total and they're all 4-foot wrought iron ones. Now if they wanted to put a 6-foot wrought iron fence, we wouldn't oppose it because we care about safety, too.

Travis Torrez, Director of Building and Code Enforcement, appeared via Zoom and made the following statements:

Mr. Torrez: I will just add that a 6-foot fence can be constructed legally anywhere within 3 feet of a patio or hot tub. However, I think he said that the fence to the north doesn't meet either of those and I'm not sure the fence to the south is within 3 feet of either the hot tub or the patio. Also, with the location denial, they would still need to come back around with a plan unless they were just doing a 6-foot fence that met setback requirements.

Mr. Sullivan: If I may very briefly address that. Even if the hot tub goes away, we would like permission to maintain the 6-foot privacy fence on both ends. As I said, it is within 39 inches of the porch of the house. Granted, it's not 36 inches but it's close.

Chairman Clawson: It could be located on the property lines, correct?

Mr. Thompson: Correct. If you grant the exception.

Dr. Peppes: Wade, this doesn't have anything to do with the type of fence that it is. All we'd be saying is that a 6-foot fence is okay.

Mr. Thompson: Right. As long as they're using approved material we are okay with it. It is going to be a different story with the HOA and probably more of a civil battle between them.

Dr. Peppes: Do we have to refer to that in our Motion tonight? If we approve this exception, do we have to say that it has to be a material that the HOA approves?

Ms. Tomasic: This doesn't have to be in your Motion because the HOA can be more restrictive than the City. The City is more permissive. You don't have to get into the materials being used because that will be part of the permitting process with the City. If the HOA doesn't approve of the material, then that's between them. It doesn't have to be in your Motion.

Chairman Clawson: We're addressing the height only. _

Dr. Peppes: What if we give them the 6-foot exception on the north and south can they also take that 6-foot exception to the back?

Mr. Thompson: No, sir.

Mr. Hawk: Can we see that map again? I'm a little confused about the 39 and 36 inches.

Mr. Torrez: Any portion of that fence needs a variance to the 30-foot rear setback for location.

Chairman Clawson: We're just talking about the north and south fence, correct? Wade, could you please point them out on the drawing so that we're clear?

Chairman Clawson: *Points to plan drawing* That one and that one. Those are what we're talking about here. Is there a Motion?

A motion to approve Case 61-2021 Tom Sullivan/Owner-Request for a fence height exception in accordance with the LDO, Section 16-4-9.4 in an RP-4 District for property commonly known as 12619 Cedar Street, was made by Dunn; seconded by Hawk. Motion carried with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Clawson, Hawk.

Case 62-2021 Forner-LaVoy Builders; Douglas & Susan Dickerson/Owners-Request for an exception to the maximum allowable square foot on a lot in accordance with the LDO, Section 16-2-5.4 (F) 2 in an RP-1 District for property commonly known as 5404 W. 153rd Street.

Staff Presentation:

Wade Thompson made the following presentation:

Mr. Thompson: The owners are remodeling the home, which includes a cantilevered bump out on the east side that is 30 inches to accommodate an aging parent who is moving in. The new addition will not encroach the side yard setback. A request for a 41 square-foot exemption is needed to construct the addition as shown on the plan.

Chairman Clawson: The reason it's an exception is because it's less than 20 percent.

Mr. Thompson: Yes, sir. It's just 1.04 percent. *Shows plan drawing* The area marked in red is where the addition will be and that is what it will look like on the side of the home.

Chairman Clawson: And it meets all the other setback requirements, correct?

Mr. Thompson: Yes, sir.

Applicant Presentation:

Susan Dickerson, 5404 W. 153rd Street, appeared and made the following comments:

Ms. Dickerson: My mother will be moving in with us and we need to be able to accommodate her on the main level of our house for her safety. Doing this will allow for her to have a closet and a shower with a bench.

Chairman Clawson: I think we understand. Are there any questions for the applicant? Is there anyone here that would like to speak for or against the application?

A motion to approve Case 62-2021 Forner-LaVoy Builders; Douglas & Susan Dickerson/Owners-Request for an exception to the maximum allowable square foot on a lot in accordance with the LDO, Section 16-2-5.4 (F) 2 in an RP-1 District for property commonly known as 5404 W. 153rd Street, was made by Dr. Peppes; seconded by Hawk. Motion carried with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Case 63-2021 Mala LLC; Bob Wiltshire & Linda Devine/Owners-Request for a Variance to the side yard setback for the placement of an outdoor kitchen in accordance with the LDO, Section 16-2-5.3(D) in an R-1 District for property commonly known as 2605 Somerset Drive.

Staff Presentation: Ashley Tomasic and Wade Thompson made the following presentation:

Ms. Tomasic: Sorry, Mr. Chairman, I have a conflict in this case so I'm going to have to step out into the hallway. If there are any legal questions that come up during the

discussion, the case will have to be continued until January so that someone else from the legal department can step in. As long as no legal questions come up you all can go ahead and vote on this case, but I'm going to step out into the hallway due to my conflict.

Mr. Thompson: The property owners have constructed an outdoor kitchen 7.40 feet from the west end of the property line. A variance of 7.60 feet is needed in order for the structure to remain in its current location.

Chairman Clawson: Are there any questions for staff?

Dr. Peppes: Wade, let me make sure I understand this. The City gave a permit, but it wasn't built the way it was shown on the plans?

Mr. Thompson: Correct. A permit was issued for the project. This grill was not on the original permit. When the inspector went out, he noticed it and that's when it was determined that it was added on later.

Mr. Dunn: Could I ask for clarification on that? You said that the grill was added on, so is there a conforming structure that something is attached to?

Mr. Thompson: The defining difference is that it has a permanent gas line. If it were just a moveable grill, it would be okay. Because it's a permanent fixture, it is deemed an outdoor kitchen.

Mr. Dunn: Without the grill, everything else there has already been approved?

Mr. Thompson: No, sir. The rock that is supporting the grill is part of the issue.

Mr. Dunn: I didn't mean that, I meant is the rest of the property legal?

Mr. Thompson: Yes, the rest of the home was approved when the permit was issued for that.

Chairman Clawson: If they disconnect the gas line and get a moveable propane tank, they wouldn't need a variance?

Mr. Thompson: I'd have to let Travis answer that question.

Travis Torrez, Director of Building and Code Enforcement, appeared via Zoom and made the following statements:

Mr. Torrez: That would be correct. Planning's policy, which was under Richard Coleman at the time, was that once you have a permanent kitchen element like that where gas lines run to it, it isn't in compliance. Otherwise, if you have a propane grill that could be moved around, it wouldn't be in violation.

Applicant Presentation: Michael Ashley, Mala LLC 1052 North Sumac Street, Olathe, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Ashley: I appreciate you guys being here. I know it's late so I'll try to make this quick. Next year will be my 30th year celebrating the profession of landscape architecture. I've been through a lot of these. I've actually never lost, so hopefully I won't tonight. I have an outstanding client who is here if you need to speak with him. We followed all the rules. We got our permits. We got a permit for a fence and constructed it. We got the permit for the whole property at 2605 Somerset Drive, which has been an incredible transformation. It's been an outstanding project. We've fixed all the drainage and it's just been a beautiful project. As a landscape architect, I'm very sensitive to the land and all of that. We had an inspector come out and look at the depth of our gas line and then we had a trunk line coming off of this grill. To your point, if we had propane we could put it one foot off of the property line and just set it right next to it. In this case, in our opinion, they approved our trunk line and we said we would go through the process and add it and then we got to the final inspection and here we are. We've got this grill that was constructed to fit absolutely perfectly in the space. We will go through the five factors, but we think it's a little ridiculous and frankly ambiguous in the code. I will admit that we made a mistake. We added it and I'm here to say that we weren't perfect. However, I don't think that it's causing any problems on the site.

Mr. Dunn: Can I ask what you think that ambiguity is?

Mr. Ashley: They're calling this grill an outdoor kitchen. It's pretty ludicrous in my opinion. I'm not trying to be rude here, but a kitchen has a sink and a bar and all of these things that can get large and atrocious. I can understand the 15-foot setback that Mr. Coleman put in place being necessary, but not in this case. I did Mr. Coleman's back yard too, and I know him very well. This is not a kitchen, but the grill falls under that category so here we are. Then the cook smells come up and we'll get into that, but there's not any close neighbors that would smell a delicious steak being cooked. We maintain that an inspector came out and approved our trunk line and then we built it and that is when it should've come up that it was a problem. We're maintaining that this is not a kitchen. It's a very high-quality design. Everything has been well taken care of. This grill really fits the space. If we take it out, it's going to look very strange. No one can see it, it's totally screened. To my point again with the LDO, it says that it's a kitchen structure and as an accessory structure it should be 15 feet off. The house, in fact, is only 11 feet from the property line. I think you have to consider all the factors. I've included pictures and the site plans, which will show that if we move the grill to the level space we have constructed, it would be right next to the fire pit which is ridiculous. I can't really move it down into the yard because it has a heavy slope on it. My client has neuropathy and blindness in one eye, so I want to keep this safe for her. We've attached an ADA certificate. To wrap it up, I'll go through the factors. Hardship. I maintain that if it was a propane grill, we could be one foot off. It was originally going to be propane, but the inspector came out and saw our line and approved the location of the line so that's when it should have come up. Now we're faced with ripping out a grill and thousands of dollars and we are just trying to finish the project. We went by all the rules. We're not

out here building something and then coming back to ask for forgiveness. We built a rain garden, we built drainage, we had a stormwater study done. We've done everything that the City has asked us to do. I think the hardship is my client's ADA conditions. The sloped yard will not allow us to go down into the yard safely. It's dangerous, especially when you have wet grass and you're trying to carry a steak and grilling utensils. I think the grill is situated perfectly. We also strictly looked at making sure we were within fire code and being 10 feet away from the structure of the house. Uniqueness of Property. We have sloped yards and a very steep slope in the back. It's going to be very difficult to rip this out and repurpose it as some of the city folks have suggested. We also have a driveway and garage next to us, as well as a pool cabana. Not a house. If you look at my map, the house is pretty far away if you're concerned about smells. It's well screened. You can't see it from anywhere. You just have this 15-foot kitchen setback. As far as neighbors, I have a letter of support signed by all 3 immediate neighbors unequivocally approving the project. I have Jason Norris, who lives to the east, send an email of support. He wishes he could be here tonight but said you could call him if you questioned that. We also did some work for Mr. Norris. The neighbor next to him let us use his driveway during the project and so on. We have a great relationship with the surrounding neighbors, so I don't think there's anything that affects their rights. Effect on public safety, there's just none. It's a gas grill. You can't see it. That should be negligible. Regarding the spirit and intent of the ordinance, the code was a little ambiguous in my opinion. It's hard to find this R-1, 15-foot accessory structure. I'm a landscape architect and I missed it, okay? But we did build it off of the gas inspected trunk line that went in. The stub up, if you will, for the grill. That's when we thought everything was okay. Then they came back for the final inspection and told us it wasn't approved. I'm asking that you'll consider approving this. I know that the other ones haven't been so good tonight. Mister John Peterson is out here tonight and I told him I was going to pull off my best John Peterson tonight and try to talk you guys into this. My client and I would really appreciate it if this gets approved and we can move forward. With that, I'll take questions.

Chairman Clawson: I have a question for Wade. Where in the LDO does it discuss what an accessory structure is? This is a small gas grill.

Mr. Thompson: Right. As Travis said earlier, this is how it's been interpreted.

Chairman Clawson: There's no location in the LDO where it's really spelled out?

Mr. Thompson: Correct.

Mr. Dunn: Just to make sure I have it clear in my head, they had approved plans to build the structure, correct? Is it just the gas line that's an issue?

Mr. Thompson: Correct, yes.

Mr. Dunn: So the structure they built, bricks and all, was in accordance with the plan?

Mr. Thompson: It's stacked stone, so it's not hard to deconstruct. You've got pictures in your packet.

Chairman Clawson: The grill wasn't indicated on the original plan?

Mr. Ashley: The client wanted to add the grill after we were under construction, so we had some discussions. That's when we talked to the city inspector. He came out and saw our gas line and that's when this should've been brought up. It was a client add-on. It was not part of the original plan. My big concern as a landscape architect was making sure we're not causing any flame near any combustible material and then this 15-foot issue came up at the very last inspection. It says very clearly in the LDO that the Planning Director has the authority to approve it, but they would never even come take a look at it so that we could avoid this meeting. I even called Mayor Dunn and told her this was a waste of the City's time. But you know, rules are rules, so here we are.

Mr. Thompson: You know, he said the gas line was stubbed out when the inspector was out there. The inspector said that it was not out there when he did the inspection because he would've noticed it and made a notation.

Mr. Ashley: I have a witness here that saw that, and my client is here, and we got approved for it.

Mr. Bussing: Mr. Ashley, in your 30 years of experience in architecture design, you've surely had projects like this where you've got a plan approved, you start work, and then there's a change. What's the procedure then for you in those cases?

Mr. Ashley: It was just such a small change. Typically, yes, you'd revise the drawing, get a change order, and make sure it is approved. I keep going back to where the inspector came out, saw our gas line, and approved the plans. I took that as meaning we were okay. I was more concerned about fire safety than I was about the 15-foot "kitchen". I understand the rule, but it's for a kitchen. A kitchen has ice boxes, refrigerators, sinks, and those types of things that they put out in south Johnson County that are crazy big. But if this were a propane grill, I could set it right next to the fence without question.

Mr. Bussing: The normal procedure would've been to come back and adjust the plan with the Planning Department, make sure everything was copacetic and then proceed. Is that correct?

Mr. Ashley: Yes, sir.

Chairman Clawson: Other questions for the applicant? Is there anyone here that wishes to speak for or against this application? This is a variance and we have to go through the five factors. You touched on them a bit. Did you have anything else you would like to add?

Mr. Ashley: To your point, we should have done a revised drawing. I just didn't think it was a significant enough change to warrant that. The hardship is now knowing that we had an inspector come out and approve the gas line, but we may have to tear out the grill. We were worried about the depth of the gas line and had it buried at 12 inches, but he came out during an inspection and told us it needed to be 18 inches deep. We did what we were told and dug a deeper trench for the gas lines. I specifically told him, on site, we're adding a grill here and asked if that was okay. That's probably when this should've come up, so I would encourage us to make sure that if our inspectors are looking at lines *inaudible*.

Mr. Thompson: He's the best.

Mr. Ashley: So am I. I'm one of the best, anyway.

Chairman Clawson: Were you running gas lines to other locations in the project?

Mr. Ashley: Yes, sir. The main gas line was for a fire pit, which is already constructed and finished. We just did a trunk side line off of it, which was in the ground. I know the inspector saw it. I'm not trying to say he's a bad guy or anything. I just think it was overlooked-that 15 feet-while he was there. That would've been the time to let me know. To me, it creates hardship for us. Costing thousands of dollars, now I've got to rip this thing out, and move it down the hill in a sloped yard that is dangerous for my client? She's got neuropathy, so taking food items down the hill is just not a good idea. Uniqueness of the property-there's a driveway right next to the grill. There's a fence. It's completely screened and you can't see the grill. I showed a 15-foot dimension there *refers to drawing*. None of those things that apply to a typical outdoor kitchen applies in this case. The yard is quite sloped in the back to allow for the rain garden, all the drainage that we put in, and all the grating that we did. All of the neighbors are here supporting this case. I don't have anyone here to speak against this. Public safety, no affect. We're about 4 feet off from where it should've been and I think the LDO was a bit ambiguous on a grill and kitchen and accessory structure here. I think we met the spirit and intent of the ordinance.

Chairman Clawson: This is a variance request and as such, we will have to evaluate the five factors. We will vote, as a Board, on each of the factors. If we vote in the affirmative on all 5 factors, then we can support a motion to approve the variance. If we feel that one or more of the factors haven't been satisfied, we have to support a motion for denial. The first factor is Uniqueness of the property. Discussion by the Board.

Mr. Dunn: I find some merit to the argument that the slope of the property makes it unique for building something for this purpose. Not for everything, but for this purpose. Once again, I'm kind of in the middle. I'm trying my best to apply these legal principles as we've been educated to do, but I do see a good argument for uniqueness.

Uniqueness criterion satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Chairman Clawson: The next is Rights of Adjacent Property Owners. Letters have been mailed out?

Mr. Thompson: Correct. I haven't heard from anyone, but you do have a signed document in your packet.

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

Chairman Clawson: The third factor is Hardship.

Mr. Dunn: Well, as I said with respect to uniqueness, if the applicant's presentation is accurate then the hardship is that they really couldn't do this project effectively if they can't leave it in this location. That's what I'm hearing. That's a hardship to property use, which I believe is the standard that we're supposed to apply.

Chairman Clawson: I also feel that the City has some responsibility here if they were out there and actually saw a gas line that was being put in.

Mr. Thompson: My report says that it wasn't there.

Chairman Clawson: Is that right? Okay.

Mr. Bussing: Mr. Chairman, I concur with Mr. Dunn. I also wanted to say that I've had many years of experience dealing with our inspectors and know them to be true professionals in how they approach their job, so I don't want to leave any misunderstanding about somebody screwing up here. Mr. Jones, our inspector, did a fine job out there. It all comes down to he said, she said, and I'll always side with our inspectors on that.

Hardship criterion satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Chairman Clawson: I'd like to point out, Wade, I think somehow there needs to be a better definition of accessory structures.

Mr. Thompson: That would involve an amendment to the LDO, which would have to go through Planning and City Council.

Chairman Clawson: The fourth factor is Public Safety and General Welfare. Comments?

Mr. Dunn: There are a lot of grills in Leawood. I can't imagine that this will be the one that negatively impacts public safety.

Chairman Clawson: I think given the location of it related to the neighbor, it's really not a factor.

Mr. Hawk: They also asked for a depth of 18 inches as opposed to 12 inches, which seems reasonable.

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

Chairman Clawson: Last is Spirit and Intent.

Mr. Bussing: I'll comment on that and agree with Mr. Ashley that if the spirit and intent of the ordinance is to build beautiful spaces, you've surely met this one.

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

A motion to approve Case 63-2021 Mala LLC; Bob Wiltshire & Linda Devine/Owners-Request for a Variance to the side yard setback for the placement of an outdoor kitchen in accordance with the LDO, Section 16-2-5.3(D) in an R-1 District for property commonly known as 2605 Somerset Drive, was made by Hawk; seconded by Dunn. Motion carried with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Case 64-2021 John Peterson; RDD Holdings Five LLC/Owner-Request for a Variance to allow an existing commercial building to be setback less than 125 feet from proposed single-family homes in accordance with the LDO, Section 16-2-6.1(D) in an SD-CR District commonly known as 4501 W. 135th Street.

Staff Presentation: Wade Thompson made the following presentation:

Mr. Thompson: The surrounding property is being proposed to be rezoned for single family homes. If that happens, this property does not meet the 125-foot separation requirement in the LDO. Mr. Chairman, the copy you have should say 125 feet and not 75 feet.

Chairman Clawson: That would typically mean that a house could not be built within 125 feet of a commercial building?

Mr. Thompson: In this particular zoning, that is correct.

Mr. Hawk: How long has that building been there?

Mr. Thompson: It was constructed in 2008.

Chairman Clawson: What kind of setback is the variance for? What kind of setback would they prefer?

Mr. Thompson: I'd have to let the applicant answer that. He's got a map of the proposed single family homes that will hopefully be built there.

Dr. Peppes: Wade, I understand that this is an ongoing process and that plan has not been approved yet. Could you enlighten us a bit?

Mr. Thompson: Yes. This has gone before Planning and City Council before by a previous applicant and was denied. I think Mark Klein is online and he could answer some of those questions better. This variance wouldn't be necessary unless that property is rezoned and it is an ongoing process.

Chairman Clawson: Rezoned, as in RP-1?

Mr. Thompson: Single family homes, probably RP-1.

Mr. Hawk: Should we be acting on it at this point then?

Mr. Thompson: They're actively working on it. I know it has been staked and a meeting noticed at that property. John would be able to answer that. I don't know what the timeline is for that project.

Applicant Presentation: John Peterson/McAllister Place LLC, 11817 Norwood Drive, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Peterson: I'm going to take my five minutes and try to put this conversation in a context which is sort of backwards from what I normally have. Usually, I'd be the guy up here trying to build two office buildings and saying I want to be closer to residential homes. This is the opposite. I'm the guy trying to develop an RP-2 villa community and we have two existing buildings close by. Their owners are here tonight probably thinking this is great but if something were to happen, it would leave them in a legal, nonconforming position. If their building burnt down, they couldn't rebuild it, so we're asking for an exception and the benefit is we get to develop our project and they get to have a legal conforming status as time goes on. I hope they never have a calamity but it would give them the reassurance that they could build back in their exact location if something were to happen. They have uniqueness because they didn't cause the issue. We have an overall uniqueness here that I feel is relevant to the situation. This is Villaggio. In 2005, there was a great idea to build a mixed use commercial community at the corner of 135th and Roe. Developers had a great idea. In fact, they were so confident that they spent millions of dollars putting the infrastructure and streets in and said the

commercial business will come and we'll make back our 4 million dollars. They were so confident and said they'd issue special benefit district bonds and assess the property because the new owners of all the retail will pay these and pay for all the infrastructure. Well, they got all of the spending of the 4 million dollars completed and all of the infrastructure in, but they had a bit of a bad gauge of the market. Sixteen years later, we have two buildings that have been built. As of now, it's been through 2 bank foreclosures and is held by a bank. Today, Johnson County taxpayers are owed over a million dollars in past *inaudible* property taxes. Bond holders of the 2 special benefit districts have not been paid for an extensive period of time. The City of Leawood is at a loss of over a million dollars cash out of the general fund. I need some tech help getting the picture on the screen. Thanks. *Refers to plan picture* With this proposal is a plan that is not commercial. It is, like I've indicated, RP-2 villas. We have a financial structure put in place because of the velocity of the market receptivity to this product. We will pay off all of the *inaudible* property taxes, we will pay back the City of Leawood, we'll take over all of the outstanding bonds, and we'll bring it to where it should be so that it can be developed. This is a huge financial mountain to climb. This nearly exact proposal was advanced to the City at the end of 2020 and, refuting staff's comment, it was not denied by City Council. It was approved. The development agreement with the financial structure was ready for approval, but that group had a financing glitch at the end and we did not move forward. The City rescinded the ordinance that approved this project. I acknowledge that I'll have to take it back through them. I figured that this issue with how close the residential lots will be to these 2 existing office buildings could be taken care of through the variance process. Going through the BZA was not an option that was raised during meetings with City Council. We're here at the direction of Planning staff to seek an exception for Mr. Buzelle's client and Mr. Patterson's ownership of his building to say that the lots that surround those 2 buildings can have less of a setback. Of course, the residential community will be advised of what the situation will be. *Changes picture on screen* This is the building at the northeast corner. It was a bank building but is now occupied by Deffenbaugh. That's Mr. Patterson's building at the southeast corner. You can see them outlined here in gray as the villas surround them. The LDO at the time required the bank to be zoned as retail because of the drive-up. That required a 125-foot setback. The bank building will sit about 67 feet from the property line of the newly proposed residential lot and there will be 100 feet between the building and the new villa. We have extensive landscaping planned between that lot and the bank building and we don't think it will affect the marketability of the residential units. That puts this in the context of where we are. The LDO section that we're asking for this exception from is unique and you don't hear it cited often. The privilege of getting this exception will go to the building owners. It says in this LDO that if you're in a situation where, in advance of destruction, there's a set of circumstances that allow for an exception it can be granted to allow the owner to rebuild in the exact footprint. If a calamity occurred without this exception being granted, they would not be able to rebuild in the exact manner that they're in. We're advancing it as the RP-2 folks who want to build this project and finally make this property viable. Going through the factors, I'll discuss uniqueness. The need for a variance arises from such a condition which is unique to the property in question and is not ordinarily found in the same zone or district. It's not a condition that was created by actions of the property owner or agents. Rights of Adjacent Property

Owners; they're here and will speak on this. The strict application of this LDO will constitute unnecessary hardship upon the property owner. They're not asking to expand. They're merely saying that they finally like what's happening with the new development and appreciate the value it will add to their properties, but in the event of a calamity they want to be able to reconstruct their buildings the way they are now. I think that staff agrees with us that the variance and the development will have a positive effect on public safety and general welfare. I think the spirit and intent of the ordinance is to have adjacent properties of different uses working in harmony. This provision allows us to take a weird situation and get something moving forward. These things apply to both applications and I'm not sure which one is on your agenda first tonight.

Mr. Dunn: The area on your plan that showed the houses on it needs to be rezoned first, correct? Assuming that rezoning is granted, will those houses that you've got laid out there be able to be built where they are shown even though they wouldn't be 125 feet from the buildings because they'd be in compliance?

Mr. Peterson: Yes.

Mr. Dunn: But if the buildings burned down later, they couldn't rebuild.

Mr. Peterson: Yes, exactly. I should've worded it that way.

Mr. Dunn: I just wanted to make sure that I understood this clearly.

Mr. Bussing: Mr. Peterson, you've intertwined two terms that are important to us. The lengthy definition you put up that explains these two gentlemen's situation kept mentioning needing an exception. You're asked for a variance. Could you please help us understand?

Mr. Peterson: Maybe I am asking for a variance. I told Doug and Greg that I've only been in front of the BZA 5 times in my 40 years of land use law. Usually we take care of this through planned zoning and the variance process. I thought it showed up as an exception.

Mr. Thompson: Here's the application.

Mr. Peterson: It's a variance. Okay.

Chairman Clawson: If this variance is approved, who will determine setback requirements around existing buildings?

Mr. Peterson: Our setbacks will be approved as part of our preliminary plan going through the residential piece.

Chairman Clawson: The setbacks on the parcels you've laid out will be determined by the classification of the lot. I'm talking about the setbacks from the existing buildings. Who sets those? Right now, it's saying 125 feet.

Mr. Peterson: If any of the owners of the office buildings wanted to demolish their buildings and redevelop with a different footprint, they would have to respect the 125-foot setback. They're still restricted to the code. This is only an issue in their existing buildings if they burn down. If that happened, it'd be an issue of legal nonconforming use. If there's more than a 50 percent loss, you can't rebuild if you're not in strict compliance with the code. This is just a protection for them. That's what this is about.

Greg Musil/Rouse Frets Law Firm, 5250 W 116th Place, appeared before the Board of Zoning appeals and made the following comments:

Mr. Musil: I'm here on behalf of RDD Holdings, which owns the property at Fontana and 135th Street. We are in complete agreement with John. The LDO does mention exceptions, so I don't know what the different standard is for that. The uniqueness here from our standpoint as the bank building (now office building) is that we've been sitting there for 13 years. The project has been sitting there for 17 years with nothing happening. That's not good for our building or property. The fact that you have Doug Patterson, John Peterson, and Greg Musil up here on the same side of something may make it unique from some kind of weird, parallel universe standpoint as well. From a property standpoint, we are in support of this as the person getting the exception and getting the right to say that if something were to happen, we could rebuild in the same footprint. That's what we're looking for. After decades of vacancy, it's only us. We want someone else out there. We have realized that the plan John's proposing is the best way to get something there. We want to be protected so that we could rebuild if needed. With respect to the rights of adjacent property owners, everyone is going to know what's there and what's coming. There won't be any surprises. The hardship is that we want something there. We don't want the land to stay vacant. At the same time, we need some protection. If the winds come through like they did tonight and take us out, or like they did in Kentucky, we want to be able to rebuild. Nobody on the residential side and nobody on the office building side will be surprised. I don't think this will affect anyone regarding public safety and general welfare. The spirit and intent of the LDO is to make sure that residential property is separated a sufficient distance from an SD-CR zone and that will still be there. We've done our due diligence with John's client. The landscaping will benefit both the residential properties and ours and we will follow through with the rezoning. Part of the question of this is whether we should ask for this exception before the rezoning is approved, but I think we're going about this in the right order. Get it done tonight so that when the rezoning happens, we can tell the City Council that these issues have been resolved.

Mr. Bussing: Mr. Musil, that's my question. What if the City Council doesn't give you the zoning you want? What if they say that this is part of the 135th Street Corridor Plan and they don't mind the land being vacant for now? What happens to these two agreements to this building?

Mr. Musil: If the exception or variance is granted, it would be available for a future residential use.

Mr. Bussing: And what happens if the City doesn't approve the land for residential use?

Mr. Musil: Then it just sits there with an exception or a variance for some future date. I don't know whether you could put a time limit or a certain condition on it. I don't know what John's client's position would be on the residential, but we're going to assume the City Council will approve the rezoning. They did approve the last plan for villas, so now that the financial aspect is being handled, we would expect the same results. We just want you to know that RDD Holdings supports the variance as requested.

Mr. Bussing: Thank you.

Mr. Dunn: I want to make sure that I'm clear on this. If we were to grant this, that wouldn't change any obligations that the buildings have as commercial-use properties, would it?

Mr. Musil: I don't think it would, because I'd have to look at the setback distances for another commercial building. It would be a lot less than the 125 feet for residential and probably easily within the 65 feet that we have. I don't see that that would be a problem.

Ms. Tomasic: Just a reminder that Mark Klein is online and available to answer any questions that you may have.

Doug Patterson, 4630 W 137th Street, appeared before the BZA and made the following comments:

Mr. Patterson: To follow up on the dialog of what happens if the residential zoning doesn't happen, these proceedings would be moot. My front yard, side yard, and rear yard setbacks are 40 feet and we plan to comply with that. Let me address the variance request with regards to the uniqueness of the property and the hardship. As you can see, Gardens of Villaggio was a little short of 2 acres in size. It's a condominium. It was my idea to make it a condominium office building and it was a very bad idea. We own only the land under our building. Everything else is a common element. It's a true obstacle in terms of marketing. When people finance an office building, they expect a yard. We don't even own the parking lot that we use for our building. *Puts drawing up on screen* Our building is in the southeast corner. The buildings to the north and west have not yet been built. What we were anticipating even before the residential plan was proposed, was collapsing our condominium. We want to take this common yellow element, Tract A, and attach sufficient land to it so that each building could have plenty of land for setbacks, green spaces, and open areas. That was our goal. We're unique because we're an office condominium with a Tract A common element that lacks real definition as to use and who should get it if the condominium is collapsed. That was until this residential

development proposal came along. Now we have an opportunity, because a significant portion of Tract A will be under contract to sell to John's client. Also, we would be able to implement sufficient rear and front yard setbacks that are legal with the 2 proposed office buildings. The hardship is that, without this variance, we will have front and side yards that are much larger than we need or want. We're basically donating parts of this Tract A common area to this development in return for work on our parking. We're in a unique position where we don't want or need the land and it's a hardship for us to keep the land. We support this. We just want to be like every other freestanding office building and have sufficient parking and setbacks and that's what approval of this application will do. I'll stand for questions.

Chairman Clawson: Doug, you were speaking to the next case.

Mr. Patterson: We've kind of combined them. I know we shouldn't, but yes. I was speaking on the next case.

Chairman Clawson: The cases are separate. You'd really like to have a setback less than 75 feet, whereas the previous case is asking for less than 125 feet. Generally for the same reasons, correct?

Mr. Patterson: That's correct. Other than us wanting to collapse our condominium and the accommodation, this variance and John's project will allow for us to go ahead and be an honest to goodness building with our own yard.

Mr. Dunn: Wade, is it the type of buildings that make the difference between the 125 feet and the 75 feet?

Mr. Thompson: Not really. The only difference is the drive through that the bank building has.

Mr. Dunn: Well then why is one 75 feet and the other 125?

Mr. Thompson: Different zoning.

Mr. Peterson: Under the LDO at the time, in order to have a drive through you had to be deemed in the retail category.

Mr. Dunn: Thank you. It all fits together now.

Chairman Clawson: They're just slightly different commercial zonings, right?

Mr. Thompson: Yes, sir.

Chairman Clawson: I think there's no one here to speak for or against this, so we are ready to address the factors in the first case. Does anyone want to take a stab at Uniqueness?

Mr. Dunn: Mr. Chairman, I've never seen a case before where we're asked for a variance before it's needed for the sole purpose of assuring that the building owners don't have a problem if there's a catastrophe down the road. I don't know if that makes it unique or not, but it's a first for me. Given the history, I'm inclined to think it's a fairly unique situation.

Chairman Clawson: Any other comments?

Uniqueness criterion satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Chairman Clawson: Rights of Adjacent Property Owners is the second.

Mr. Thompson: I did receive a call from a property owner across the way, a Mr. Stuart Sharp. He just had some questions and once they were answered, he was okay with the properties being rezoned to single family.

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

Chairman Clawson: The third factor is Hardship.

Mr. Dunn: Mr. Chairman, I'll speak on that one. I see this as a potential hardship. I realize that it's not a hardship if and until the rezoning to residential is approved. That in itself creates a hardship because it would seem like somebody has got to go first. I don't know if I need to state this for the record, but if we are to approve this request it is solely for the purpose of avoiding this problem if it's rezoned. If it's not rezoned, it's moot, and our records should reflect that.

Mr. Hawk: This goes beyond the scope of this property. We're talking about bondholders, the City, and people who may have had a loss of income that we don't even know. I think we should look towards taking care of some people that we don't even know.

Chairman Clawson: Well the variance request says that it's to allow an existing commercial building to be set back from proposed single family. So if it's never rezoned as single-family, this means nothing.

Hardship criterion satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Chairman Clawson: The fourth is Public Safety and General Welfare.

Mr. Dunn: I don't see any issues there.

Mr. Bussing: I also don't see any issues.

Mr. Hawk: Nothing changes.

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

Chairman Clawson: The fifth factor is Spirit and Intent.

Mr. Dunn: Once again, I don't see any issues.

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

A motion to approve 64-2021 John Peterson; Rdd Holdings Five LLC/Owner-Request for a Variance to allow an existing commercial building to be setback less than 125 feet from proposed single-family homes in accordance with the LDO, Section 16-2-6.1(D) in an SDCR District commonly known as 4501 W. 135th Street, was made by Dunn; seconded by Hawk. Motion carried with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Case 65-2021 John Peterson; HOAD LLC/Owner-Request for a Variance to allow an existing commercial building to be setback less than 75 feet from proposed single-family homes in accordance with the LDO, Section 16-2-6.3(D) in an SD-O District commonly known as 4630 W. 137th Street.

Staff Presentation: Wade Thompson made the following presentation:

Mr. Thompson: The surrounding property is being proposed to be rezoned for single-family homes. If that happens, the property would not meet the 75-foot separation requirement in the Leawood Development Ordinance.

Applicant Presentation: John Peterson, 11817 Norwood Drive, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Peterson: Mr. Chairman, I'd be happy to indicate that my comments and those of the subject from the prior application should be incorporated into the record for this application. I appreciate your support.

Chairman Clawson: Excellent. That's fine with me. In that case, we can go through the five factors. The first is Uniqueness.

Mr. Dunn: Mr. Chairman, I would also like to incorporate my comments from the prior case to Uniqueness. I think the same factors apply to this.

Uniqueness criterion satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Chairman Clawson: Rights of Adjacent Property Owners is the second factor.

Mr. Dunn: I have nothing to add.

Mr. Hawk: Use Mr. Dunn's comments from the previous case as well.

Chairman Clawson: Same comments from the prior case.

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

Chairman Clawson: Hardship.

Mr. Dunn: Once again, I'd like to incorporate into the record my comments from the prior case with respect to this case as well.

Hardship criterion satisfied with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Chairman Clawson: The fourth factor is Public Safety and General Welfare.

Mr. Dunn: I can't see any issues.

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

Chairman Clawson: Spirit and Intent. Staff notes that granting the variance will not generally be opposed to the spirit and intent of the LDO.

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

A motion to approve Case 65-2021 John Peterson; HOAD LLC/ Owner-Request for a Variance to allow an existing commercial building to be setback less than 75 feet from proposed single-family homes in accordance with the LDO, Section 16-2-6.3(D) in an SD-O District commonly known as 4630 W. 137th Street, was made by Dunn; seconded by Dr. Peppes. Motion carried with a unanimous vote of 4-0. For: Dunn, Dr. Peppes, Hawk, Bussing.

Mr. Bussing: Mr. Peterson, do you have a timeline for when you expect to go to the city for rezoning?

Mr. Peterson: We will go before the Planning Commission in January and hope to get in front of City Council in February. We're very excited to move this forward.

Mr. Bussing: Great. Good luck.

MEETING ADJOURNED