

New Albany Board of Zoning Appeals met in the Council Chamber of Village Hall, 99 W. Main Street and was called to order by Board of Zoning Appeals Chair, Mr. Gallagher, at 7:00 p.m.

Those answering roll call:

Mr. Everett Gallagher	Present
Mr. Kirk Smith	Present
Ms. Andrea Wiltrout	Present
Ms. Kerri Mollard	Present
Mr. Shaun LaJeunesse	Present
Ms. Marlene Brisk (council liaison)	Present

(Mr. Gallagher, Mr. Smith, Ms. Wiltrout, Ms. Mollard, Mr. LeJeunesse, and Ms. Brisk present via GoToMeeting.com).

Staff members present: Steven Mayer, Development Services Coordinator; Chris Christian, Planner; Mitch Banchefsky, City Attorney (via GoToMeeting.com); Ms. Pam Hickok, Clerk; and Josie Taylor, Clerk (via GoToMeeting.com).

Moved by Ms. Wiltrout to approve the February 24, 2020 meeting minutes, seconded by Mr. Smith. Upon roll call: Ms. Wiltrout, yea; Mr. Smith, yea; Ms. Mollard, yea; Mr. LeJeunesse, yea; Mr. Gallagher, yea. Yea, 5; Nay, 0; Abstain, 0. Motion passed by a 5-0 vote.

Mr. Gallagher asked for any corrections or additions to the agenda.

Mr. Christian stated the applicant for VAR-24-2020 requested to have the application tabled until the May meeting.

Mr. Gallagher asked staff if they had a list of the witnesses or applicants needed to be sworn in this evening.

Mr. Mayer stated there was not a list and indicated there were different methods that could be used to swear in applicants and witnesses. Mr. Mayer added that Mr. Banchefsky could also speak on this.

Mr. Gallagher stated anyone who spoke was asked to swear to tell the truth and nothing but the truth and that the first time a person spoke they should confirm they have sworn to tell the truth.

Mr. Gallagher asked if there was anyone who wanted to discuss any items not on tonight's Agenda. (No response).

APL-9-2020 Appeal

Appeal to city staff's interpretation of garage "floor area" as defined in C.O. 1105.02(t) for the property located at 4646 Wilkin Court (PID:222-000962-00). Applicant: Elizabeth Kessler c/o Pete Griggs, Brosius, Johnson and Griggs LLC

Mr. Gallagher recused himself from this application and asked Ms. Wiltrout, Board of Zoning Appeals (hereafter, "BZA") Vice-Chair, to proceed.

Mr. Banchefsky asked if the attorneys for the appeal were present.

Ms. Jennifer Huber, attorney with Brosius, Johnson & Griggs, LLC for the Applicant/Appellant(s), Ms. Kessler, stated she was present.

Mr. Georgiton, attorney with Dinsmore & Shohl LLP for Mr. and Mrs. Howser/Appellee(s), stated he was present.

Mr. Banchefsky asked if either attorney was awaiting a person that was not yet present.

Ms. Huber stated no.

Mr. Georgiton did not respond.

Mr. Banchefsky stated this kind of appeal hearing was out of the ordinary for the BZA. Mr. Banchefsky stated this was an appeal from a staff decision regarding how the size of an accessory structure was calculated. Mr. Banchefsky stated this meeting was being conducted virtually due to the Covid-19 situation and asked that if anyone had a technology problem to please state they had a problem. Mr. Banchefsky said there was a chat box available on the right hand side of the screen, he believed, to allow participants to communicate via text if all else failed. Mr. Banchefsky indicated staff would speak first this evening and then the Appellant, Ms. Kessler and her attorney. Mr. Banchefsky stated the Appellant was the back yard neighbor of the Appellee, Mr. Howser, and his attorney. Mr. Banchefsky stated he reserved the right to make a closing statement and make inquiries during this process. Mr. Banchefsky added that since this was an appeal hearing each side would be able to call witnesses and cross-examine. Mr. Banchefsky stated he believed one witness had been subpoenaed by the Appellant, Mr. Ryan Hannigan, a City employee. Mr. Banchefsky asked if Mr. Hannigan was present.

Mr. Hannigan stated yes.

Mr. Banchefsky said that, as stated, anyone giving testimony must be sworn in. Mr Banchefsky stated those speaking would be asked, the first time they spoke, to confirm they had been sworn in. Mr. Banchefsky stated the BZA had two options: to uphold staff's position on how the garage area was calculated by denying this appeal or to overrule staff by granting this appeal. Mr. Banchefsky stated there had been some late arriving material, a brief filed by the Appellant on April 23, 2020 and a brief filed by the Appellee earlier this current day. Mr. Banchefsky stated there was a provision in the Code that provided the BZA did not have to make a decision for thirty (30) days from the date of this hearing. Mr. Banchefsky stated that if the BZA wanted to, all evidence could be presented this evening and the hearing be completed, but take thirty (30) days to review the briefs and other materials and then vote at the May BZA hearing.

Mr. Banchefsky stated the standard of review, outlined in the staff report's page 3, he believed, was that in order to approve or affirm the Appellant's appeal the BZA must find that staff's interpretation of the applicable City Code was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by a preponderance of substantial, reliable, or probative evidence based on the record as a whole. Mr. Banchefsky stated it was the Appellant's burden to convince the BZA that the standard of review's requirements had been met. Mr. Banchefsky noted the importance of making and a record and said a reviewing court or panel would want to see a record of action that detailed the reasons why the BZA, as a whole and its members individually, voted the way they did, what the votes were based on. Mr. Banchefsky encouraged BZA members to take notes during this process they could later rely on when making a motion so a clear record, detailing the basis for their decisions, could be made. Mr. Banchefsky asked if there were any questions. (No response.)

Mr. Mayer swore to tell the truth and nothing but the truth. Mr. Mayer presented the staff report and discussed the appeal.

Ms. Wiltrout asked Mr. Mayer if there were examples on the prior use of the definition of "floor area" in a situation involving a garage that had not included a patio.

Mr. Mayer stated staff had consistently not included a patio space when calculating the floor area. Mr. Mayer said staff had historically done just the walled in areas of an enclosed garage, detached garage.

Ms. Wiltrout asked if others had any questions. (No response.)

Ms. Wiltrout called for the Applicant/Appellant.

Ms. Huber stated she was speaking for the Applicant/Appellent Ms. Kessler.

Ms. Wiltrout asked if Ms Huber would like to begin with an opening statement.

Ms. Huber stated she would. Ms. Huber said this appeal focused on applying the provisions of the Zoning Code and asked that those provisions that existed be applied to the structure at issue. Ms. Huber stated this structure essentially contained three (3) structures or three (3) uses, which Mr. Mayer had identified. Ms. Huber stated the garage was a part; the motor lounge, entertainment room, or party space was a part; and the covered porch was the third. Ms. Huber stated the Zoning Code contained provisions that applied to each of those spaces independently. Ms. Huber noted that to attach the spaces, call them all a garage, and then render the covered porch section legally and effectively invisible was arbitrary in this instance.

Ms. Huber noted she had a PowerPoint presentation she believed staff was providing and thanked staff for this. Ms. Huber requested that if there were questions as she spoke to please stop her so she could respond or provide more information. Ms. Huber stated she was ready to discuss her PowerPoint presentation and then move on to testimony.

Mr. Peter Georgiton stated he wanted to lodge an objection to the nature and scope of the presentation if he could.

Ms. Wiltrout asked what the objection was based on.

Mr. Georgiton stated the objection was based on the fact that several of the slides, mainly toward the end, discussed the setback, the measurement of the setback, as well as the height of the structure, and purported to challenge those. Mr. Georgiton said the problem was that the appeal documents, filed back on February 18, 2020 he believed, did not assert those rationales for appealing the City's decision. Mr. Georgiton stated that under the Code the appeal documents were required to set forth the reasons for the appeal and, because those were not timely asserted and were not part of the appeal documents, the Appellee requested that any arguments regarding measurements of the setback or the height of the structure be precluded as they were not subject to appeal. Mr. Georgiton stated the only issue that was brought up in that February 18, 2020 letter was that of whether the structure complied with the square footage requirement.

Ms. Wiltrout stated she would allow the testimony to get it on the record but said that Mr. Georgiton's argument was noted.

Ms. Huber, in response to Mr. Georgiton's objection, stated the Appellee had, in fact, responded to those items and said it seemed disingenuous to object at this point. Mr. Huber said the time had not run on those items. Ms. Huber stated the City had only rendered a decision that was being appealed in respect to the area and, if need be, if the BZA determined those issues were not right before the BZA this evening (which she believed they were and the BZA would see they were as they dealt with the entire structure being deemed a garage), then the Appellant reserved the right to appeal those other issues at a later date.

Ms. Wiltrout stated she would be happy to have all testimony presented and would rule on anything she felt went beyond the scope.

Ms. Huber stated she was providing some context photos in her presentation and discussed what was being shown on the photos. Ms. Huber noted that the structure in question was not a perfect rectangle and stated this would become important later in the presentation. Ms. Huber also noted the roof covering the porch and said it was not a patio. Ms. Huber indicated on a photo that the garage portion of the structure was closer to the Appellant's property line than other portions of the structure. Ms. Huber added that to the far, far right of the accessory structure some of the raised footer that had been created and the raised grade were visible. Ms. Huber stated the three (3) issues the Appellant was highlighting in this presentation and testimony were that the structure in fact, when reading the Code closely, (1) exceeded the maximum area that it could be; (2) that it had possibly encroached into the easement and, therefore, the setback along the rear property line of the Howsers' property; and (3) it may also be taller than it was permitted and/or taller than it was approved. Ms. Huber stated she was saying "may" because she was not permitted to obtain those measurements herself and asked that the City be able to provide those measurement tonight, ideally.

Ms. Huber said that as far as the first issue it was clear that it exceeded the maximum area because of the application of the definition of "floor area," the exclusion of areas that should have been counted, and items she would provide more detail about.

Ms. Huber indicated a photo she believed was taken on March 15, 2020 to provide context on what happened and what it looked like at this time. Ms. Huber said Ms. Kessler would be happy to speak about what it looked like at this time as she sees it from her home. Ms. Huber indicated the height was very noticeable on this photo as well as the covered porch with its roof. Ms. Huber stated the landscaping shown, even when the leaves or foliage were on, did not screen the structure from view and the Appellant wanted the BZA to consider that item also.

Ms. Huber noted that the structure's entire area exceeded the maximum area and indicated four (4) legal reasons why that was the case. Ms. Huber added that Appellant had briefed these issues, but she wanted to discuss them and answer any questions. Ms. Huber stated any one of the four (4) reasons would render the structure over-sized by square footage. Ms. Huber stated the general term "area" should be the measurement used, not the defined term "floor area." Ms. Huber stated that where a defined term was used it had to be used carefully and where it had been codified to be used one could not use it where it had not been used or use it where one thought it should be used.

Ms. Wiltrout asked Ms. Huber what was the definition of "area" she would like the BZA to use.

Ms. Huber stated that area could be the general area, the entire area of the structure which would include the covered porch, to make that more specific and nail it down.

Ms. Wiltrout stated okay.

Ms. Huber stated that, as opposed to floor area, for which she would show more detail, which excluded certain areas by definition, the term area was not a defined term so it could be used in the same way learned in school and should be measured post to post including the area of the structure. Ms. Huber noted that would be the effect of using area instead of "floor area."

Ms. Wiltrout asked if there were other instances in the Code that Ms. Huber was aware of where that definition was used.

Ms. Huber stated there were other times in the Code where it was used, where it said the term "floor area." Ms. Huber stated that in the provision for area in the section of the Code they were looking at, §1165.06(c)(4), it said "[s]hall not exceed 800 square feet, provided that in no instance shall the detached garage or carport exceed the ground floor area." Ms. Huber said that was an intentional use of "floor area" and there were other places in the Code where the words "floor area" were used. Ms. Huber added that she was not aware of an exception, the words were used with respect to a primary or principle structure. Ms. Huber stated that where in certain industries places they would use a term that was less than the entire area of something, this was not one of them by the Code. Ms. Huber stated this would require measurement of the entire footprint of the building.

Ms. Wiltrout asked if that would be if they used Ms. Huber's definition.

Ms. Huber stated if the Code's definition were used, she was not trying to create a new definition. Ms. Huber stated she saying that one could not use a defined term where it had not been used in the Code.

Ms. Wiltrout stated okay.

Ms. Huber stated that if under the term "floor area" the area of an open porch was excluded, then the area of garages would also have to be excluded and that was nonsensical. Ms. Huber stated that the covered porch should not have been omitted from the "floor area" because it was an open-sided structure, not an open porch. Ms. Huber stated the entire structure was not a garage.

Ms. Mollard asked if the patio did not have a roof, would that be different in Ms. Huber's definition or interpretation of the definition.

Ms. Huber stated that if it did not have a roof it might fall under the definition of "floor area" because, as item number three (3) on the slide she was presenting stated, if it was not covered it might be an open porch. Ms. Huber said that in that case it might be able to be excluded under the definition of "floor area."

Ms. Mollard asked if it were excluded would this structure then be within the 800 square feet.

Ms. Huber stated she had not been able to affirmatively measure the structure, not that she had sought to. Ms. Huber stated she believed Mr. Mayer's, and possibly staff's, determination was that it did, she was not sure. Ms. Huber asked if it was being constructed as approved, as she was not sure if it was or not.

Ms. Huber stated the other reason the term "floor area" was not the right term here was that if open porches were excluded, which had been done here and was one of the reasons why they

were here tonight, then one also had to exclude garages, which were part of that same definition. Ms. Huber stated floor area shall not include open porches, uncovered steps, or garages. Ms. Huber noted that would be crazy, if in this instance they did not count the open porch or garage but it was a garage or partly a garage. Ms. Huber stated she was not suggesting that should be done, but was pointing out that because that definition fully applied would require it be done, it was not the right definition here. Ms. Huber stated it was arbitrary and capricious to use a definition where they would have to strike whole words to make it fit.

Ms. Huber stated they had discussed item three (3) a little. Ms. Huber noted that even if it was decided she was wrong, it should be "floor area," the covered porch should still not be omitted because it was not an open porch it was a covered porch. Ms. Huber stated she believed it was clear from the materials already seen that this was not in its entirety a garage. Ms. Huber stated it had a variety of purposes and to call it just a garage was disingenuous and had resulted in the push and pull they were in tonight.

Ms. Huber stated that some of these had already been highlighted this evening, so she would not spend a lot of time on them, but asked that if more explanation was wanted she be asked. Ms. Huber stated codified ordinance §1165.06(c)(4) provided that the area of a "detached garage" or "carport," which had been applied here,"[s]hall not exceed 800 square feet ..." Ms. Huber indicated the definition of "floor area" in §1105.02(t) and noted that it was not called for here but was what had been done. Ms. Huber noted the terms used must be used carefully and intentionally. Ms. Huber noted the term area, under its *Webster's Dictionary* definition, would include all components of the structure including the covered porch as measured post to post. Ms. Huber said the City's amended Code provided for that and felt it was helpful to consider. Ms. Huber said there was no reason they could not measure the area of the covered porch the same way now.

Ms. Wiltrout asked if Ms. Huber would recommend that same measurement be used if the porch did not have a roof over it.

Ms. Huber stated it was hard for her to answer hypotheticals, but she saw where Ms. Wiltrout was going. Ms. Huber stated there were lots of "ifs," lots of things they had to consider. Ms. Huber said if it were a garage and if "floor area" was applicable, but they were going to include the definition of garage but not include the definition or the space that was the open porch, again, that was where they got to with not giving effect to all of the provisions of the Zoning Code if they called the whole thing a garage. Ms. Huber stated that was the legal spiral she had to go into if they had to consider a porch that did not have a roof on it. Ms. Huber stated she thought the proposition was that it should not be a garage, that open spaces, open structures had measurements to use and that was what this was and that should be applied.

Ms. Huber asked to move to the slide entitled "Exclusions from Floor Area." Ms. Huber stated this presented an argument as to why "floor area" was not the correct measurement. Ms. Huber stated that if they excluded open porches then they also had to exclude the area of the garage. Ms. Huber stated that would not get them any further forward here because part of it was a garage, and you would be able to come up with structures having invisible garages and invisible porches which could be monstrous and could create a loophole people would take advantage of. Ms. Huber stated she was not proposing that be done, but was saying it was not the right term. Ms. Huber said if gymnastics and acrobatics have to be done to make a definition fit a situation then they were going about it the wrong way. Ms. Huber added that if a definition did not work legislatures in every jurisdiction could amend the zoning code and, in the absence of that, one applied the provisions they had.

Ms. Huber stated the porch was not an "open porch." Ms. Huber stated that using the same definition of "floor area," §1105.02(t), it included open porches, but this was not an open porch. Ms. Huber stated there was not a formal definition in the definitions section of the Code, but it was helpful to use other portions of the Code for context. Ms. Huber said §1165.03(b) described an open porch as "an open, uncovered porch or paved terrace..." Ms. Huber said, in contrast, an "open sided structure" in §1165.06(e) was a "free-standing, unheated structure unenclosed except for a structural system supporting a roof, and screen panels ..." which is what this was and what it would be absent its connection with one wall to the rest of the structure. Ms. Huber said that to attach it and make it invisible or not count it or legally not regulate it at all was arbitrary and capricious. Ms. Huber said that if the BZA determined this was not an open porch, which it was not because it was covered by a full roof, then it should not have been excluded from the definition of floor area when it was measured.

Ms. Huber stated the entire structure was not a garage. Ms. Huber said she understood from Mr. Mayer's comments they felt they had to pick one, but that to her there was no Code requirement she was aware of that required that be done. Ms. Huber said that picking one area, even the one staff said was the most square footage, noting that she might count the motor lounge and the porch, to provide another alternative. Ms. Huber said adding those two areas together, saying the area that was not a garage should count, and again, this was a hypothetical where one portion was used to represent a whole absent a Code requirement that be done, and absent something other than "its the most space," an arbitrary and capricious result was created. Ms. Huber noted that "private garage" was a defined term, §1105.02(v), and with that definition the area labeled "new garage bay" in the presentation, was a "portion of a building designed or used for the storage of motor-driven vehicles." Ms. Huber added that what that definition did not go on to say was that if a portion of the building was designed or used for the storage of motor-driven vehicles the entire building shall be considered a garage.

Ms. Huber said the area labeled "new garage bay" was a garage as it had the storage of a car, but not the motor lounge and the covered porch, which had not been asserted, planned, or designed to, or used for, the storage of motor-driven vehicles. Ms. Huber said the applicable sections of the Code should be applied to those portions of the building. Ms. Huber stated that a principal structure, a main structure, did not become a garage because it had a garage. Ms. Huber said if that was an analogous situation that would happen all across the community. Ms. Huber stated the entire structure did not become a garage, did not get evaluated or regulated as a garage, it had its own regulations, components, requirements, and maximums and that was what they were asking the BZA to determine here tonight.

Ms. Huber stated that another consideration before the BZA this evening was that Code §1165.06(c) required "detached garages and car ports" to be "at least" ten (10) feet from any "lot lines of adjoining lots and shall not occupy any easement." Ms. Huber stated that in this case the slide's highlighted area showed that on the recorded plat a fifteen foot easement existed along the property line. Ms. Huber stated that was why the structure here, although the straight setback was ten (10) feet, was required to be at least fifteen feet from the property line due to the easement. Ms. Huber said she would reserve her questions for Mr. Hannigan on the measurements here for later, but that was a concern they had although they had not been able to measure it. Ms. Huber stated they also were concerned it was not being constructed in accordance with the plans as approved.

Mr. Banchefsky stated he had spoken to Mr. Hannigan in preparation for this meeting and during their conversation Mr. Hannigan had opened some mail or some delivery containing a survey dated today which showed a fifteen (15) foot, six (6) inch separation on the part of the garage closest to lot 36 and a fifteen (15) foot, eight (8) inch separation for the lower portion,

measured from the garage. Mr. Banchefsky stated he thought staff might have this. Mr. Banchefsky stated this was measured from the part of the structure that protruded closest to the property line.

Ms. Huber stated she did not have that and asked Mr. Banchefsky to send it to her at some point. Ms. Huber asked if Mr. Banchefsky was saying that the City had a survey done.

Mr. Banchefsky stated he believed the City asked the Howser's consultant or architect to provide the City with this survey. Mr. Banchefsky stated it was sealed by a State of Ohio professional surveyor. Mr. Banchefsky indicated he believed that survey was being shown on the screen at this moment.

Ms. Huber stated thank you.

Mr. Banchefsky stated it was hard to read but the measurements were at the bottom of the rendering of the accessory structure.

Ms. Huber asked staff to zoom into the area for her.

(Staff zoomed in to the area indicating the measurements Mr. Banchefsky had stated.)

Ms. Huber stated perfect. Ms. Huber asked if it had been measured from the two corners of the garage portion and then measured to a surveyed or staked property line, was that how that had been done.

Mr. Banchefsky stated he could not speak to that but that was what it appeared.

Ms. Huber asked if she could ask Mr. Hannigan about that.

Mr. Banchefsky stated Mr. Hannigan had not prepared this, but Ms. Huber could certainly ask him.

Ms. Huber asked for the survey to be sent to her.

Mr. Banchefsky stated glad to.

Ms. Wiltrout asked Ms. Huber if she needed a minute to change her presentation or respond.

Ms. Huber stated she did not, thank you. Ms. Huber asked to move on to the next slide, titled "Height." Ms. Huber stated this was the final concern the Appellant had which they had asked the City for more information on and were bringing for the BZA's consideration tonight as far as the determinations being arbitrary, capricious, up to this point. Ms. Huber stated the height of the structure was really more question than an argument at this point. Ms. Huber stated she wanted to know how the height was measured, what was measured. Ms. Huber stated she had seen from some plans what had been approved, so she thought some of the remaining questions were whether it had been constructed according to what was approved. Ms. Huber stated she wanted to bring to the BZA's attention §1165.06(e)(6), which said "[g]rading: if the open sided structure ..." Ms. Huber noted the porch essentially was, an open-sided structure. Ms. Huber stated she was not sure the elevated grade had been submitted in the applications. Ms. Huber stated she would be happy to look and see, if someone could direct her to where it had been approved. Ms.

Huber stated that on visual inspection it did appear to have been raised significantly from the underlying grade of the property. Ms. Huber stated it concerned whether that grade was included in the height, where the height was measured from and to, and whether it was being constructed in accordance with the approvals that had been received.

Ms. Huber asked for the next slide. Ms. Huber stated she would finish the presentation with photos so the BZA could have a sense of what the structure looked like on March 15th; what the concerns were. Ms. Huber stated the drainage issue could be seen happening on this photo, the puddles. Ms. Huber stated that was a concern and she did not believe the City had required that downspouts be tied into the storm sewer system, so the impervious surface created by this almost 900 square foot roof was going to have to go somewhere. Ms. Huber stated it looked like it was starting to accumulate even more on the surrounding property. Ms. Huber stated one could also see a little bit of the elevated footer which was above what used to be the grade. Ms. Huber stated there was a little better look of how the plants that were there would not do an adequate job of screening.

Ms. Huber asked for the next slide and stated it did an even better job of showing how the structure had been raised up. Ms. Huber stated that if one compared where the black drainage tiles or pipe were running and their elevation as compared to the elevation of the structure and the surrounding dirt and evergreen trees illustrated the elevation above the grade. Ms. Huber stated you could imagine, and see from the prior photo, where that had created drainage problems. Ms. Huber stated while she believed this tile or pipe was draining into a grate there, it had clearly not alleviated the problem.

Ms. Huber indicated the following photo provided another view showing how, even when the leaves were back on the trees and landscaping. the structure was not going to be screened from view. Ms. Huber stated one could see the roof over the covered porch and see how this was going to be viewed from the Appellant's home. Ms. Huber stated the Appellant could see all of it. Ms. Huber stated one could compare the structure's roofline with that of the home on the property and see that the height was significant.

Ms. Huber asked to move to the next slide, titled "Relief Requested." Ms. Huber stated Appellant was asking the BZA to determine that the area of the covered porch should have been included and, that if included, it exceeded the area that the structure could be and it needed to be brought into compliance with the Code. Ms. Huber stated that would require the BZA, as Mr. Banchefsky identified, to approve the application from Ms. Kessler which would overturn the determination that staff had made. Ms. Huber stated that unless there were any questions she could move on to testimony.

Mr. LeJeunesse asked if there was a landscaping plan associated with this project.

Ms. Huber stated she was not aware of one.

Mr. LeJeunesse asked if the owners could be asked if there was a landscaping plan to go along with the project.

Mr. Scott Howser, homeowner/Appellee, stated there was and it had been approved by the New Albany Country Club Architectural Review Committee (hereafter, "ARC").

Mr. LeJeunesse asked to look at that and whether there was drainage as part of that.

Mr. Howser stated the drainage had all been hooked up into the drain tile. Mr. Howser stated the photos had been taken long before the drainage had been installed. Mr. Howser stated that had all been tied in the drain tile that was at the rear of the property.

Ms. Wiltrout asked Mr. Howser if he swore to tell the truth and nothing but the truth.

Mr. Howser stated yes.

Ms. Wiltrout asked Mr. Howser if he could repeat all he had said that he wanted to be considered sworn testimony.

Mr. Howser stated yes. Mr. Howser stated the photos had been taken long before any of the rough grade was done and had all been applied there. Mr. Huber said that if one looked at the elevations they were quite different today than what was reflected in the photo. Mr. Howser stated there was a landscape plan that was reviewed and approved by the ARC. Mr. Howser stated he believed his architect might speak later and he could show what that was. Mr. Howser stated all of the downspouts had been installed around the roof area and been cord and tied into the drain tile directly. Mr. Howser stated that what had been reflected earlier, that corrugated black tile, had been used during the construction process to run some water off into that drain tile but it had all been tied in directly to the drain tile, as designed.

Mr. LeJeunesse stated he would like to take a look at that landscape plan if they had access to it.

Mr. Howser stated he was sure his architect could share that this evening on this call.

Ms. Huber asked if she could ask Mr. Howser a question.

Ms. Wiltrout stated Ms. Huber would have a chance to cross examine Mr. Howser. Ms. Wiltrout asked if anyone had other questions for Ms. Huber at this time.

Ms. Mollard stated the relief requested here was asking for the overturning of the staff's determination and asked Ms. Huber if there was any other remedy in her request. Ms. Mollard asked if she was suggesting that the structure be knocked down or modified. Ms. Mollard asked Ms Huber to further elaborate on what the relief requested was.

Ms. Huber stated that they were not asking that the structure be torn down, assuming it complied with the easements and the setbacks, things that could not be waived, settled for, or agreed to by the Appellant . Ms. Huber stated they did fully admit that the Code provided that owners of property in the City may have accessory structures, they were asking, what their ideal outcome would be and, certainly at a minimum, the removal of the covered porch because it exceeded the area, the agreement not to replace it with a paver patio or an open porch of some kind. Ms. Huber continued, saying the appropriate landscape screening, adding that it seemed that had possibly been proposed to and approved by the ARC. Ms. Huber stated her question to Mr. Howser was going to be about what was meant by tied into the drain tile, she did not know where the drain tile was draining to. Ms. Huber stated so, the removal of the covered porch and an agreement not to replace it with an open porch, the appropriate landscape, and the installation of either French drains or some form of drains where it was not draining onto property which then, because of the grade, would flow downhill onto neighbors' properties, including that of the Appellant.

Ms. Wiltrout asked staff what the typical procedure was for residents if a neighbor was making improvements, permitted or not, that impacted drainage on their property.

Mr. Mayer stated that typically staff would only enforce if it was in a drainage easement, which served a subdivision or a larger drainage area. Mr. Mayer stated that in this case the underlying requirements to tie into the downspouts and the residential lots were exempt from the residential runoff controls and would become a private property matter.

Ms. Wiltrout asked how those would be resolved.

Mr. Mayer stated those would be resolved privately between the homeowners.

Ms. Wiltrout asked like in court, if there was a problem, or did the City have any mechanism to help them resolve the issues.

Mr. Mayer stated the City did not have any remedy to resolve those issues.

Mr. LeJeunesse asked Ms. Huber about her complaint that the setback had not been far enough. Mr. LeJeunesse asked what had caused Ms. Huber to challenge that, what data did she have that led her to believe it was below the fifteen (15) foot setback.

Ms. Huber stated it was more of an eyeball estimate, something that had been seen. Ms. Huber stated she was a terrible judge of distance, but she thought it was important to know whether it was in the easement. Ms. Huber noted she thought the property owner would want to be sure that it was not. Ms. Huber added that if it was not, that might answer that question for the Appellant, they simply had not had that information up to this point.

Mr. LeJeuness stated so it was pure speculation that it was beneath that fifteen ...

Ms. Huber stated it was from observation and being curious whether it was close or ...

Mr. LeJeunesse stated okay, thank you.

Mr. Howser asked if they would like him to answer Ms. Huber's question now he would be happy to.

Ms. Wiltrout stated she was trying to control the cross-examining, but Mr. Howser could answer the question while the topic was in front of them.

Mr. Howser stated there was a storm drain tile back at the corner near the intersection of the four (4) properties that was back behind where the electrical transformer was and all the drain tiles were off of. Mr. Howser said the gutters were directly tied into that, so they ran directly into that drain tile for water collection.

Ms. Huber asked if all of the water that was generated off of the roof was tied in through gutters and downspouts into that tile which went into what, she assumed, was a storm sewer.

Mr. Howser stated that was correct.

Ms. Huber stated thank you.

Mr. Howser stated he would suggest that if she was curious about the other water and, he could not remember the term she used, but there were black corrugated pipes that came out of the mounds in the rear of Ms. Kessler's yard that water ran out of, so he was not convinced that the water she had suggested would come off into that easement was from his property. Mr. Howser stated she would need to do some more homework there as well.

Ms. Huber asked who had just spoken.

Mr. Howser stated he had just spoken.

Ms. Huber asked if he was saying there was drainage tile that was coming out from the mounding that was also draining.

Mr. Howser stated in the property behind him, not on his property, but he would be happy to snap some photos for her, there was some corrugated pipe that came out of the mounds at the rear of Ms. Kessler's property where water ran out of. Mr. Howser stated he was not sure that in the photo she had shown earlier, that the water could come from his adjacent property.

Ms. Huber stated another neighbor of one or both of yours.

Mr. Howser stated, no, from Ms. Kessler's property.

Ms. Huber stated okay, she saw.

Ms. Mollard asked staff and Mr. Banchefsky whether the questions here about including this porch, whether it was a covered porch or not, were brought up when the applicant first submitted his plans and proposals. Ms. Mollard asked if the questioning about whether or not the 800 square feet was measured properly had been objected to early on or was this the first time the rationale that was used was questioned.

Mr. Banchefsky stated he believed it was the first time it was raised but he thought that was more appropriately answered by staff.

Mr. Mayer stated he could not say when it was first questioned for this application. Mr. Mayer stated he knew it occurred around the time they measured the property that it was first brought to staff's attention, the questions of setback and area. Mr. Mayer stated that as far as that went, for these types of measurements, the policy and methodology for calculating the area was something they had always, historically, done this way. Mr. Mayer stated he could not say if they had past conversations preceding this detached garage in question.

Ms. Wiltrout stated she had a follow up to Ms. Mollard's question and asked for a sense of the timeline here: when the application was made and construction was started to when the application for this appeal had been filed.

Mr. Mayer said he would hand that over to Mr. Hannigan.

Mr. Hannigan stated his name and said he swore to tell the truth and nothing but the truth. Mr. Hannigan stated the original application was from October 21, 2019.

Mr. Banchefsky asked if this was Mr. Hannigan speaking.

Mr. Hannigan stated correct.

Mr. Banchefsky asked if Hannigan had been sworn in.

Mr. Hannigan stated yes.

Mr. Banchefsky stated thank you.

Mr. Hannigan stated he believed the complaint had been lodged in March 2020 and the original approval was October 2019. Mr. Hannigan stated it looked like the submittal was October 10, 2019 and the approval was on October 21, 2019.

Ms. Mollard asked if all neighbors had been notified, so Ms. Kessler and other neighbors had been notified back in October of the application.

Mr. Mayer stated no, neighbors were not notified of the submittal for a permit to construct a building but they were notified of this appeal.

Ms. Huber stated the City's formal determination with respect to the structure on which this appeal had been brought, was rendered on or around January 30, 2020. Ms. Huber stated the letter they had received from the City was dated the 23rd and postmarked the 30th. Ms. Huber stated the appeal had been brought, as appropriate, as provided and permitted, within twenty (20) days after that determination, promptly.

Mr. Georgiton asked Ms. Huber to agree that Ms. Kessler had not raised any objections to Mr. Howser's construction of the garage until a letter was sent in January 2020 to the City, which the City had responded to and which they had appealed to.

Ms. Huber stated that was not her understanding.

Mr. Georgiton asked when was the first time the City was informed of it.

Ms. Huber stated if Ms. Kessler were allowed to testify she might be able to provide a little more detail on that and it would be under oath.

Ms. Wiltrout asked to proceed to the next portion of Ms. Huber's presentation and asked if she had a witness.

Ms. Huber stated she did and wanted to start with Mr. Hannigan.

Ms. Wiltrout asked Mr. Hannigan if he had been sworn.

Mr. Hannigan stated yes.

Ms. Huber asked Mr. Hannigan to state his department and role with the City.

Mr. Hannigan stated he was with the Development Department and was the building inspector.

Ms. Huber asked what were some of his duties and responsibilities in that role.

Mr. Hannigan stated he enforced the residential Code of Ohio for residential and commercial construction.

Ms. Huber asked if had performed those duties with respect to this application, the Howser's accessory structure.

Mr. Hannigan stated he was one of the ones who did. Mr. Hannigan stated there were three (3) inspectors in the department and all three had been out to this property to perform inspections.

Ms. Huber asked if all three inspectors had inspected the property and the structure.

Mr. Hannigan stated that was correct.

Ms. Huber stated they had requested, in advance, an authenticated measurement of the structure, location of the rear property line, distance from the rear property line, and distance of any applicable setbacks and easements. Ms Huber asked Mr. Hannigan if he was prepared to provide that information and if he would like to do that now or was there another time and place.

Mr. Hannigan stated he was not a certified surveyor and in a project like this they would require a certified survey which they had not received so he could not answer that.

Ms. Huber asked if he had arranged for the survey that Mr. Banchefsky referenced, or not survey, but the document.

Mr. Hannigan stated they had requested it, yes.

Ms. Huber asked who he had requested that from.

Mr. Hannigan stated the contractor.

Ms. Huber asked who that was.

Mr. Hannigan stated Hale Construction.

Ms. Huber asked, as far as the dimensions of the structure, had he been able to authenticate those measurements.

Mr. Hannigan stated they had not performed the framing inspection yet so he could not speak to that dimension but the setback dimensions he could verify were where they were supposed to be.

Ms. Huber stated she was having trouble hearing Mr. Hannigan. Ms. Huber asked if, at any point, Mr. Hannigan had measured the height and area of the structure.

Mr. Hannigan stated he had not.

Ms. Huber asked if he had said he had not.

Mr. Hannigan stated he had not, they had not performed a framing inspection yet.

Ms. Huber stated she was under the understanding that he was the person who had measured the structure in actuality and that was why he had been subpoenaed.

Mr. Hannigan stated the only request for measurement that was given was the setback through the dimensions of the structure.

Ms. Huber stated the subpoena included the request for the dimensions of the structure as well. Ms. Huber asked if he was not prepared to provide testimony on the dimensions of the structure.

Mr. Hannigan stated he was not.

Ms. Huber asked Mr. Banchefsky to weigh in on that.

Mr. Banchefsky stated yes and asked if Ms. Pam Hickok was present.

Ms. Pam Hickok, with the Zoning Department, stated she was present.

Mr. Banchefsky stated that he had been informed that it was not within the purview of the Building Department to actually measure the structure. Mr. Banchefsky stated that was done by the Zoning Department and Ms. Hickok was responsible for doing that. Mr. Banchefsky stated that was why she had been asked to participate this night. Mr. Banchefsky said he believed that what Ms. Hickok's testimony would be, that she looked at the plans and laid a scale on those plans, and saw if the dimensions stated on the plans matched what she found when she had scaled it. Mr. Banchefsky asked Ms. Hickok if that was accurate.

Ms. Wiltrout asked if Ms. Hickok swore to tell the truth and nothing but the truth.

Ms. Hickok stated yes, she did. Ms. Hickok stated all measurements were based on the plans sent in. Ms. Hickok stated she used a scale to verify the measurements written on the plans.

Mr. Banchefsky asked if that had been heard.

Ms. Huber stated not well.

Mr. Banchefsky asked Ms. Hickok to get closer to the microphone.

Ms. Hickok stated she was using a handheld microphone. (Staff assisted Ms. Hickok with audio). Ms. Hickok asked if she could be better heard at this time.

Mr. Banchefsky stated a little bit.

Ms. Hickok stated what she had said was that she measured the plans submitted for review and used a scale to verify the measurements they had written on the plans to determine the area.

Mr. Banchefsky stated thank you.

Ms. Huber stated no one had been to the property to measure the structure.

Ms. Hickok stated not at this time, Mr. Hannigan's framing inspection had not been completed yet.

Ms. Huber stated if no one could testify to the actual dimensions of the structure, she still had those questions. Ms. Huber stated the subpoena they had provided asked for the dimensions of the structure or for someone to be prepared to talk about that. Ms. Huber stated she understood

that may have been lost in translation, she just wanted to put it on the record that the subpoena requested that information and it did not appear that was there tonight.

Mr. Banchefsky stated he believed the testimony was that process did not take place until the framing inspection occurred and that had not been done yet.

Ms. Huber stated she understood, but she thought that if a subpoena had been issued for that information it would have been helpful to have. Ms. Huber stated she thought the BZA, and she did not want to speak for them, but she would have found it useful to have this night. Ms Huber asked Ms. Hickok if she had inspected the drawings.

Ms. Hickok stated correct.

Ms. Huber asked when she had inspected the drawings, approximately.

Ms. Hickok stated her signature was dated October 22, 2019.

Ms. Huber asked if she had measured the structure's area at that time.

Ms. Hickok stated yes.

Ms. Huber asked what was its total square footage.

Ms. Hickok stated just a minute, it was not right in front of her.

Ms. Huber stated she understood and if it was easier she could direct these questions to Mr. Hannigan, however it was easier for the City.

Ms. Hickok stated it looked like the square footage was 776

Ms. Huber asked if that was the area of the garage and the party room.

Ms. Hickok stated correct.

Ms. Huber asked what was the area of the covered porch.

Mr. Howser stated he would ask once more that Ms. Huber refrain from using the term "party room" to describe the area outside of the garage bay. Mr. Howser stated the other space was a space for tools and other automotive paraphernalia. Mr. Howser stated the way Ms. Huber was describing it he took offense to and would appreciate it if she please stopped saying that.

Ms. Huber stated she was not sure if that was an objection or what it was. Ms. Huber asked if he preferred her to call it a motor lounge she thought she could do that.

Mr. Howser stated thank you.

Mr. Georgiton stated he would make the objection on behalf of Mr. Howser. Mr. Georgiton stated they objected to the characterization. Mr. Georgiton stated there was no evidence in the record it was a party room, it was called a motor lounge in the plans and that was the terminology.

Ms. Huber stated she would call it a motor lounge and reserved the right to cross-examine Mr. Howser as to its use this evening. Ms. Huber asked Ms. Hickok to confirm that she had not measured the structure, actually, on the property.

Ms. Hickok stated correct.

Ms. Huber asked if Ms. Hickok had measured the structure for compliance with setbacks.

Ms. Hickok stated yes.

Ms. Huber asked if those were as applied.

Ms. Hickok stated yes, she measured them on paper.

Ms. Huber asked how she had located the rear property line.

Ms. Hickok stated she had been provided a site plan that showed the property lines and the measurements for the property lines and then she used a scale to verify that the measurements matched hers.

Ms. Huber asked if she had a process for verifying the location of those items, the easement, property line.

Ms. Hickok stated the certified survey from a surveyor verified it.

Ms. Huber asked if the City relied on the application materials that had been presented.

(A comment that could not be properly heard was made by an unidentified party). Ms. Huber stated she could not hear that.

Ms. Hickok stated she used the site plans to measure the application submitted, the plat for the subdivision to make sure the easements were done correctly, the survey at the end that was mentioned earlier by Mr. Hannigan, was how they verified any final location.

Mr. Hannigan stated, as a clarification, they were not certified surveyors so it was not appropriate for them to verify on the job site. Mr. Hannigan stated that was why they relied on a professional to provide that to them.

Ms. Huber stated she understood. Ms. Huber asked if, when an application was presented to the City, they relied exclusively on the documents they received and did n0t do an independent verification on something as critical as a property line.

Mr. Hannigan stated they were independently verifying it by getting a survey from a certified surveyor. Mr. Hannigan stated if they looked at the job site and it was obvious it was in the encroachment they would bring that to the attention of the contractor but it was not their obligation to locate the ... (sound was cut off at this point).

Ms. Huber stated she would move on from that. Ms. Huber asked Ms. Hickok if she had measured the structure's height from the plans.

Ms. Hickok stated yes, she believed it was twenty (20) feet, six (6) inches to the top of the chimney.

Ms. Huber asked measured from where to where.

Ms. Hickok stated it was from the grade shown on the plans to the top of the chimney.

Ms. Huber asked if the chimney was included in the height.

Ms, Hickok stated no, but that was where the (20) feet, six (6) inches was, to the top of the chimney.

Ms. Huber asked if Ms. Hickok had the measurement without the chimney.

Ms. Hickok stated Mr. Hannigan had just provided it, it was seventeen (17) feet, six (6) inches.

Ms. Huber asked seventeen (17) feet, six inches to the highest roof peak.

Ms. Hickok stated of course.

Mr. Huber stated they had talked about the top of the measurement, where was the bottom of the measurement.

Ms. Hickok stated it was shown on the plan.

Ms. Hickok asked if the plan showed the footer that had been installed.

Ms. Hickok stated she did not think so on the plan she was looking at.

Ms. Huber stated Ms. Hickok did not know how high that elevation was made.

Mr. Hannigan asked for clarification on terms. Mr. Hannigan stated footer means very different things to different people.

Ms. Huber asked who was speaking and what was said.

Mr. Hannigan stated his name and asked Ms. Huber to clarify what the elevated footer she was referring to was.

Ms. Huber stated it looked to her, and it was her understanding from the photos only, that a footer was built on top of ground, the ground was raised, the footer was built on top of it, and then the structure was built on top of the footer. Ms. Huber stated the distance that the ground was raised to create a raised building is what she was asking for. Ms. Huber stated if she had used the wrong terminology please correct her.

Mr. Hannigan stated that would not be considered a raised footer, that was simply a leveling of the foundation. Mr. Hannigan stated that would not be permitted to be exposed at final construction.

Ms. Huber asked Mr. Hannigan to describe what had happened with the moving of ground and the raising, what was his opinion or what did he know to have happened here.

Mr. Hannigan stated he thought they had altered the grade in such a way as to provide a safe and level foundation.

Ms. Huber asked if that had been proposed and approved on the plans.

Mr. Hannigan stated the construction complied with the plans.

Ms. Huber asked if somewhere on the plans it had been proposed to do this leveling or elevating, or whatever, it was.

Mr. Hannigan stated it was showing level the footer.

Ms. Huber asked if he was reading into it that it meant they could change the ground so it was level, even if that was several feet or more than a foot in the air.

Mr. Huber stated yes, that was common in construction.

Ms. Huber asked if he knew how much the ground had been raised to level the ground.

Mr. Hannigan stated that was not known.

Ms. Huber asked if there was no regulation of how high someone can elevate it or .level it to create a level ground. Ms. Huber stated there seemed to be no oversight of that either, right.

Mr. Hannigan stated there was a requirement for grading that was to direct water away from a structure and that would be required in this space.

Ms Huber asked how high that requirement was.

Mr. Hannigan stated 32 inches above the footer.

Ms Huber asked so the grade could be raised, should be raised, must be raised, 32 inches.

Mr. Hannigan stated must be raised.

Ms Huber asked if that had been done here.

Mr. Hannigan stated this was not finished grading, so it had not been done yet.

Ms Huber asked if Mr. Hannigan had stated this was contemplated under the plans that were approved.

Mr. Hannigan stated that information had been provided at the time of the review and the construction was in compliance with those approved docs.

Ms Huber asked when that information had been provided.

Mr. Hannigan stated during the review.

Ms. Huber asked when that was.

Mr. Hannigan stated October 21, 2019. Mr. Hannigan stated the original submittal date was October 10, 2019, it was reviewed and approved on October 21, 2019.

Ms Huber asked if he had not been to the property to inspect, what was he comparing to the plans.

Mr. Hannigan stated he could not understand her question. Mr. Hannigan stated if the plans showed a footer they go out and look at the footer.

Ms Huber asked if he had inspected the property for compliance with the plans.

Mr. Hannigan stated yes he had.

Ms. Huber asked when that was.

Mr. Hannigan stated there had been a number of inspections from October 23, 2019 up through April 6, 2020.

Ms. Huber asked what he was inspecting at the April 6th inspection.

Mr. Hannigan stated he was not the inspector at that time but it was an electrical service inspection.

Ms Huber asked in that span of inspections, when was the last time Mr. Hannigan inspected the property.

Mr. Hannigan stated mechanical underground on December 19, 2019.

Ms Huber asked if at that point the structure was proceeding in accordance with the plans.

Mr. Hannigan stated that was correct.

Ms. Huber asked how far along the structure was at that point.

Mr. Hannigan stated they had not put any walls up yet.

Ms Huber asked if he had not inspected the property since then.

Mr. Hannigan said he had been to the property, at the request of the BZA, to take a look specifically at setbacks. Mr. Huber stated he went back to the job site and took measurements in regard to the setback for the Building Code compliance inspection, in line with his certification as an inspector in the State of Ohio.

Ms. Huber asked if that had been done today.

Mr. Hannigan stated that had been on Friday.

Ms Huber asked when he inspected the property on Friday, what was he inspecting for.

Mr. Hannigan stated the setbacks.

Ms. Huber asked how he had inspected the setbacks.

Mr. Hannigan stated he used a tape measure and measured the distance from the fence to the exterior wall.

Ms. Huber asked if he measured from the fence.

Ms. Hannigan stated correct.

Ms. Huber asked if he confirmed that that the fence was the property line.

Mr. Hannigan stated no and that was why they required a certified surveyor.

Ms. Huber stated understood. Ms. Huber asked what point along the wall, if Mr. Mayer could show on the presentation, at what point along the wall Mr. Hannigan measured to.

Mr. Hannigan stated outside the exterior wall.

Ms. Huber stated there were three different widths of the pieces of the structure there, so the garage portion, the motor lounge portion, or the covered porch portion.

Mr. Hannigan stated the garage portion.

Ms Huber asked if he had inspected the property for anything else when he was there on Friday.

Mr. Hannigan stated no.

Ms Huber asked if his conclusion on Friday had been that, with respect to setbacks only, the structure was being constructed in accordance with the approvals and was not in the easement.

Mr. Hannigan stated that was correct.

Ms Huber stated that if this question was not to Mr. Hannigan then she deferred to Ms. Hickok and asked when an applying property owner or designee provided application materials to the City, did they certify to the accuracy and completion of the information contained in those materials.

Mr. Hannigan stated the applicant signed at the back of the application.

Mr. Huber asked if that acted as a certification and that was why the City relied on that information.

Mr. Hannigan stated correct.

Ms. Huber stated that operated as a certification of the accuracy and completion of the information that was provided.

Mr. Hannigan stated correct.

Mr. Huber asked if either of them was aware whether the City had directed the owners of the property to proceed at their own risk with respect to the structure.

Mr. Mayer asked if that was at the time of permit approval, when was she asking. Mr. Mayer stated he did not understand the question.

Ms. Huber asked when this appeal became pending, did the City advise the Howser's to proceed at their own risk.

Mr. Mayer stated he had spoken to Mr. Howser on the phone and told him that they would not be taking any enforcement action, that as far as their interpretation of the Code everything met Code compliance.

Ms. Huber asked when he had talked to Mr. Howser.

Mr. Mayer stated he did not know if he knew that date but he believed it was early this year, perhaps January.

Ms. Huber asked if it was after this appeal had been filed.

Mr. Mayer stated he did not know.

Ms. Huber stated her question was were the Howsers ever advised or told by the City to proceed at their own risk. Ms. Huber asked if the answer to her question was they did not know.

Mr. Mayer stated he did advise the Howsers that they could continue to construct the house if and when an appeal or some type of other action occurred.

Mr. Huber asked if they were advised an appeal was pending and it was up to them whether they wanted to continue construction.

Mr. Mayer stated he thought it was spoken in "what if" scenarios and he did not know if any formal application had been submitted at that time, but that certainly these questions had been brought to the City's attention.

Ms. Huber asked Ms. Hickok and Mr. Hannigan if they had any additional information to provide with respect to that question.

Ms. Hickok stated no.

Mr. Hannigan stated no.

Ms. Huber stated she had no additional questions and at this point would like to examine Ms. Kessler.

Ms. Wiltrout asked Mr. Georgiton if he had any questions for Ms. Hickok or Mr. Hannigan.

Mr. Georgiton stated he did.

Mr. Georgiton asked Mr. Hannigan if he had been involved in connection with the approval of the permit for this property.

Mr. Hannigan stated yes.

Mr. Georgiton asked if, at all times, the City of New Albany had acted within its normal and customary practices in approving the Howsers' permit application.

Mr. Hannigan stated he did not understand the question.

Mr. Georgiton stated he was just asking if during the course of approving the permit did he act within the normal policies and procedures that were applied by the City of New Albany in connection with approving permits for accessory structures.

Mr. Hannigan stated that was correct.

Mr. Georgiton asked if the City concluded, in its review of the permit, that the structure the Howsers were constructing complied with the City of New Albany's zoning ordinance.

Ms. Hickok stated that was correct.

Mr. Georgiton asked if he was aware of any issues with respect to the structure with respect to drainage.

Mr. Hannigan stated he was not.

Mr. Georgiton asked if he was aware of any issues with the structure with respect to downspouts.

Mr. Hannigan stated he was not.

Mr. Georgiton asked if he was aware of any issues with the structure with respect to height.

Mr. Hannigan stated he was not.

Mr. Georgiton asked if Ms. Hickok was aware of any issues with the structure the Howsers were constructing with respect to its height.

Ms. Hickok stated she was not.

Mr. Georgiton asked if she was aware of any issues with respect to downspouts with respect to the Howsers' structure.

Ms. Hickok stated she was not.

Mr. Georgiton asked about any issues with respect to grading.

Ms. Hickok stated no, she was not.

Mr. Georgiton asked Mr. Hannigan if he was aware of any issues with respect to grading.

Mr. Hannigan stated no, he was not.

Mr. Georgiton asked Ms. Hickok if she had measured the plans that were submitted by the Howsers to the City.

Ms. Hickok stated correct.

Mr. Georgiton asked if she had found that those plans, after measuring them, the structure was under the 800 square foot requirement for garage accessory structures.

Ms. Hickok stated correct.

Mr. Georgiton asked if she had measured the structure in accordance with the procedures she typically used for measuring any structure in New Albany.

Ms. Hickok stated correct.

Mr. Georgiton asked if, when measuring an accessory structure, did she include covered porches.

Ms. Hickok stated no.

Mr. Georgiton asked if, in fact, she had never included covered porches when measuring accessory structures in New Albany.

Ms. Hickok stated correct.

Mr. Georgiton asked Mr. Hannigan if he had testified that a framing inspection had not yet been done.

Mr. Hannigan stated that was correct.

Mr. Georgiton asked if it was typical at this stage of construction of a structure like the Howsers', for the framing measurements to have not yet been done.

Mr. Hannigan stated that was common, yes.

Mr. Georgiton stated he had no further questions.

Ms. Wiltrout asked Ms. Huber if she would like to call her next witness.

Ms. Huber asked if she could ask Ms. Hickok one question.

Ms. Wiltrout stated go ahead.

Ms. Huber asked Ms. Hickok if she had testified that she never measured a covered porch.

Ms. Hickok stated correct.

Ms. Huber asked what about when it stood by itself, as opposed to the structure.

Mr. Georgiton asked Ms. Huber to repeat that question, adding that it had been garbled.

Ms. Huber asked what about when it stood by itself as a structure.

Ms. Hickok stated the Code did not have area requirements for patios, so when she looked at a patio she was looking for setbacks.

Ms. Huber asked if Ms. Hickok drew a distinction between a covered porch and a patio for her purposes.

Ms. Hickok asked what was the question.

Ms. Huber asked if for her purposes, did she draw a distinction between a covered porch and a patio.

Ms. Hickok stated no.

Ms. Huber asked Ms. Hickok if an uncovered paver patio, for example, would be treated exactly the same as a covered porch, in that she would only measure it for setbacks and not for its area.

Ms. Hickok stated the difference that she could think of right now was that an open, uncovered porch could encroach into some setbacks where a covered porch would not be allowed to encroach.

Ms. Huber stated so the Zoning Code did, in fact, make a distinction between those items.

Ms. Hickok stated, correct, for encroachment purposes.

Ms. Huber stated she would stop there.

Mr. Georgiton asked if he could follow up on that line of questioning.

Ms. Wiltrout stated yes and then they would move on.

Mr. Georgiton asked Ms. Hickok if she had a copy of Code in front of her.

Ms. Hickok stated yes.

Mr. Georgiton asked Ms. Hickok to turn to \$1165.03 and asked Ms. Hickok if that was the section governing side yards.

Ms. Hickok stated that was correct.

Mr. Georgiton asked if in subsection (B) there was a reference to open porches.

Ms. Hickok stated correct.

Mr. Georgiton stated when it referred to open porches it said in a residential district "an open, uncovered porch or paved terrace may project into a required side yard if a minimum of five feet is maintained to any adjoining lot line" and asked Ms. Hickok if she saw that.

Ms. Hickok stated yes, she did.

Mr. Georgiton asked if that was the setback requirement she was talking about with respect to open porches.

Ms. Hickok stated correct.

Mr. Georgiton asked Ms. Hickok if she understood an open porch to include either, as it said in subsection (B), an open porch or an uncovered porch or a paved terrace.

Ms. Huber asked what was the question.

Mr. Georgiton stated he was asking Ms. Hickok if she understood an open porch to include an open porch, an uncovered porch, or paved terrace.

Ms. Huber asked if he was asking for a legal determination.

Mr. Georgiton stated he was not asking for a legal determination, he was asking, as a zoning coordinator, how Ms. Hickok applied the Code based upon her understanding.

Mr. Mayer asked if the question could be repeated once more.

Ms. Georgiton stated he would withdraw the question, he did not want to confuse anybody. Mr. Georgiton stated those were all the questions he had.

Ms. Wiltrout stated Ms. Huber could call her next witness.

Ms. Huber called Ms. Kessler, Appellant.

Ms. Wiltrout asked Ms. Kessler if she swore to tell, the whole truth, and nothing but the truth.

Ms. Kessler stated she did.

Ms. Huber asked Ms. Kessler how long she had owned the property at 4633 Yantis Drive.

Ms. Kessler stated it was approximately twenty (20) years.

Ms. Huber asked Ms. Kessler where her property was located with respect to the 4646 Wilkin Court property.

Ms. Kessler stated directly behind.

Ms. Huber asked where the structure was located with respect to her property.

Ms. Kessler stated it ran exactly along her property line. Ms. Kessler stated she saw it from every room in the house besides the basement and two (2) half baths without any windows. Ms. Kessler stated every other room of her house had a view of the structure.

Ms. Huber asked how much of the structure she could see, some of it, all of it.

Ms. Kessler stated that from different parts of the house she could not see all the way to the other side, the one side that faced the Howsers' house, she could not see, but she could see everything else, including the top of it from her second floor.

Ms. Huber asked if there was any screening of landscape, hardscape, any screening of that view from her property.

Ms. Kessler stated there was, on her property, some existing landscape screening but there had, to her understanding and visual view, been nothing new put in. Ms. Kessler said it was a pretty straight shot and, because of the height, there currently was not screening that covered at least the top part of the structure from her view.

Ms. Huber asked, being that close to the structure, what had she observed about it, about its construction.

Ms. Kessler stated it was built, and she did not have measurements, but it was built up, they had changed the plot and the grade. Ms. Kessler stated it was almost a thousand (1,000) foot building that was built on a raised footer. Ms. Kessler stated she was guessing, but she knew people actually had those measurements, the concrete footer was built on the existing ground so that raised the building up and they piled land on top of it, so it was built now much higher. Ms. Kessler stated that when a very large structure was built up that close to her property line, everything did flow downhill. Ms. Kessler stated she knew Mr. Howser said they had addressed drainage but she was in her yard all the time and the entire quadrant was a swamp. Ms. Kessler said that when you built something very large and changed the grade and built it up, everything would flow into the yard making that sort of corner quadrant very swampy.

Ms. Huber asked if she could describe the pace of construction while this appeal had been pending.

Ms. Kessler stated flying along, including on weekends sometimes. Ms. Kessler said they had been building every day and moving very quickly since she filed the appeal.

Ms. Huber asked if it was her understanding that the Howsers were directed to proceed at their own risk with respect to construction.

Ms. Kessler stated that when she came home after an extended vacation in January, that was when one could see the shape. Ms. Kessler stated the first time she saw the shape she was startled at how big it looked even without the roof on. Ms. Kessler said she had reached out to the architectural review board to see if it had been approved and was told it had been approved but they were not sure it was being built to plan. Ms. Kessler stated her understanding was they told the Howsers they needed to address the concerns about the height because it appeared to be built much taller than the plans that had been approved. Ms. Kessler stated the architectural review board, she thought, had told them that they should pause on the building until they were in compliance with the height plan.

Ms. Huber asked if she had ever seen what she would characterize as a slowing or a stopping in response to that.

Ms. Kessler stated no.

Ms. Huber asked about how far along the structure was when Ms. Kessler thought that would have happened, when the proceed at your own risk or be advised ...

Ms. Kessler stated it was in January when she returned home from an extended vacation and the brown form of the walls was up, there was no roof, that was when she first raised a concern about the size and being close to her property.

Ms. Huber asked what the structure looked like now or as close to now when she last took a look at it.

Ms. Kessler stated it looked almost complete now. Ms. Kessler stated the land was all torn up and it was not finished, but the physical structure looked fairly complete.

Ms. Huber stated they had talked about Ms. Kessler's concerns about the drainage and screening and asked if Ms. Kessler had additional concerns about the structure and how it may be used or planned to be used.

Ms. Kessler stated noise.

Ms. Huber asked if it would impact Ms. Kessler's use of her property.

Ms. Kessler stated the motor lounge appeared to be additional space for socialization and with the large addition of the outdoor covered porch space she was concerned about noise. Ms. Kessler stated it was not in use yet, so she would see how that happened. Ms. Kessler stated having a large space that could be potentially used for entertaining fifteen (15) feet from her yard raised concerns about future entertaining.

Ms. Huber asked if Ms. Kessler had concerns about how that would impact her use of her property.

Ms. Kessler stated yes, if there was noise and socializing on a consistent basis in an outdoor connective space that close to her property, she thought that would be disruptive.

Ms. Huber asked if she had ever considered building an accessory structure on her property.

Ms. Kessler stated she had.

Ms. Huber asked Ms. Kessler if she had ever ended up doing that.

Ms. Kessler stated she had been going to build a pool house at the end of her pool but it was too close to the property line so she did not build it there.

Ms. Huber asked Ms. Kessler if there was anything else she would like the BZA to consider.

Ms. Kessler stated she thought she had already testified about it, but really the height and the build up. Ms. Kessler stated she was not a construction person, but the plans that were approved looked like it was built on the existing grade, they did not show a build up and it had been built up. Ms. Kessler said also, she was not clear, if the approved plans were for the height that it was actually being built. Ms. Kessler stated she could not measure it, but from her yard it was a very large, tall structure very close.

Ms. Huber stated she had no further questions for Ms. Kessler.

Ms. Wiltrout asked Mr. Georgiton if he had any cross-examination for Ms. Kessler.

Mr. Georgiton stated yes and asked if Ms. Kessler if she had not measured the setback for the property.

Ms. Kessler stated she had not, no.

Mr. Georgiton asked if she had measured the height of the structure.

Ms. Kessler stated she did not have that ability, no.

Mr. Georgiton asked if she had measured the grading.

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Ms. Kessler stated she did not have that ability, no.

Mr. Georgiton asked if she had measured the area of the structure.

Ms. Kessler stated she did not have that ability, no.

Mr. Georgiton asked Ms. Kessler if she was currently the managing partner of the Columbus office of Jones Day.

Ms. Kessler stated correct.

Mr. Georgiton asked if she represented clients in litigation.

Ms. Kessler stated correct.

Mr. Georgiton asked if she understood that when one was a party seeking relief one bore the burden of proof.

Ms. Kessler stated correct.

Mr. Georgiton stated he was done.

Ms. Kessler stated she did not know anything about zoning boards or enforcement but she did know federal and state rules of procedure, just did not know zoning rules.

Mr. Georgiton stated thank you, no further questions.

Ms. Wiltrout asked Ms. Huber if she had any further witnesses to call at this time.

Ms. Huber stated she did not have anyone else to call but she would ask to reserve the right to ask questions of Mr. Howser, who had already testified to some extent.

Ms. Wiltrout stated that was fine. Ms. Wiltrout added that she assumed Mr. Georgiton would call him and she could cross-examine him at that time if that worked for her.

Ms. Wiltrout asked Mr. Georgiton if he would like to proceed with an opening statement and present his case.

Mr. Georgiton stated he did not think he would need Mr. Howser's testimony with respect to the structure. Mr. Georgiton stated Mr. Howser had already provided some testimony about the intent so if Ms. Huber had some questions for him she could go ahead and ask them.

Ms. Huber asked Mr. Howser if the structure was being built according to the plans that were approved by the City.

Mr. Howser stated he was not a specialist in construction, but based upon the work he had done with Hale Construction, architect Todd Parker, yes.

Ms. Huber asked if, to the best of his knowledge, it was being constructed in accordance with the approved plans.

Mr. Howser stated yes.

Ms. Huber asked if they were being constructed in accordance with the plans that were approved by the ARC.

Mr. Howser stated yes.

Ms. Huber asked if those were different plans or the same plans.

Mr. Howser stated they were the same plans.

Ms. Huber asked if they were one and the same.

Mr. Howser stated yes, the plans sent to the ARC were the ones that were sent to the City for approval for the structure.

Ms. Huber asked if he knew what height it was approved to be.

Mr. Howser stated he would defer that question to the architect.

Ms. Huber asked if she could ask the architect after she was finished asking Mr. Howser questions.

Mr. Georgiton stated he would be calling Mr. Parker as a witness and Ms. Huber could ask him on cross.

Ms. Huber stated thank you.

Ms. Huber asked if Mr. Howser could add anything to the conversation about the elevation, the ground was built up, to put the structure on top of it.

Mr. Howser stated that he was not a specialist in construction, but his understanding was the footers had to be buried below the frost line, so he did not think that was accurate, but he would defer to Mr. Parker to answer that question.

Ms. Huber asked if the porch portion had a roof.

Mr. Howser stated he thought it had been clearly established that it did.

Ms. Huber stated she just wanted to make sure.

Mr. Huber asked Mr. Howser if he would call that a covered porch, for his purposes.

Mr. Howser stated he would call it a porch.

Mr. Georgiton stated he was lodging an objection, but Mr. Howser could answer.

Mr. Howser stated he would just call it a porch.

Ms. Huber asked Mr. Georgiton what his objection was.

Mr. Georgiton stated that to the extent Ms. Huber was asking Mr. Howser a legal question, a legal interpretation of the Code, he objected. Mr. Georgiton stated that to the extent Mr. Howser was answering based on his personal, non-legal understanding, he was fine with that.

Ms. Huber stated that was what she was trying to do. Ms. Huber asked Mr. Howser if he had signed the plans that were submitted to the City for the various approvals, applications, and permits.

Mr. Howser stated he did not understand her question and added that he did not sign plans, he worked with Mr. Parker to develop the plans and they went through the appropriate process for the ARC review and then the City for a building permit.

Ms. Huber held up to the screen an image of a document and asked Mr. Howser if that was his signature she was holding up to the screen.

Mr. Howser stated he could not, he did not even know what document she was showing, and he could not respond because he did not know what it was.

Ms. Huber stated the document was the City's residential permit application. Ms. Huber asked Mr. Howser if he had not signed it on October 10, 2019, and she understood he was not saying that, who else would have signed it.

Mr. Howser stated likely Mr. Parker or Mr. Andrew Hale, perhaps.

Ms. Huber asked if Mr. Howser had seen the residential permit application materials, at any point, that were submitted to the City. Ms. Huber asked if he had reviewed those.

Mr. Howser stated he believed that had been done by Austin Cummings, a representative of Hale Construction, the contractor he had hired to build the structure.

Ms. Huber asked if Mr. Howser had not seen the residential permit application materials.

Mr. Howser stated he could not recall.

Ms. Huber stated Mr. Howser had stated in his brief that other neighbors had no objection to the structure. Ms. Huber asked if Mr. Howser had asked them.

Mr. Howser stated he and his wife had spoken at length with Mr. Ziffer, who was present at this BZA meeting, and directly abuts his property, as well as neighbors Mr. and Ms. Morrison, and Sara Kisner, and none of them had any issues with the structure.

Ms. Huber asked about when Mr. Howser had talked to them.

Mr. Howser stated he had spoken to them on a daily basis.

Ms. Huber asked about the structure before it was constructed, while it was being constructed, all throughout that process.

An unidentified party at the BZA meeting stated yes, all of the above.

Mr. Georgiton stated there had been another person speaking and requested the person be sworn in to testify, because Mr. Howser had indicated they were on the line.

Ms. Wiltrout asked whoever had just spoken to please introduce themselves and stated she would swear that person in.

Mr. James D. Ziffer, a neighbor of Mr. Howser's, stated he thought Ms. Wiltrout was referring to him.

Ms. Wiltrout asked Mr. Ziffer if he swore tell the truth, the whole truth, and nothing but the truth.

Mr. Ziffer stated he swore to tell the truth and nothing but the truth.

Mr. Ziffer stated he was a direct, adjacent neighbor to the Howsers.

Ms. Huber asked Mr. Georgiton if he was going to call Mr. Ziffer.

Mr. Georgiton stated he could.

Ms. Huber stated her question was, she thought the person who had interjected was maybe Mrs. Howser.

Mr. Georgiton stated no, that was Mr. Ziffer who had begun to speak.

Ms. Wiltrout asked if Ms. Huber could finish her questions with the witness currently testifying and then call Mr. Ziffer later during Mr. Georgiton's case in chief, if that was okay with everyone.

Ms. Huber stated that was fine. Ms. Huber asked Mr. Howser if he had said that he had communicated with his neighbors about the structure as it had been constructed and that they did not have a problem with it or a concern.

Mr. Howser stated that through normal course of conversation with neighbors, it was not that they had sought people out to discuss it. Mr. Howser stated they had followed the process through the ARC and the City and in the course of normal conversation, of course they had talked to their neighbors.

Ms. Huber stated her question was, did Mr. Howser ask neighbors whether they had a concern or issue with his structure.

Mr. Howser stated no.

Ms. Huber asked Mr. Howser if no, he had not asked them.

Mr. Howser stated he had not asked them before he proceeded to build the structure. Mr. Howser said that throughout the construction, and he believed Mr. Ziffer would speak to this shortly, there had been no concerns raised by any other party about the look, size, fitting into the landscape, etc.

Ms. Huber asked Mr. Howser how he intended and planned to use the motor lounge.

Mr. Howser stated the purpose of that space was to extend what they did in the garage, he had vehicles to put in that space, to sit, and to store paraphernalia related to his automobiles, tools, etc. Mr. Howser stated it was to enjoy a space with his family, children, and parents.

Ms. Huber asked Mr. Howser if he was not planning on entertaining guests in that space.

Mr. Howser stated he was not sure what Ms. Huber was going for here. Mr. Howser stated that if Ms. Huber was calling his parents guests or neighbors guests, then absolutely he planned on having them in that space no differently than he did on his patio.

Ms. Huber asked if Mr. Howser had some degree of those types of gatherings now and could he describe what that type of gathering looked like, how many people, how long it lasted.

Mr. Howser stated he was not sure that was any of her concern and said he would direct that to his counsel. Mr. Howser stated that, if one noticed in Ms. Kessler's yard was a very large pool and a recently constructed pool house so ...

Ms. Huber stated that was not the subject of this appeal. Ms. Huber stated her question, as Mr. Howser had raised the use of the motor lounge and asked her not to call it a party room, she wanted to know about the use of the motor lounge.

Mr. Georgiton stated he objected, there was a lot of stuff that was coming in that had nothing to do with the appeal and he thought Mr. Howser could finish his answer.

Ms. Huber stated she was not sure that was an answer to her question. Ms. Huber said her question was how was Mr. Howser planning to use the motor lounge, did he anticipate having gatherings of people there, gathering of guests other than family members, and, if so, how many, how long, what type of gathering.

Mr. Howser stated they had family dinner there every Sunday evening and that usually constituted neighbors the Morrisons, his wife, his three adolescent children, and the Morrisons' children. Mr. Howser said that was a good expectation of what a gathering was on his property.

Ms. Huber asked if the motor lounge area had, or would have, a bathroom, a fireplace.

Mr. Howser stated that was not correct, there was a fireplace in the motor lounge but not a bathroom.

Ms. Huber asked if there was a bathroom in the accessory structure at all.

Mr. Howser stated there was.

Ms. Huber asked where the bathroom was located.

Mr. Howser stated in the garage

Ms. Huber asked if the motor lounge planned to have a wet bar and wine cabinet.

Mr. Howser stated it might have a small refrigerator, an ice maker, and a sink.

Ms. Huber asked if the plans indicated a wet bar and wine cabinet that would be consistent with Mr. Howser's understanding.

Mr. Howser stated the drawings reflected a sink and, he believed, some refrigeration and likely ice maker.

Ms. Huber asked if there was seating for at least six (6) people, was that consistent, possibly more, she could not tell.

Mr. Howser stated he believed six (6) was accurate.

Ms. Huber asked if it would have a television and a sound system.

Mr. Howser stated he was not sure.

Ms. Huber asked if Mr. Howser had ever been directed by the City or a representative of the City to proceed at his own risk with respect to the structure.

Mr. Howser stated they had not.

Ms. Huber asked if Mr. Howser had ever been directed that way by someone from the ARC.

Mr. Howser stated he believed Mr. Rubey at some point had spoken to Mrs. Howser and had questions about the project approvals, but outside of that conversation no. Mr. Howser stated that when he had spoken to the City the City was very clear that they were not issuing a stop work order and that everything was in alignment with the process and procedure.

Ms. Huber asked if there had been no, "hey an appeal is pending,' and noted that she would agree there was a distinction between proceed at your own risk and a stop work order.

Mr. Howser stated they had never been given advice to proceed at their own risk. Mr. Howser stated they had been told specifically that the City had responded or was responding to Ms. Kessler's request and would not issue a stop work order and that they were in alignment with the processes and procedures for their building permits.

Ms. Huber stated okay and said she had no further questions for Mr. Howser.

Ms. Wiltrout asked Mr. Georgiton if he had any re-direct or if he wanted to call his next witness.

Mr. Georgiton stated he would move on to his portion of the presentation.

Mr. Georgiton stated his clients had done everything right and everything one would expect somebody to do when building a new structure in their yard. Mr. Georgiton said every step of the way his clients were transparent with the community and the City. Mr. Georgiton stated the Howsers had reached out to the ARC for the New Albany Country Club Association in May 2018 to discuss this structure, and the ARC approved the concept in May 2018 and approved the final drawings in July 2018. Mr. Georgiton said when his clients were ready to begin construction they sought a permit from the City of New Albany and provided submittals to the City, including detailed plans setting forth what they were planning on putting on the property showing all setbacks, the area, the height, all those issues. Mr. Georgiton stated the City reviewed and concluded his clients' structure complied with the Zoning Code and Building Code and issued the permit in October 2019.

Mr. Georgiton said construction began shortly thereafter. Mr. Georgiton said it was not until January 2020 that Ms. Kessler first raised issues with the City about this structure. Mr. Georgiton stated there was a letter from early January 2020 that had been provided by Ms. Kessler's counsel which had prompted a response from the City. Mr. Georgiton stated that was what, eventually, resulted in this appeal. Mr. Georgiton stated that nearly three (3) months had transpired with construction by the time his clients had any inkling there was a potential issue with this property.

Mr. Georgiton noted he wanted to reassert an objection he had raised earlier about the issues that had been brought before the BZA today. Mr. Georgiton said the Appellant had thrown a lot of things against the wall. Mr. Georgiton stated the Appellant had not met her burden with respect to any of these issues but they should not even have to be gotten to. Mr. Georgiton said the issues they had heard about concerning entertainment and the impact on Ms. Kessler's property, landscape screening, downspouts, height, noise, grading, etc., none of those had been put forward in the initial appeal document filed by Ms. Kessler with the City in February 2020. Mr. Georgiton said he thought it was unfair for his clients to have to try and respond to these myriad issues now when they were not raised in the appeal. Mr. Georgiton stated they should have been raised in the appeal documents so that a dialog that must have first taken place with the City and the Howsers could have taken place before it even got to this point. Mr. Georgiton stated it was so Ms. Huber did not have to ask questions about the height and try to get information; that stuff should have already been addressed. Mr. Georgiton stated they should have seen if they could have come to some sort of a resolution on those issues long before this point. Mr. Georgiton stated that was the reason why the Code required those issues to be raised in the appeal documents, because the idea was that they could be worked out before even getting to this process. Mr. Georgiton stated that had not been done here and he thought issues with regard to setback, entertainment, downspouts, grading, all of that stuff, should be set aside. Mr. Georgiton stated the issue here was really a narrow one: whether or not the City of New Albany appropriately calculated the area of this accessory structure.

Mr. Georgiton stated his clients were very concerned about this process, concerned about the fact they paid \$250,000 into this structure and construction was nearly complete and now they were faced with the prospect of their structure being declared not in compliance with the Code. Mr. Georgiton said counsel had indicated she was not asking for the structure to be demolished, that they were looking for some modification. Mr. Georgition stated that, notably, counsel again raised issues that had nothing to do with the appeal about grading, screening, and things that were completely collateral to the issues before the BZA.

Mr. Georgiton stated that the interpretation of the Code Appellant's counsel was asking the BZA to apply was to take the structure and divide it into three (3) independent components and then apply each of the different requirements set forth in the Code to the structure. Mr. Georgiton said he had to say that one of those requirements, with respect to recreational structures, was that the height be only ten (10) feet. Mr. Georgiton said all could agree the structure was higher than ten (10) feet. Mr. Georgiton stated that although Appellant's counsel now said they were not asking for the structure to be demolished, he wondered what the end result would be if Appellant continued to pursue this argument. Mr. Georgiton stated he was not suggesting he or his clients wanted the structure demolished in any way, as a substantial investment had been put into the structure, but that was what was really at stake here.

Mr. Georgiton noted financial devastation was at stake for his clients who made this investment, followed all the steps, and then the Appellant was going to pull the rug out from under them. Mr. Georgiton stated he and his clients thought Ms. Kessler's objections were untimely, it was too late to raise these issues. Mr. Georgiton said it was over a year and a half

since his clients announced plans and well after the construction had begun. Mr. Georgiton stated that even if Ms. Kessler's appeal was not deemed untimely, it was he and his client's position that the structure complied with the Code. Mr. Georgiton said the garage, unlike what Ms. Kessler attempted to argue here, that it could be divided into three (3) discrete structures, was one structure and that could not be disputed. Mr. Georgiton said the drawings of the floor plan, noting one was on the screen at this time, showed clearly one structure. Mr. Georgiton stated there was one (1) foundation, as pointed out in the brief. Mr. Georgiton said the photos of the structure that had been seen had just one uniform building there. Mr. Georgiton stated three (3) different Code standards could not be applied to one building, what Appellant was proposing was unprecedented, never been done before in the City.

Mr. Georgiton stated Ms. Hickok's testimony indicated that was not how things were done, particularly with respect to porches. Mr. Georgiton stated this was for good reason as it would lead to absurd results and insert uncertainty into the Code and cast doubt upon the Code's interpretation. Mr. Georgiton stated he submitted that many multi-use buildings would now be in doubt if the BZA were to apply the interpretation of the Code advanced by the Appellant. Mr. Georgiton said that, to demonstrate that this could not be the case, what had to be looked at was the Appellant's reliance on the provisions for open-sided structures. Mr. Georgiton stated the Appellant advanced that the garage standard be applied to the garage portion, the recreational structure standard to the motor lounge, and the open-sided structure requirements for the porch.

Mr. Georgiton stated the Code's definition of an open-sided structure required an open-sided structure to be free standing. Mr. Georgiton stated Appellant had said the Code should be applied according to its plain language and he agreed. Mr. Georgiton stated the plan language of the term free standing was that it was not structurally attached or affixed to another structure. Mr. Georgiton said clearly, the porch was not free standing. Mr. Georgiton stated that demonstrated the Code was not really designed to have multiple sections of accessory structure requirements applied to a uniform structure. Mr. Georgiton stated the accessory structure provisions provided different requirements for different types of accessory structures. Mr. Georgiton stated because there was one (1) structure here the primary use of that one structure had to be looked at. Mr. Georgiton stated the primary use was a garage, the bulk of the structure was being used as a garage. Mr. Georgiton stated, as Mr. Howser had testified, the motor lounge and the porch supported that garage use, the entire purpose of storing tools, showcasing automobiles, things of that nature. Mr. Georgiton stated he thought it was entirely appropriate, not arbitrary, for the City to conclude the primary use of this structure was as a garage. Mr. Georgiton stated that once that determination was made, that triggered the requirements for a garage accessory structure. Mr. Georgiton said under the Code, the square footage requirement was 800 square feet. Mr. Georgiton stated the method to calculate square footage under the Code needed to be looked at and submitted that the City was correct in concluding that the area should be measured with reference to the definition of "floor area" in the Code.

Mr. Georgiton stated opposing counsel had argued that floor area did not apply to accessory structures, that the term was not found in relation to the garage, and only really applied to primary buildings. Mr. Georgiton stated that was not the case. Mr. Georgiton said Appellant's argument kind of fell apart when the 800 square foot requirement was looked at. Mr. Georgiton stated that in that very section of the Code it said the structure must be 800 square feet and it could not be larger than the floor area, specifically using that term, of the main building. Mr. Georgiton stated that the area of the garage was measured in relation to the floor area and, in fact, if one looked at the area requirements for each of the types of accessory structures, one would see the term floor area used repeatedly. Mr. Georgiton stated the Definitions section clearly indicated that the definitions applied throughout the zoning ordinance and the definition

of floor area referred to buildings, it did not mention primary buildings, it referred to all buildings and, of course, an accessory structure was a building. Mr. Georgiton stated there was ample support in the Code for the idea that floor area applied to the measurement of garage accessory structures.

Mr. Georgiton stated he wanted to respond to Appellant's other argument that somehow the application of the term floor area would work an absurdity into the Code because the definition of floor area, in addition to excluding open porches, excluded garages, rendering the garage requirements a nullity. Mr. Georgiton stated that was not the case because he thought the floor area requirements could be harmonized with the accessory structures. Mr. Georgiton stated that initially, when calculating floor area, garages were to be removed, but when there was an accessory structure, the Code specifically stated what the square footage requirements were for a garage. Mr. Georgiton stated that could be added back in and those terms be applied in harmony. Mr. Georgiton stated that under the terms of the Code, once floor area was accepted as the proper measurement of the garage then the definition excluded open porches.

Mr. Georgiton said the Appellant disagreed with this argument that the porch here was an openporch, but that was neither here nor there. Mr. Georgiton said the exceptions in the definition of floor area did not even need to be gotten to because floor area itself was defined as the measurement of the area from exterior walls. Mr. Georgiton stated that because there were no exterior walls on the porch then the exterior porch was not included in the definition of floor area. Mr. Georgiton stated that applying the plain language of the Code, the measurement of the motor lounge and the garage bay, and it was undisputed that the measurement of that area, and the only evidence before the BZA, was that the area was some 770 square feet and so fit in the Code. Mr. Georgiton stated that because the porch did not fall under the definition of floor area it was excluded and that was consistent with what the City of New Albany had done for years.

(Mr. Georgiton asked that two persons he could see at the bottom of the screen please stop distracting him with their activities. Mr. Ziffer stated he was the person and would be glad to comply.)

Mr. Georgiton stated he and the Howsers believed the Code was very clear, it was not inconsistent. Mr. Georgiton said one could read and apply the definition of floor area when measuring a garage and could do so in harmony with the requirements of the accessory structure. Mr. Georgiton stated it was hard to understand how floor area could not be applied to the measurement of a garage accessory structure when the term floor area expressly appeared in the provisions regarding area. Mr. Georgiton stated that they could not envision how area would be measured in any other manner aside from a consideration of the floor area. Mr. Georgiton stated the Code specifically defined what the floor area was and because there were no exterior walls on the porch, it was not included.

Mr. Georgiton stated he would like to call Mr. Todd Parker, the architect for this project.

Ms. Wiltrout asked Mr. Parker if he swore to tell the truth and nothing but the truth.

Mr. Parker stated he did.

Mr. Georgiton asked Mr. Parker where he was currently employed.

Mr. Parker stated he was the owner of F5 Design Architecture, Inc.

Mr. Georgiton asked how long Mr. Parker had been with F5.

Mr. Parker stated he had founded the business eighteen (18) years ago.

Mr. Georgiton asked Mr. Parker if in his work with F5 he had occasion to do work with respect to structures constructed in New Albany.

Mr. Parker stated yes.

Mr. Georgiton asked Mr. Parker how often.

Mr. Parker stated they probably did anywhere from fifteen (15) to 25 projects a year in New Albany.

Mr. Georgiton asked Mr. Parker what role had with the construction of an accessory structure at 4646 Wilkin Court, owned by the Howsers.

Mr. Parker stated he was the architect.

Mr. Georgiton asked if, as the architect, he had designed this structure.

Mr. Parker stated correct.

Mr. Georgiton asked Mr. Parker to describe generally for the BZA what the structure was.

Mr. Parker stated it was exactly what they saw on paper, it was an oversized, single car garage bay with a motor lounge area and an open porch.

Mr. Georgiton asked what the structure's primary purpose was.

Mr. Parker stated it was to store a car.

Mr. Georgiton asked if Mr. Parker had designed the structure with that in mind.

Mr. Parker stated yes.

Mr. Georgiton asked if he considered the structure to be multiple structures.

Mr. Parker stated no.

Mr. Georgiton asked if there was one shared foundation for the structure.

Mr. Parker stated yes.

Mr. Georgiton asked if Mr. Parker considered the porch to be free standing.

Mr. Parker stated no.

Mr. Georgiton asked why that was.

Mr. Parker stated all the foundation walls were connected, the roof of the open sided porch area was connected to the wall of the motor lounge.

Mr. Georgiton asked if Mr. Parker had occasion to seek building permits from the City of New Albany on behalf of his clients.

Mr. Parker stated yes, often.

Mr. Georgiton asked how about variances.

Mr. Parker stated yes.

Mr. Georgiton asked Mr. Parker if he had ever been involved in matters before the BZA in New Albany.

Mr. Parker stated yes.

Mr. Georgiton asked Mr. Parker what involvement he had with the submission of the project to the New Albany Country Club Community Association's ARC.

Mr. Parker stated he had handled all of the submissions for this project.

Mr. Georgiton asked if the ARC had approved the site plan for the garage.

Mr. Parker stated yes.

Mr. Georgiton asked if the ARC had approved the building.

Mr. Parker stated yes.

Mr. Georgiton asked Mr. Parker what involvement he had with the submission of the project to the City of New Albany for review and approval.

Mr. Parker stated he consulted with the City early on about the structure and the areas and then Hale Construction submitted the plans for permitting.

Mr. Georgiton asked Mr. Parker when he had consulted with the City when he said 'early on,' when, in relation to October 2019, had that been.

Mr. Parker stated June 12, 2018.

Mr. Georgiton asked Mr. Parker what he had consulted with the City about.

Mr. Parker stated he had wanted to verify whether or not the open porch would be considered part of area to see if a variance was needed or not. Mr. Parker stated he had been told it was not included in the area of the structure.

Mr. Georgiton asked if that was Mr. Parker's understanding at the time the permit was submitted to New Albany.

Mr. Parker stated absolutely.

Mr. Georgiton asked if New Albany had approved the permit.

Mr. Parker stated yes.

Mr. Georgiton asked if during the permit process New Albany had ever come back to Mr. Parker and indicated there were any potential issues with the property that needed to be rectified.

Mr. Parker stated no.

Mr. Georgiton asked if had been Mr. Parker's understanding that when the City approved the permit the City concluded the structure was in compliance with the City of New Albany Zoning Ordinance

Mr. Parker stated yes.

Mr. Georgiton stated he wanted to admit a few exhibits. Mr. Georgiton stated there were three (3) exhibits attached to the motion or brief he had submitted today. Mr. Georgiton stated one had been circulated to counsel earlier today. Mr. Georgiton asked if the City had those and could bring them up.

Mr. Mayer stated yes.

Mr. Georgiton asked for Exhibit A to be opened up in the presentation. Mr. Georgiton asked Mr. Parker if he had a copy of Exhibit A in front of him.

Mr. Parker stated yes.

Mr. Georgiton asked Mr. Parker to tell the BZA what Exhibit A was.

Mr. Parker stated it was the conceptual approval from the ARC.

Mr. Georgiton asked Mr. Parker what he meant by conceptual approval.

Mr. Parker stated that attached to that there were drawings of the structure, the site plan, the elevations, and the floor plan the ARC reviewed and ordered to issue the approval.

Mr. Georgiton asked if this had been more of a preliminary approval.

Mr. Parker stated yes.

Mr. Georgiton asked staff to scroll to the very top of Exhibit A and asked Mr. Parker if the ARC had approved Exhibit A.

Mr. Parker stated yes.

Mr. Georgiton requested Exhibit B be opened up on screen. Mr. Georgiton noted he had given Mr. Parker his own copy of Exhibit B. Mr. Georgiton asked Mr. Parker if he could tell the BZA what Exhibit B was.

Mr. Parker stated it was the final ARC approval.

Mr. Georgiton asked if, going back to the first approval, the ARC had reviewed, done the preliminary approval, in May 2018.

Mr. Parker stated yes.

Mr. Georgiton asked if the next approval was in July of 2018.

Mr. Parker stated yes.

Mr. Georgiton asked Mr. Parker what had been submitted to the ARC at that time.

Mr. Parker stated the final plans.

Mr. Georgiton asked if that would have included floor plans, site plans, and details of the structure.

Mr. Parker stated that was correct.

Mr. Georgiton asked if anyone at the ARC had expressed any issues or opposition to the structure at that time.

Mr. Parker stated no, that would be seen at the comments at the bottom of Exhibit B if there had been anything.

Mr. Georgiton asked Mr. Parker if that went with the first application as well.

Mr. Parker stated yes.

Mr. Georgiton stated he was submitting Exhibits A and B to the BZA and moving along to Exhibit C. Mr. Georgiton noted Mr. Parker had a copy of Exhibit C in front of him. Mr. Georgiton asked Mr. Parker if he could tell the BZA what Exhibit C was.

Mr. Parker stated Exhibit C was the building permit that was issued by the City of New Albany.

Mr. Georgiton asked if the issue date was October 22, 2019.

Mr. Parker stated yes.

Mr. Georgiton asked Mr. Parker if, at that time, the City had communicated to him any concerns about the square footage of the structure.

Mr. Parker stated no.

Mr. Georgiton asked Mr. Parker if, at that time, the City had communicated to him any concerns with respect to the height of the structure.

Mr. Parker stated no.

Mr. Georgiton asked how about the grading of the structure.

Mr. Parker stated no.

Mr. Georgiton asked drainage issues.

Mr. Parker stated no.

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Mr. Georgiton asked how about with respect to screening issues.

Mr. Parker stated no.

Mr. Georgiton asked if, since that time, the City of New Albany had ever expressed any concern about the square footage of the structure.

Mr. Parker stated no.

Mr. Georgiton asked what about with respect to the grading of the structure.

Mr. Parker stated no.

Mr. Georgiton asked what about with respect to the height of the structure.

Mr. Parker stated no.

Mr. Georgiton asked what about with respect to drainage.

Mr. Parker stated no.

Mr. Georgiton asked if Mr. Parker had ever been made aware by anyone before this night of any issues with flooding with respect to the structure.

Mr. Parker stated he had not.

Mr. Georgiton asked Mr. Parker if he had heard Ms. Hickok's testimony about the square footage of the motor lounge and garage.

Mr. Parker stated yes.

Mr. Georgiton stated Ms. Hickok has testified that the square footage of the motor lounge and garage area was less than 800 square feet and asked Mr. Parker if he recalled that testimony.

Mr. Parker stated yes.

Mr. Georgiton asked if Mr. Parker agreed with that testimony.

Mr. Parker stated he would call it more like (words spoken were unclear due to audio issues) ...

Mr. Georgiton asked if, based upon Mr. Parker's measurement, the area of the garage and the motor lounge was within the 800 square foot requirement for garage accessories.

Mr. Parker stated yes.

Mr. Georgiton asked when construction on the garage began.

Mr. Parker stated he believed October 23, 2019.

Mr. Georgiton asked if that was the day after the permit was received.

Mr. Parker stated basically, yes.

Mr. Georgiton asked what was the current status of the construction.

Mr. Parker stated the exterior, the shell, was about ninety percent (90%) complete. Mr. Parker stated it was down to final grading, driveway prep, and whatnot.

Mr. Georgiton asked Mr. Parker when he anticipated the structure would be complete.

Mr. Parker stated probably in the next thirty (30) days or so.

Mr. Georgiton asked Mr. Parker when was the first time he learned there were any objections to the Code compliance of the structure.

Mr. Parker stated he had been made aware by the ARC there were some questions about the structure in early January.

Mr. Georgiton asked Mr. Parker what about the City of New Albany, with respect to the zoning of the structure.

Mr. Parker stated nothing.

Mr. Georgiton asked if Mr. Parker had eventually learned that Ms. Kessler was filing this appeal.

Mr. Parker stated yes.

Mr. Georgiton asked Mr. Parker if it came as a surprise to him that Ms. Kessler was contesting the zoning compliance of the structure.

Mr. Parker stated yes.

Mr. Georgiton asked Mr. Parker why.

Mr. Parker stated because the City issued a zoning permit.

Mr. Georgiton asked Mr. Parker if during his time as an architect he had ever had occasion to seek approval from New Albany or the BZA for multi-use accessory structures.

Mr. Parker stated yes.

Mr. Georgiton stated Ms. Kessler advocated dividing up the building into three (3) structures and applying different parts of the Code, with respect to accessories, to each part of the structure based on that part's purpose. Mr. Georgiton asked Mr. Parker if he had ever seen the City or the BZA apply the Code in such a manner.

Mr. Parker stated he had not.

Mr. Georgiton asked Mr. Parker if, based on his work on this project, he believed that the structure was complaint with the New Albany Code.

Mr. Parker stated yes.

Mr. Georgiton stated he had no further questions for Mr. Parker.

Ms. Wiltrout asked if Ms. Huber had any re-direct or cross-examination.

Ms. Huber asked Mr. Parker how tall the structure had been approved to be.

Mr. Parker stated the height shown on the plans, to the peak of the roof, was seventeen (17) feet, nine (9) inches.

Ms. Huber asked Mr. Parker, measured from where to where.

Mr. Parker stated the grade at the front of the structure to the height of the peak of the roof.

Mr. Huber asked Mr. Parker if roof at its highest peak.

Mr. Parker stated yes.

Ms. Huber asked Mr. Parker how tall the structure was as it had been constructed.

Mr. Parker stated he had not measured it.

Ms. Huber asked Mr. Parker if it was seventeen (17) feet, nine (9) inches as he had just testified.

Mr. Parker stated he had not measured it.

Ms. Huber asked if it might be more than Mr. Parker had said was approved.

Mr. Parker stated he had not measured it.

Ms. Huber asked if Mr. Parker could provide any other guidance on the height.

Mr. Parker stated no.

Ms. Huber asked Mr. Parker if, in fact, he did not know how tall it was at this time.

Mr. Parker stated he had not measured it.

Ms. Huber asked Mr. Parker, or if it was in compliance with what had been approved.

Mr. Parker stated he believed, yes, it was in compliance with what had been approved.

Ms. Huber asked Mr. Parker, so its seventeen (17) feet, nine (9) inches then.

Mr. Parker stated he had not measured it.

Ms. Huber asked Mr. Parker how high the ground had been raised up. Ms. Huber noted they had heard testimony it had been raised up to make it level and asked about how high it had been raised up, from what it was to what it currently was.

Mr. Parker stated he would clarify the grading issue. Mr. Parker stated that on page ten (10) of Mr. Georgiton's brief there was a snapshot site plan of existing grades that had been taken by Landmark Survey. Mr. Parker stated he had hired Landmark Survey in June 2018 to give him the elevations so he could resolve the grading plan. Mr. Parker stated the numbers represented elevation heights of existing grade before construction had started. Mr. Parker stated what was not shown on that snapshot was the front of the garage, the Howser's existing garage. Mr. Parker stated there was almost five (5) feet of fall from their existing garage to the back corner of this property. Mr. Parker stated they had to raise the front up about a foot for the garage doors to align so they would not have water running into this garage. Mr. Parker stated that was perfectly acceptable. Mr. Parker said that in their grading plan on the construction drawings they showed spot elevations showing how they were going to re-grade the north side of that structure to slope down to that drainage easement and that catch basin in the back corner. Mr. Parker stated what had been done to date was still a rough grade. Mr. Parker said exposed brick ledge was visible but not exposed framing. Mr. Parker stated the ground would still be raised to cover the concrete, and, with the final landscape plan the ARC approved, they have to level the grade out to plant some screening and then it would slope gently back to the catch basin in that corner.

Ms. Huber asked Mr. Parker how tall was the footer.

Mr. Parker stated the footer was buried into the ground and was eight (8) inches tall. Mr. Parker stated if Ms. Huber wanted the construction, technical definition of a footing, it was what the block wall sat upon and was buried into the ground because it had to sit on suitable soil below frost depth, as Mr. Hannigan had stated, and was only eight (8) inches tall.

Ms. Huber asked if then there were additional components between the footer and the foundation and the bottom of the structure.

Mr. Parker stated there was a foundation wall that sat upon that and the brick and the wood framing sat on.

Ms. Huber asked Mr. Parker how tall was the foundation wall.

Mr. Parker stated it was five (5) courses of blocks so it was about forty (40) inches but noted that 32 inches of it was below grade.

Ms. Huber asked Mr. Parker, eight (8) inches of the true footer plus forty (40) inches of the foundation wall, right.

Mr. Parker stated that 32 inches of that were below grade.

Ms. Huber asked 32 of the forty (40).

Mr. Parker stated yes.

Ms. Huber asked if there was still sixteen (16), if her math was right, that was above grade.

Mr. Parker stated that was covered up by brick.

Ms. Huber stated those were all her questions for Mr. Parker.

Ms. Wiltrout asked if the parties objected to a five (5) minute break.

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Mr. Georgiton stated fine.

Ms. Huber stated no objection.

Ms. Huber and Ms. Kessler engaged in discussion.

Ms. Brisk advised Ms. Huber and Ms. Kessler their discussion was audible.

Ms. Huber stated thank you.

Ms. Wiltrout called the meeting back to order at 10:07 p.m.

Mr. Georgiton asked Ms. Huber if she had no more questions for Mr. Parker.

Ms. Huber stated she did not.

Mr. Georgiton stated he had one follow-up and said he wanted Mr. Parker to authenticate a document and introduce it. Mr. Georgiton asked Mr. Parker to look at Exhibit D and asked staff to pull up Exhibit D.

Mr. Mayer stated they might not have an Exhibit D.

Mr. Georgiton asked if Mr. Banchefsky had a copy of Exhibit D.

Mr. Banchefsky asked if that was separate, saying that what he had he had sent to the City.

Mr. Georgiton stated he had sent an email this afternoon.

Mr. Banchefsky stated he did not know if he had seen that.

Mr. Georgiton stated he would represent that Exhibit D was a copy of the plans submitted to the City and he wanted to make sure they were authenticated and submitted to the BZA so there was a set of those plans. Mr. Georgiton asked if there was any objection if he just furnished that to Mr. Banchefsky to supply to the BZA.

Ms. Wiltrout stated the only problem was that Mr. Banchefsky did not have them. Ms. Wiltrout asked if Mr. Georgiton could resend them, adding that the BZA would not be able to look at them during this hearing.

Mr. Parker stated the City staff would have a copy of the plans on record as the approved plans.

Mr. Georgiton stated the question was whether or not it was part of the appeal record and he did not know that.

Mr. Mayer stated yes, they were sent to the BZA members ahead of this night's meeting.

Mr. Georgiton stated that as long as that was part of the record then he was okay. Mr. Georgiton asked if that included the site plan, with the picture of the details of the building, the area, and such.

Ms. Wiltrout asked staff if there was a way to show Mr. Georgiton what the BZA members had seen.

Mr. Mayer stated yes.

Mr. Georgiton asked full sized and legal.

Mr. Mayer stated yes and indicated when an image of that was visible on the screen. Mr. Mayer stated staff had sent three (3) sheets, L100, A200, and A100.

Mr. Georgiton asked if those were full sized with legible dimensions.

Mr. Mayer stated yes.

Mr. Georgiton said he then thought they were fine as long as the understanding was it was part of the record. Mr. Georgiton stated he was resting the case.

Mr. Georgiton stated he wanted to reiterate, if the BZA had not already, he encouraged them to review Appellee's brief which he thought set forth, with pictures and detail, why the garage was clearly within the ambit of the zoning ordinance. Mr. Georgiton stated it fell within the 800 square foot requirement and that the Appellant simply had not satisfied her burden of proof to establish the structure fell outside the Code. Mr. Georgiton stated, in particular, with the new issues that were raised, which Appellee did not think were properly part of this appeal, there was no evidence in the record establishing there were any issues with Code with respect to setbacks, grading, drainage, or any of those issues. Mr. Georgiton stated Appellee thought those were collateral to the appeal and should not be considered. Mr. Georgiton stated Appellee requested, and, formally, to the extent it had not been done, submitted his brief to the record and the supporting materials and requested the BZA deny Appellant's appeal.

Ms. Wiltrout asked for closing statements from Ms. Huber and Mr. Banchefsky.

Ms. Huber stated she had sent the subpoena and had anticipated having information about the height tonight and was disappointed she did not have that. Ms. Huber stated zoning requirements of specific application were imposed and applied all the time. Ms. Huber stated one huge example was the difference between a principle structure and a garage; the component that was a garage. Ms. Huber said certainly there were different, specific requirements that were applied to different components of a house and it happened all the time. Ms. Huber said there was no estoppel against the government, the government regulations were what they were, no matter the jurisdiction and that was still a component. Ms. Huber stated it was not enough for the moyor lounge to contain automobile related memorabilia. Ms. Huber stated that, to put it bluntly, if it was not big enough to drive a car into and was not being planned to drive a car into, it was not a garage. Ms. Huber she moved and asked the BZA Chair person to enter the exhibits (Exhibits A-E) as well as her brief.

Mr. Banchefsky asked Mr. Georgiton, for clarity, what was his Exhibit list.

Mr. Georgiton stated A through D.

Mr. Banchefsky stated he thought he only had C, so if Mr. Georgiton had anything else he wanted to submit ...

Mr. Georgiton stated Exhibit D was a copy of the plans as submitted to the City and, as he had established, and as was on the screen in front of everyone, that was exactly what he planned to submit. Mr. Georgiton stated that, understanding that was part of the record, he did not need to separately submit that.

Mr. Banchefsky stated, from a common sense perspective, this was a free standing garage. Mr. Banchefsky stated garages such as this were considered accessory structures under the Code, stating he referred to them as deluxe garages. Mr. Banchefsky stated it was a growing trend in upscale communities where people, instead of having the standard garage, would have additional areas added to it. Mr. Banchefsky stated a lot of these had been seen in New Albany. Mr. Banchefsky stated staff had reviewed this accessory structure and reasonably determined its primary use was a garage and calculated and evaluated its size accordingly, with the total enclosed structure having less than 800 square feet, as provided for by Code. Mr. Banchefsky stated that, in doing so, staff applied the Code both reasonably and consistently, just as it had evaluated such structures over the years. Mr. Banchefsky indicated that to internally divide the structure into three (3) separate areas, with each a different Code requirement, including size and height, would produce an absurd result. Mr. Banchefsky stated the City asked the appeal be denied. Mr. Banchefsky said that further, the City felt Appellant had not met the burden of proof going forward.

Mr. Banchefsky asked if the BZA wanted to proceed on this appeal this night with a vote or would like additional time, the thirty (30) days provided by Code, to review the briefs that had been submitted over the last four (4) days.

Mr. Banchefsky noted that the BZA could proceed to a vote or elect to wait thirty (30) days to review and then vote.

Mr. LeJeunesse stated he would move to push it out thirty (30) days for the vote.

Mr. Smith stated he was comfortable to vote this night.

Ms. Mollard stated she was comfortable voting this night.

Ms. Wiltrout stated she was comfortable voting this night.

Mr. Banchefsky stated that typically at this time there would be discussion amongst BZA members about the information and evidence presented so they had an opportunity to state their reasoning and rationale on the record and then proceed to a vote.

Mr. LeJeunesse asked, for clarity, was the BZA addressing the three (3) complaints or the square footage complaint.

Mr. Banchefsky stated the BZA was addressing the appeal that had been filed.

Mr. LeJeunesse stated it sounded like there were three (3) components to that appeal; square footage; variance to the property line; and building height. Mr. LeJeunesse asked if all of those would be taken into consideration or ...

Mr. Banchefsky stated no, in his opinion it was the size of the structure.

Ms. Mollard indicated Mr. LeJeunesse had a motion on the floor and asked if he wanted to withdraw or amend it.

Mr. LeJeunesse stated yes, if they were just talking about the square footage of the building, he would withdraw his motion and motion to vote tonight.

Ms. Wiltrout asked if there were more questions or discussion before moving to a vote.

Ms. Mollard stated no, there had been a lot of matters brought to the BZA this night, but when she looked at the document in front of her, it said the request was to appeal the staff's interpretation of floor area. Ms. Mollard stated it was her understanding that was a primary concern. Ms. Mollard said other issues had been brought up such as was the construction of the building in line with the approved plans, was the height the appropriate height, those were things, from her perspective, adding she would need Mr. Banchefsky's legal interpretation, outside the purview of the BZA. Ms. Mollard stated if the actual construction was not in line with the approved plan that was not before the BZA this night. Ms. Mollard stated they had heard testimony in terms of landscaping and screening to address the other things. Ms. Mollard asked Mr. Banchefsky if it was correct the BZA was just going to put a motion forward about the staff's interpretation of floor area

Mr. Banchefsky stated correct.

Ms. Wiltrout stated she agreed with Ms. Mollard. Ms. Wiltrout said the areas of height and setbacks were not established by evidence that she believed met the standard of proof. Ms. Wiltrout stated she knew there had been issues gathering that evidence, but she did not believe the BZA had evidence before it to make rulings as to those matters. Ms. Wiltrout stated she thought they had discussed the interpretation of floor area and would be ready to vote on that.

Mr. Banchefsky stated that was correct, the appeal was what was set forth in the complaint.

Ms. Mollard said she could move a motion to deny the appeal, which also meant to approve staff's interpretation of floor area as reasonable and consistent.

Ms. Wiltrout stated that from reading the staff report she thought, and Mr. Banchefsky could correct her if she was wrong, but they had to say to make a motion to grant the appeal filed by Ms. Kessler and then they could vote.

Mr. Banchefsky stated it should be phrased in the affirmative, correct. Mr. Banchefsky stated, if possible, any thoughts and comments that would advise a reviewing court why they were voting this way would be helpful in terms of making that record.

Ms. Mollard stated that from her perspective the motor lounge was in keeping with the purpose of a garage structure given that the design was for automotive and storage of automotive spaces. Ms. Mollard stated, in keeping with that, the concept that this was three (3) different buildings did not make sense to her. Ms. Mollard stated the conversation about the covered porch versus an open porch, from her perspective, based on all heard this night, it was an open patio, it had a roof but it did not have walls. Ms. Mollard stated that, when staff reviewed this, she saw their reasoning that there were the enclosed walls of the garage area and the motor lounge and that, in fact, was the structure upon which they looked for the square footage which was under 800 square feet. Ms. Mollard stated that seemed reasonable to her and, based on the conversation this night, it was consistent with other accessory structures. Ms. Mollard stated she understood Ms. Huber's points about the definition of floor area, that it excused garages and that seemed nonsensical when it was a garage, but she believed the City of New Albany had addressed that by creating new rules for accessory structures. Ms. Mollard stated this garage was separate and stand alone from the primary house. Ms. Mollard said the staff's interpretation seemed very reasonable. Ms. Mollard stated she appreciated the other perspective but did not agree that patio, because it had a roof, was part of the interior structure of the building.

Mr. Smith stated he agreed with Ms. Mollard and appreciated all the effort, time, and energy put forth on this, but they needed to keep in scope what the question was here. Mr. Smith stated it was the appeal of the staff's interpretation and he thought, due to previous interpretation by staff and by definition of this being under 800 square feet, he would not see an ability to approve the appeal.

Ms. Wiltrout stated she appreciated all the testimony and wanted to note that she was looking at this purely from an area perspective, not based on any other matters that had been raised as challenges, because she did not believe those were properly brought forward at this time and were not part of the appeal. Ms. Wiltrout stated she believed the staff's interpretation of the ordinances was not unreasonable, unconstitutional, arbitrary, or capricious. Ms. Wiltrout stated she could see both sides of the argument, but holding the standard of review she must in this case, she did not believe that the decision of the City's staff should be overturned at this time.

Mr. LeJeunesse stated his opinion was that staff's interpretation of the policy or statute was correct. Mr. LeJeunesse stated he did not agree with the challenging of it being three (3) separate buildings, as that was not really logical in his mind. Mr. LeJeunesse stated they also had to think about trends in the community and, to Mr. Banchefsky's point, this was a trend, that people were making multi-uses of their garage spaces so they would see this trend again and they needed to set good precedents for it.

Ms. Wiltrout asked if a formal vote was needed.

Mr. Banchefsky stated a formal vote was needed.

Moved by Ms. Wiltrout to accept the staff report, the applicant's brief, the Appellee's brief, and all recorded exhibits for those briefs into the record, seconded by Mr. LeJeunesse. Upon roll call vote: Ms. Wiltrout, yea; Mr. LeJeunesse, yes; Ms. Mollard, yea; Mr. Smith, yea; Mr. Gallagher, abstain. Yea, 4; Nay, 0; Abstain, 1. Motion carried by a 4-0-1 vote.

Moved by Ms. Wiltrout to grant the appeal filed by Ms. Kessler c/o Brosius, Johnson & Griggs, LLC for application APL-9-2020, seconded by Mr. Smith. Upon roll call vote: Ms. Wiltrout, no; Mr. Smith, no; Mr. LeJeunesse, no; Ms. Mollard, no; Mr. Gallagher, abstain. Yea, 0; Nay, 4; Abstain, 1. Motion failed by a 0-4-1 vote.

VAR-21-2020 Variance Variance request to Innovation Zoning District text section II(D)(c) to allow a paved walkway to encroach the required 25 foot pavement setback along Innovation Campus Way (PID: 095-111372-00.010). Applicant: Dave Kaldy

Mr. Christian presented the staff report.

Ms. Wiltrout asked if the applicant had accepted the conditions of approval yet.

Mr. Gallagher asked if Mr. Kaldy swore to tell the truth, the whole truth, and nothing but the truth.

Mr. Dave Kaldy, the applicant, stated he did. Mr. Kaldy stated yes, they were willing to accept the conditions that were set forth.

Moved by Mr. Smith to accept the staff report and related documents into the record, seconded by Ms. Mollard. Upon roll call vote: Mr. Smith, yea; Ms. Mollard, yea; Mr. LeJeunesse, yea; Ms. Wiltrout, yea; Mr. Gallagher, yea. Yea, 5; Nay, 0; Abstain, 0. Motion carried by a 5-0 vote.

Moved by Ms. Wiltrout to approve application VAR-21-2020 with the conditions stated in the staff report that the paved area at the office entrance must be connected into the proposed walkway, subject to staff approval, seconded by Mr. Smith. Upon roll call vote: Ms. Wiltrout, yea; Mr. Smith, yea; Mr. LeJeunesse, yea; Ms. Mollard, yea; Mr. Gallagher, yea. Yea, 5; Nay, 0; Abstain, 0. Motion carried by a 5-0 vote.

VAR-24-2020 Variances

Variance to the Hawksmoor zoning text section III(1) to allow a detached garage to be installed within the platted preservation zone and to C.O. 1165.04(a)(2)(b) to allow the detached garage encroach the 10 foot set back from the primary residence where city code requires a minimum 10 foot setback at 8 Hawksmoor Drive (PID:222-004645-00). Applicant: Jode Ballard

Moved by Mr. Gallagher to table VAR-24-2020 until the May 2020 BZA meeting, seconded by Ms. Wiltrout. Upon roll call vote: Mr. Gallahger, yea; Ms. Wiltrout, yea; Ms. Mollard, yea; Mr. Smith, yea; Mr. LeJeunesse, yea. Yea, 5; Nay, 0; Abstain, 0. Motion carried by a 5-0 vote.

Other Business

Annual Organizational Meeting

Chairperson Nomination

Mr. Gallagher nominated Ms. Wiltrout as Chairperson.

Ms. Wiltrout accepted.

Moved by Mr. Gallagher to nominate Ms. Wiltrout as Chairperson, seconded by Mr. Smith. Upon roll call: Mr. Gallagher, yea; Mr. Smith, yea; Ms. Wiltrout, yea; Mr. LeJeunesse, yea; Ms. Mollard, yea. Yea, 5; Nay, 0; Abstain, 0. Motion passed by a 5-0 vote.

Vice-Chairperson Nomination

Ms. Wiltrout nominated Mr. Gallagher.

Mr. Gallagher accepted.

Moved by Ms. Wiltrout to nominate Mr. Gallagher as Vice-Chairperson, seconded by Mr. Smith. Upon roll call: Ms. Wiltrout, yea; Mr. Smith, yea; Mr. Gallagher, yea; Mr. LeJeunesse, yea; Ms. Mollard, yea. Yea, 5; Nay, 0; Abstain, 0. Motion passed by a 5-0 vote.

Secretary Nomination

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Mr. Gallagher nominated Ms. Mollard.

Moved by Mr. Gallagher to nominate Ms. Mollard as Secretary, seconded by Ms. Wiltrout. Upon roll call: Mr. Gallagher, yea; Ms. Wiltrout, yea; Ms. Mollard, yea; Mr. LeJeunesse, yea; Mr. Smith, yea. Yea, 5; Nay, 0; Abstain, 0. Motion passed by a 5-0 vote.

Establish date, time, and location for 2020 regular meetings

Moved by Mr. Gallagher to continue to meet on the fourth (4th) Monday of each month at the City Council Chambers at Village Hall, seconded by Ms. Wiltrout. Upon roll call: Mr. Gallagher, yea; Ms. Wiltrout, yea; Ms. Mollard, yea; Mr. LeJeunesse, yea; Mr. Smith, yea. Yea, 5; Nay, 0; Abstain, 0. Motion passed by a 5-0 vote.

Mr. Gallagher polled members for comment.

Mr. Banchefsky stated he was not a member but wanted to congratulate Ms. Wiltrout on being Chairperson. Mr. Banchefsky stated he wanted to thank all BZA members and appreciated their effort and thoughts on the appeal decision.

Moved by Ms. Wiltrout, seconded by Mr. Gallagher, to adjourn the meeting. Upon roll call vote: Ms. Wiltrout, yea; Mr. Gallagher, yea; Mr. Smith, yea; Mr. LeJeunesse, yea; Ms. Mollard, yea. Yea, 5; Nay, 0; Abstain, 0. Motion carried by a 5-0 vote.

Meeting adjourned at 10:44 p.m.

Submitted by Josie Taylor.

APPENDIX



Board of Zoning Appeals Staff Report April 27, 2020 Meeting

4646 WILKIN COURT APPEAL

LOCATION: APPLICANT: REQUEST:	4646 Wilkin Court (PID: 222-000962-00) Elizabeth Kessler c/o Pete Griggs, Brosius, Johnson & Griggs LLC Appeal to staff's interpretation of "floor area" found in Codified Ordinance Chapters 1105.02(t)
STRATEGIC PLAN:	Neighborhood Residential District
ZONING:	R-3 and R-4
APPLICATION:	APL-09-2020

Review based on: Application materials received February 18, 2020.

Staff report prepared by Chris Christian, Planner

I. REQUEST AND BACKGROUND

The application is an appeal to staff's interpretation of "floor area" found in Codified Ordinance Chapter 1105.02(t). The applicant is appealing the interpretation of floor area regarding a building permit that was issued for a detached garage at 4646 Wilkin Court. The site plan submitted in the building permit included an open porch attached to the garage that staff did not include in the detached garage's area calculation per the definition of floor area in Codified Ordinance 1105.02(t).

The applicant is appealing staff's interpretation of this code section, stating that the area of the open porch should have been included in the floor area calculations for this structure. The area of the open porch is 169 square feet and if it was included in the floor area calculations it would have resulted in the garage being over the maximum allowable, 800 square foot size per C.O. 1165.06(c)(4).

Per Codified Ordinance Section 1113.01(a) Appeals to the Board of Zoning Appeals concerning interpretation or administration of this Ordinance by a staff member may be taken by any person aggrieved including a tenant, or by a governmental officer, department, board, or bureau, unless otherwise specified in this chapter. Such appeal shall be taken within twenty (20) days after the date of the decision, by filing with the Board of Zoning Appeals, a notice of appeal specifying the grounds thereof.

II. SITE DESCRIPTION & USE

The parcel is 0.50 acres according to the Franklin County Auditor's website and currently has a single family home constructed on it. The property is located in Section 1 of the New Albany Country Club—Bottomly Crescent. According to the Franklin County Auditor's website the home was built in 1990.

III. ASSESSMENT

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The application complies with application submittal requirements in C.O. 1113.03, and is considered complete. The Property owners within 200 feet of the property in question have been notified.

IV. EVALUATION

Considerations and Basis for Decision

The following information in addition to application submittal information and meeting presentations and discussions should be considered in the Board's decision for the requested appeal:

- This application is an appeal to staff's interpretation of "floor area" as defined in Codified Ordinance Chapter 1105.02(t).
- The applicant is appealing the interpretation of floor area regarding a building permit that was issued for a detached garage at 4646 Wilkin Court. Codified Ordinance Chapter 1105.02(t) (Definitions) reads:
 - "Floor area" of a building means the sum of the gross horizontal areas of the building floors, measured from the exterior faces of exterior walls. "Floor area" shall not include basements, elevator and stair bulkheads, unfinished attic spaces, terraces, breezeways, open porches, uncovered steps, or garages.
- At the time that the permit was submitted, new code changes to C.O. 1165 were not in effect therefore the previous code requirements still applied. Codified Ordinance Chapter 1165.06(c)(4) (Accessory Uses or Structures) read:
 - Area. Shall not exceed 800 square feet, provided that in no instance shall the detached garage or carport exceed the ground floor area of the main building or five percent (5%) of the total lot, whichever is less.
- The city's Codifies Ordinance does not define "area." C.O. 1105.02(v) defines "Garage, private" as a *building, or portion of building, designed or used for the storage of motor-driven vehicles owned and/or used by the occupants of the principal use of the property.* Historically city staff has interpreted "area" in city's Accessory Structure regulations (C.O. 1165.06(c)(4)) to mean "floor area" in the city's Definitions Chapter (C.O. 1105) based on the enclosed (walled) area of a detached garage since the city's Codified Ordinances define a private garage as the portion of the building used by the property owners for storage of vehicles and does not include patio space.
- Based on these definitions staff's methodology for calculating the size/area of a detached garage is based on the floor area within the exterior faces of the exterior walls (enclosed space).
- City staff calculates the detached garage as having a gross floor area of 776 square feet. City staff did not include the open porch that is attached to the garage in the area calculation requirements per the definition found in C.O. 1105.02(t) which states that open porches shall not be included in floor area calculations. The applicant is appealing staff's interpretation of this code section, stating that the area of the open porch should have been included in the floor area calculations it would have resulted in the garage being over the maximum, allowable 800 square foot size.

V. RECOMMENDATION

If the Board finds that Staff's interpretation of "floor area" is correct, the appeal should be denied. If, on the other hand the Board finds that Staff's decision was in error, the applicant's appeal should be upheld, which would require the property owner at 4646 Wilkin Court to either revise the garage so that it meets the 800 square foot maximum or apply for a variance.

VI. ACTION AND STANDARD OF REVIEW

20 0427 BZA Minutes

The Board of Zoning Appeals shall hear and decide the appeal for APL-9-2020. The action by the board shall be to approve, approve with supplementary conditions, or disapprove the request for appeal.

Per the law director's office, the standard of review is as follows. In order to approve/affirm the applicant's appeal, the Board of Zoning Appeals must find staff's interpretation of the applicable city code provisions to be unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by a preponderance of substantial, reliable or probative evidence based on the whole of the record.

Accordingly, if the Board of Zoning Appeals finds that staff's interpretation of "floor area" is incorrect, and should include the area of the porch, the Appellant's appeal should be approved/affirmed.

Absent such a finding, the city's interpretation of 1105.02(t), should be accepted and the appeal disapproved/denied.

The motion should always be made in the affirmative. An appropriate motion for this appeal would be "To make a motion to grant the appeal filed by Elizabeth Kessler c/o Pete Griggs, Brosius, Johnson & Griggs LLC for application APL-9-2020."

For the Board's clarification:

- A. Approval of the appeal would override staff's decision to deny this proposal.
- B. Disapproval of the appeal would confirm staff's decision to deny this proposal.



Approximate Site Location:

Source: Google Earth



Board of Zoning Appeals Staff Report April 27, 2020 Meeting

AXIUM 3 PAVEMENT SETBACK VARIANCE

LOCATION:	8982 Innovation Campus Way (PID: 095-111372-00.010)
APPLICANT:	Dave Kaldy
REQUEST:	Variance to Innovation District Limitation Text section II(D)(c) to allow a
	paved walkway to encroach the required 25 foot pavement setback along
	Innovation Campus Way
ZONING:	L-GE [Limited General Employment] – Innovation District Limitation Text
	Subarea A
STRATEGIC PLAN:	Office District
APPLICATION:	V-21-2020

Review based on application materials received February 28, 2020 Staff report prepared by Chris Christian, Planner

Starr report prepared by emission, ramie

IV. REQUEST AND BACKGROUND

The applicant requests a variance to the Innovation District Limitation text section II(D)(c) to allow a paved walkway to encroach the required 25 foot pavement setback along Innovation Campus Way.

Per C.O section 1113.05 property owners within 200 feet of the property in question have been notified.

V. SITE DESCRIPTION & USE

The site is located within Licking County in the portion of the business park known as the Personal Care and Beauty Campus. The neighboring properties are zoned to allow the same limited General Employment District uses. The site is surrounded by other General Employment zoned and used sites including the original Axium building to the west, Bocchi and Mast Global to the east, Magnanni to the north and Voyant (formerly known as Vee-Pak) to the south. The site will be used by Axium Plastics and a 96,900 square foot building is currently under construction on site.

VI. ASSESSMENT

The application complies with application submittal requirements in C.O. 1113.03, and is considered complete. The Property owners within 200 feet of the property in question have been notified.

Criteria

The standard for granting of an area variance is set forth in the case of Duncan v. Village of Middlefield, 23 Ohio St.3d 83 (1986). The Board must examine the following factors when deciding whether to grant a landowner an area variance:

All of the factors should be considered and no single factor is dispositive. The key to whether an area variance should be granted to a property owner under the "practical difficulties" standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable and practical.

- 1. Whether the property will yield a reasonable return or whether there can be a beneficial use of the property without the variance.
- 2. Whether the variance is substantial.
- 3. Whether the essential character of the neighborhood would be substantially altered or adjoining properties suffer a "substantial detriment."
- 4. Whether the variance would adversely affect the delivery of government services.
- 5. Whether the property owner purchased the property with knowledge of the zoning restriction.
- 6. Whether the problem can be solved by some manner other than the granting of a variance.
- 7. Whether the variance preserves the "spirit and intent" of the zoning requirement and whether "substantial justice" would be done by granting the variance.

Plus, the following criteria as established in the zoning code (Section 1113.06):

- 8. That special conditions and circumstances exist which are peculiar to the land or structure involved and which are not applicable to other lands or structures in the same zoning district.
- 9. That a literal interpretation of the provisions of the Zoning Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of the Zoning Ordinance.
- 10. That the special conditions and circumstances do not result from the action of the applicant.
- 11. That granting the variance requested will not confer on the applicant any special privilege that is denied by the Zoning Ordinance to other lands or structures in the same zoning district.
- 12. That granting the variance will not adversely affect the health and safety of persons residing or working in the vicinity of the proposed development, be materially detrimental to the public welfare, or injurious to private property or public improvements in the vicinity.

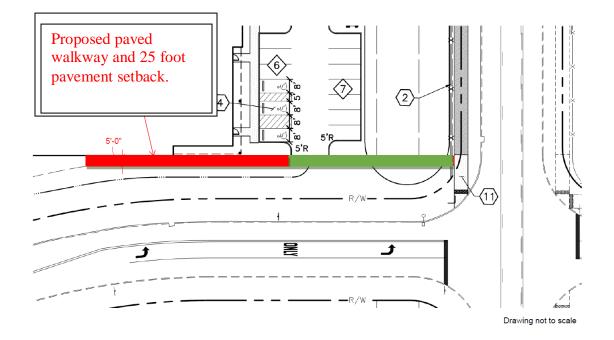
IV. EVALUATION

Considerations and Basis for Decision

Variance to Innovation District Limitation Text section II(D)(c) to allow a paved walkway to encroach the required 25 foot pavement setback along Innovation Campus Way. The following information should be considered in the Board's decision:

- 1. The site is zoned L-GE (Limited-General Employment) under the Innovation District Limitation Text. The limitation text requires a 25 foot pavement setback from Innovation Campus Way.
- 2. The applicant requests a variance to allow a 5 foot paved walkway to encroach the required 25 foot pavement setback along Innovation Campus Way. The applicant states that this paved walkway connects the 24/7 employee entrance on the side of the building to the parking lot on the site. The building's front entrance is the primary entry for the office space and is only accessible during business hours.
- 3. The proposed walkway will connect the primary employee access door to the parking lot and the leisure trail system along Smith's Mill Road.
- 4. The variance does not appear to be substantial. The applicant is proposing a minimal encroachment into the pavement setback. Plus, the 5 foot wide paved walkway improves the overall connectivity on the site and provide a connection into the leisure trail system. In order to provide additional onsite connectivity, staff recommends a condition of approval that the paved area shown at the office entrance be connected to the proposed walkway.

5. The variance preserves the "spirit and intent" of the zoning requirement and "substantial justice" would be done by granting the variance Connections from a parking lot to the public leisure trail system are permitted, therefore only a portion of this proposed walkway requires a variance as depicted below. The walkway space shown in green is permitted and the walkway space in red requires a variance. The zoning text encourages pedestrian connections throughout the site and to public trails. The applicant states that the addition of the walkway will enhance connectivity on site.



- 6. The essential character of the neighborhood will not be substantially altered since Innovation Campus Way serves as a truck route for the Personal Care and Beauty Campus. The section of street primarily serves trucks and therefore has limited required improvements. Additionally, the applicant is required to install the landscaping required per the Personal Care and Beauty Campus Landscape Standards and granting this encroachment will not impact the landscaping so the streetscape and character will not be impacted.
- 7. It does not appear that the variance would adversely affect the delivery of government services.
- 8. It appears that the variance will not adversely affect the delivery of government services, the health and safety of persons residing or working in the vicinity of the proposed development, be materially detrimental to the public welfare, or injurious to private property or public improvements in the vicinity.

V. RECOMMENDATION

Staff recommends approval of the variance request. This encroachment is limited to a five foot paved walkway which is not substantial. This walkway will enhance connectivity on site as well as connect into the leisure trail system along Smith's Mill Road which is encourages by the zoning text. Furthermore, the encroachment is along a truck road and will not alter the established visual aesthetic along Innovation Campus Way.

VI. ACTION

In accordance with C.O. 1113.06, "Within thirty (30) days after the public hearing, the Board of Zoning Appeals shall either approve, approve with supplementary conditions, or disapprove the request for appeal or variance." If the approval is with supplementary conditions, they should be in accordance with C.O. Section 1113.04. The decision and action on the application by the Board of Zoning Appeals is to be based on the code, application completeness, case standards established by the courts, and as applicable, consistency with city plans and studies.

Should the Board of Zoning Appeals find that the application has sufficient basis for approval, the following motion would be appropriate:

Move to approve variance request V-21-2020 with the following conditions.

1. The paved area at the office entrance must be connected into the proposed walkway, subject to staff approval.

Approximate Site Location:





Board of Zoning Appeals Staff Report April 27, 2020 Meeting

ACCESSORY STRUCTURE VARIANCES 8 HAWKSMOOR

LOCATION: APPLICANT: REQUEST:	 8 Hawksmoor Jode Ballard (A) A variance request to Hawksmoor zoning text section II(1) to allow a detached garage to encroach 10 feet within a preservation zone; and (B) A variance request to C.O. 1165.04 (a)(2)(b) to allow a detached garage to be setback 6.6 feet from the primary residence where city code requires a minimum 10 foot setback.
ZONING:	I-PUD (Hawksmoor)
APPLICATION:	V-24-20
STRATEGIC PLAN:	Neighborhood Residential

Review based on: Application materials received March 6, 2020

Staff Report Completed by Chris Christian, Planner

I. REQUEST AND BACKGROUND

The applicant requests the following variances to construct a detached garage at 8 Hawksmoor.

- (A) To Hawksmoor zoning text section II(1) to allow a detached garage to encroach 10 feet within a preservation zone.
- (B) To C.O. 1165.04 (a)(2)(b) to allow a detached garage to be setback 6.6 feet from the primary residence where city code requires a minimum 10 foot setback.

II. EVALUATION

The application complies with C.O. 1113.03, and is considered complete. The property owners within 200 feet of the property in question have been notified.

Criteria

The standard for granting of an area variance is set forth in the case of Duncan v. Village of Middlefield, 23 Ohio St.3d 83 (1986). The Board must examine the following factors when deciding whether to grant a landowner an area variance:

All of the factors should be considered and no single factor is dispositive. The key to whether an area variance should be granted to a property owner under the "practical difficulties" standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable and practical.

1. Whether the property will yield a reasonable return or whether there can be a beneficial use of the property without the variance.

- 2. Whether the variance is substantial.
- 3. Whether the essential character of the neighborhood would be substantially altered or adjoining properties suffer a "substantial detriment."
- 4. Whether the variance would adversely affect the delivery of government services.
- 5. Whether the property owner purchased the property with knowledge of the zoning restriction.
- 6. Whether the problem can be solved by some manner other than the granting of a variance.
- 7. Whether the variance preserves the "spirit and intent" of the zoning requirement and whether "substantial justice" would be done by granting the variance.

Plus, the following criteria as established in the zoning code (Section 1113.06):

- 8. That special conditions and circumstances exist which are peculiar to the land or structure involved and which are not applicable to other lands or structures in the same zoning district.
- 9. That a literal interpretation of the provisions of the Zoning Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of the Zoning Ordinance.
- 10. That the special conditions and circumstances do not result from the action of the applicant.
- 11. That granting the variance requested will not confer on the applicant any special privilege that is denied by the Zoning Ordinance to other lands or structures in the same zoning district.
- 12. That granting the variance will not adversely affect the health and safety of persons residing or working in the vicinity of the proposed development, be materially detrimental to the public welfare, or injurious to private property or public improvements in the vicinity.

III. EVALUATION

Considerations and Basis for Decision

(A) Variance request to Hawksmoor zoning text section II(1) to allow a detached garage to encroach 10 feet within a preservation zone.

The following should be considered in the Board's decision:

History

There have been multiple instances where requests have been made to alter or encroach preservation zone boundaries within the Hawksmoor subdivision.

- In 2007, City Council approved a modification to the final plat for section 1 of the Upper Clarenton subdivision which removed the preservation zone identified as the "no disturb zone" from lots 32 and 33 (RES-54-2007). It was determined that the no disturb zone was inappropriately identified on these lots and the modification was approved as the city.
- In 2010, the Planning Commission approved a final plat modification (ZM-3-2010) for the Hawksmoor subdivision to remove a portion of the preservation zone between lots 7 and 8 of the subdivision. A portion of the preservation zone was approved for removal in order to provide future driveway access for lot 7.
- In 2015, the Planning Commission approved a final plat modification (FPM-23-2015) that combined two lots. The combination resulted in portions of the lot being inaccessible because an existing tree preservation zone transected the middle of the property. The Planning Commission approved a portion of the preservation on lot 6 to be removed and swapped with a larger land dedication area on another portion of the lot. In this case, the application was approved due to lot access issues and the fact that the applicant was replacing the preservation zone area with new land on another portion of the property.
- In 2020, the Planning Commission denied a variance request to allow a patio to be built within a platted preservation zone at 9230 Pamplin Way in the Tidewater subdivision (VAR-112-2019). A portion of this property backs onto a tributary to the Blacklick creek with a corresponding 150 acre drainage area.

Evaluation

- 1. The applicant proposes to build a detached garage at 8 Hawksmoor. 150 square feet of the garage will encroach 10 feet into a 20 foot preservation zone on this property.
- 2. The applicant states that this preservation zone was created in order to provide a landscape buffer between this lot and the adjacent lot 7. There is a 10 wide utility easement inside the preservation zone that the applicant is not encroaching.
- 3. The variance request does not meet the spirit and intent of the zoning text which is to preserve this area and provide a buffer between the adjacent properties. There are many examples throughout New Albany where preservation zones have been established during the final plat and final development plan process in order to preserve and protect environmental features that exist in the area, and in order to provide buffering and screening for adjacent properties.
- 4. The variance request does appear to be substantial. A variance has never been granted to allow an encroachment into a preservation zone simply to build a structure. If the variance is granted, it may set a precedent where similar types of requests can be approved for other properties. As stated preservation areas not necessarily established in order to protect environmentally sensitive areas and features. There are examples throughout the rest of the city where these preservation zones are used to provide buffering within and between subdivisions.
- 5. There do not appear to be any special conditions and circumstances existing which are peculiar to the land or structure involved and which are not applicable to other lands or structures in the same zoning district. In the other examples where the Planning Commission and City Council have approved the removal of a preservation area, there were issues related to lot access or a preservation area that was established in the wrong location.
- 6. It appears the problem could be solved by some manner other than the granting of a variance. While this location creates a courtyard for the garages, there is other space on the lot, outside of the preservation zone, where this garage could be built on the side of the property.
- 7. It appears that the variance will not adversely affect the delivery of government services, the health and safety of persons residing or working in the vicinity of the proposed development, be materially detrimental to the public welfare, or injurious to private property or public improvements in the vicinity.
- (B) C.O. 1165.04 (a)(2)(b) to allow a detached garage to encroach the 10 foot setback from the primary residence where city code requires a minimum 10 foot setback.

The following should be considered in the Board's decision:

- 1. C.O. 1165(a)(2)(b) states that detached structures must be located at least 10 feet away from the primary structure situated on the same lot.
- 2. The applicant proposed to build a detached garage located approximately 6.6 feet away from the primary residence on the same property.
- 3. The two variance requests for this property are linked. The design intent of the garage location appears to be to create an automobile courtyard due where it is located in relation to the existing attached garages on the site. It appears that the garage doors are aligned with the existing attached garage across the driveway in order to achieve a symmetrical design. For this reason, the location of the proposed garage is appropriate, however, in order to allow the garage to be constructed in this location results in an encroachment into the preservation zone which staff is not supportive of. For this reason, the request is substantial and does not meet the spirit and intent of the zoning text if granted as it necessitates that another variance request be granted.
- 4. It appears that the essential character of the area may be substantially altered or suffer a substantial detriment by the approval of the variance. The orientation and position of the garage being 6.6 feet away from the house requires encroachment into a preservation zone. It appears some of the existing landscaping will be impacted and rezoned.
- 5. It appears that the variance will not adversely affect the delivery of government services, the health and safety of persons residing or working in the vicinity of the proposed development, be materially

detrimental to the public welfare, or injurious to private property or public improvements in the vicinity.

IV. RECOMMENDATION

Staff recommends denial of the variance requests. Preservation zones are created to protect and preserve environmentally sensitive areas as well as to provide a landscape buffer between residents. These preservation zones also implement and advance the goals and recommendations found in the city's strategic plans and design documents. The 2014 New Albany Strategic Plan's residential strategies include preserving and contributing to open spaces and other amenities. Preservation areas are an important amenity for the city and contribute to the goals of the 2014 Strategic Plan as well as the New Albany Design Guidelines and Requirements. The New Albany Design Guidelines state that the distinctive character of New Albany is due to a combination of architecture and the physical environment. While the design intent of garage in relation to the existing garages on the site is appropriate, this location necessitates an encroachment into the preservation zone which staff does not support.

Historically the city has only allowed driveways to encroach preservation zones in special circumstances where it is needed to allow access to the home from the public street. There do not appear to be any special conditions or circumstances existing which are peculiar to the land in this case. Granting this request may set a precedent that will allow similar types of requests to be approved for other properties within the city.

V. ACTION

In accordance with C.O. 1113.06, "Within thirty (30) days after the public hearing, the Board of Zoning Appeals shall either approve, approve with supplementary conditions, or disapprove the request for appeal or variance." If the approval is with supplementary conditions, they should be in accordance with C.O. Section 1113.04. The decision and action on the application by the Board of Zoning Appeals is to be based on the code, application completeness, case standards established by the courts, and as applicable, consistency with village plans and studies.

Should the Board of Zoning Appeals find that the application has sufficient basis for approval, the following motion would be appropriate:

Move to approve variance request V-24-2020 (conditions of approval may be added).

General Site Location:



Source: Google Earth