

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF MAY 2, 2013 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Chairman: the number of members present constitutes a quorum and the regular meeting of the Board of Zoning Adjustment called to order at 6:00 p.m. Let us have roll call.

Call of Roll:

Members Present:

Frank Lamb
Larry Cooke
Billy Mayhand
Willie Robison, Chairman

Members Absent:

Jim Moss
Philip Durant

Staff Present:

Adrienne D. Jones, Director of Community Development
Tony Hoffman, BZA Attorney
Pat Johnson, Recording Secretary

Chairman: we do not have any old business tonight, but let me say this, we have four members present tonight, which is a quorum and it will take four affirmative votes to pass an appeal. We do have a quorum. Is that correct?

Ms. Johnson: yes, sir.

Chairman: The first order of business is approval of the January 3rd, 2013 meeting minutes. If there are no other corrections, additions or deletions, the Chair will entertain a motion.

Approval of Minutes:

The minutes of the January 3rd, 2013 meeting were considered for approval.

A **Motion** was made by **Mr. Lamb** and **Seconded** by **Mr. Mayhand** to **approve the minutes.**

The Motion carried unanimously.

New Business:

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Appeal #2013-01 Sportsman's Storage, LLC

Chairman: next item on the agenda is Appeal #2013-01 Sportsman's Storage, LLC, a variance request to allow the north rear setback to be twenty-feet, in lieu of, the required twenty five-feet, and the west side setback to be five-feet, in lieu of, the required twenty five-feet. The property is Lot 2 of Sportsman Marine Subdivision, which is zoned B-2, General Business. Ms. Jones.

Ms. Jones: (displayed a Power Point Presentation of Lot 2 of Sportsman Marine Subdivision and the surrounding area). I think you have said it all. Because we have two applications tonight that are dealing with nonconformities, I felt it necessary to at least talk about nonconformity, as it is listed in our Land Use Ordinance. Article 9-2 talks about nonconformance, in that, it is the intent of this section to recognize the elimination of existing buildings and structures or uses that are not in conformance with the provisions of this Ordinance, in so much as it is a subject of health, safety, and general welfare and for the prevention of the establishment of new uses, which would violate said provisions. It is also the intent of this Ordinance to administer the elimination of nonconforming uses, buildings, and structures so as to avoid any unreasonable invasion of established private property rights. In approving variances it is the BZA's authority to authorize upon appeal in specific cases such variances from the terms of this Ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this Ordinance will, in an individual case, result in unnecessary hardship, so that the spirit of this Ordinance shall be observed, public safety and welfare secured, and substantial justice served. Such variances may be granted in such individual cases of unnecessary hardship upon a finding by the Board, and that is found in Article 21 of the Land Use and Development Ordinance. These provisions apply to both applications tonight. Sportsman's Storage is located on Gabel Street, and it is a lot that has a frontage on McIntyre Street as well. Here are pictures that show McIntyre, as well as Third Street, which shows the back of the building. This picture shows you Third Street looking toward Highway 98, you can see the boats stored in that area on the left. The property is zoned B-2 General Business and the setbacks depend on the way that the lot is configured. It appears that in 2007 the Planning Commission approved a site plan where the front setback was measured from Highway 98. The back setback would be on Third Street, and the setback to the north, which is twenty five-feet on McIntyre Street, as well as the setback on the south, which is Gabel Street, was considered a side setback.

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Ms. Jones: in 2008, the subdivision plat was approved with twenty five-feet on McIntyre Street as you can tell the subdivision plat changed the configuration of the front of the lot, and it appears that the front of the lot is supposed to be Gabel Street, making the rear of the lot McIntyre Street, and the side would be Third Street and the interior side would abut the three lots that are adjacent to Highway 98. So there in-lay's the problem. The main questions that we have to consider here is are there any topographic conditions peculiar to this lot. I would say yes because this is a double frontage flag lot and the reconfiguration of the orientation from the front, rear and side setbacks that were established with the site plan, which at that time met our zoning requirements, but at the time that the subdivision plat was laid out it did not. Are they self-imposed conditions? In reconfiguring the lot, the answer would be yes, and the encroachment to the north on McIntyre Street was an error of the contractor. Unnecessary hardship? I find that to be debatable because the question would be did we find an unnecessary hardship at this time or would we find an unnecessary hardship if the building were destroyed beyond the amount that is listed in Article 9-2 for altering nonconformities. The buildings are already there and the encroachments do not appear to be causing any hardships or causing any other problems for the existing and surrounding area, which would be Third Street, which also provides access to a church that is located north of the subject property, as well as, McIntyre Street, which also provides access for that church, this business and another business that is located on Highway 98. Would relief cause substantial detriment to the public good? I do not think so. I do not think that it would have made a difference if they had come and gotten a variance before they built it or it being replaced as it is currently sitting now. Because of those reasons I would recommend that you approve it. Again they are existing nonconforming, and they are not trying to expand it. They are just trying to get an entitlement to have a twenty-foot setback along McIntyre Street and a five-foot setback along Third Street, which is a sixty six-foot right-of-way, and I think the gravel drive is maybe ten-foot wide at this time. So there is plenty of room for expansion, if the City or the County wanted to develop that road in the future. That is all I have.

Chairman: thank you Ms. Jones. Before we have any participation would you go back to the slide showing the 2007 site plan? The site approval plan is 2007 and the subdivision approval was in 2008. What changed between 2007 and 2008?

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Ms. Jones: in 2007 they considered the entire area. If you can see the flag, that entire flag on the 2007 side was one property, one parcel, and the setback was where they measured the front on Highway 98. Now the subdivision plat was where they carved out three lots along Highway 98 and so they could not consider Highway 98 to be the front setback for Lot 2 anymore. They had to reconfigure it where you have your frontage along a public right-of-way. So they chose Gabel Street as their frontage. So the difference between 2007 and 2008 is where they measured their front setback. When they reconfigured that, it threw everything into a tizzy.

Chairman: okay, this is Gabel Street out here right and this would be Third and McIntyre back here?

Ms. Jones: that is correct.

Chairman: okay. Does anyone else have any questions for Ms. Jones?

Mr. Lamb: had the storage buildings been constructed by 2008 or just the subdivision of the lot?

Ms. Jones: let me see.

Chairman: I believe it was done prior to that. It might have been done in 2008. Because I stood there at my sons business at Shoreline Power Equipment and watched them while they built those first units there.

Ms. Jones: the site disturbance permit was issued in 2007.

Mr. Lamb: I just want to be sure in my mind that the storage buildings were not built when it was five-feet, which is 2007 and in 2008 it was twenty five-feet, and at that point that is when they built the buildings, that is what I am trying to clarify in my mind.

Mr. Smith: my name is Stewart Smith with HMR. It is my understanding that construction was beginning prior to the recording of this plat, and the twenty five-feet was actually thought of, on our part, as a Scrivener error, as the five-feet was based on Third Street being considered an alleyway.

Chairman: Third Street at one time was dirt, it was not gravel.

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Chairman: you are saying that they considered it as just an alleyway that had been built by vehicles going in and out there. Because I use to make that little circle my way many times to dodge the potholes.

Mr. Smith: yes, sir. Mr. Eady, who was the former Planning Director, considered it that, and that was what one of his statements were concerning it, that it was five-feet off that line. So after the site development plans and everything were processed, then the subdivision came along after the fact, and then that is where, like Ms. Jones said or explained, the confusion came about.

Chairman: does anyone have any questions?

Mr. Lamb: for you Ms. Jones. It says in here that the Planning Commission approved a five-foot setback. Now it is my understanding that only the Board of Adjustment can approve a variance from the established setbacks under the Ordinance. Where am I going wrong?

Ms. Jones: the Land Use Ordinance says that there is no rear setback except where there is five-feet abutting an alley or thirty-feet where abutting a residential district. They considered Third Street to be an alley, so five-feet was the zoning district requirement.

Mr. Lamb: okay.

Ms. Jones: it is just when they reconfigured the frontage, side and rear, then those numbers switched. I would contend that Third Street is not an alley, but it is a recorded right-of-way. Although, it is a gravel driveway it is still a right-of-way. It is not designated as an alley, as alleys are specified on subdivision plats and lots. So I would contend that Third Street is not an alley, McIntyre Street is not an alley and they should be subject to whatever the minimum district requirements are from a street or a corner lot.

Mr. Lamb: at the present time Third Street is maintained by the County as a street?

Ms. Jones: well, the City of Daphne does some maintenance in the area too. They both do maintenance in that area.

Mr. Lamb: so they are considering it not an alley, but a street.

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Ms. Jones: yes, sir.

Chairman: McIntyre is considered a street, I hate to do like some people do, be antidotal, but my sons business there paid City taxes, so therefore it was in the City. It was maintained by the City and after doing much research, and at that time, Ken Eslava was the Public Works Director, and he and I looked at it and found out that yes it is maintained by the City so therefore that was a city street. It was not an alleyway. Even though when you get to the woods and it picks up on the other side that is maintained by the County, that part of McIntyre is in the County, but coming off of Highway 98 and going back to where Third Street comes in that is a street, and I maintain that Third Street, even though they said it was an alleyway, that it was a street because it was on the map as a city street, I believe it was. So how did it get from twenty five-feet to five-feet? Go over that again. Because somewhere down the line it was originally the twenty five-feet then it went back to the five-feet or five-feet to twenty five-feet, one or the other.

Ms. Jones: well, I cannot defend or explain what Mr. Eady's thought process may have been, but the Ordinance has always said what Article 13 currently says about setbacks.

Chairman: so if that was quote, "by the City", deemed an alley then the five-feet would be correct.

Ms. Jones: that is correct.

Chairman: if it was deemed as an alley, by the City, if it was not a street the twenty five-feet does not come into play. Is that correct?

Mr. Lamb: originally.

Ms. Jones: right.

Mr. Lamb: subsequently on the second plat, 2008 was it?

Ms. Jones: yes that was the subdivision plat. You have got your site plan and you have the subdivision plat.

Mr. Lamb: the subdivision plat approved in 2008 recognized it as being a street.

Ms. Jones: yes, it was recognized as now being a city street.

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Mr. Lamb: and they said the setback was twenty five-feet. However, the building was already constructed.

Ms. Jones: the building was already built, that is correct.

Mr. Lamb: based on prior knowledge that it was five-feet and they thought they were okay.

Ms. Jones: that is correct, yes. So it was not a Scrivener's error, it was on purpose, this is what the book says should be on the subdivision plat, and that had to be on the plat before it could be approved, but that does create a conflict. Well it does create nonconformity for the buildings that are already there.

Mr. Cooke: Gabel Street, Third Street and McIntyre Street. On the city maps they are not shown as city streets. Is that correct?

Ms. Jones: I have no idea, but what I can show you is, if you will look at the zoning map there. It does show that Third Street is outside of the Daphne city limits, but it also shows that McIntyre Street is within the city limits.

Mr. Cooke: okay. So one street is not within the city limits of Daphne?

Ms. Johnson: Third Street is not ours.

Ms. Jones: Pat says that Third is not ours.

Mr. Cooke: okay.

Chairman: Third is not in the city?

Ms. Jones: no.

Chairman: okay.

Ms. Jones: but that makes no difference in whether it is considered an alley or a right-of-way. It is still a right-of-way.

Mr. Cooke: but is that within the County then, that street?

Ms. Jones: it would have to be because Montrose is Baldwin County's jurisdiction.

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Mr. Cooke: I just wondered if the church that is located on the northwest corner that has two signs up stating they are within the city limits of Fairhope were, that is what I was wondering.

Ms. Jones: some businesses and entities if they have the zip code claim that municipality. So they probably have a Fairhope zip code.

Mr. Cooke: so this street is a County street?

Ms. Jones: Montrose is Baldwin County. Yes, sir.

Chairman: Ms. Jones, Sportsman's Marine itself, the boat and repair, that is in the County?

Ms. Jones: that is correct.

Chairman: the storage facilities are in the City because I believe they requested that they be annexed into the City. Just the storage facility and not, I call it the store, the store itself.

Ms. Jones: when it was annexed it was vacant property, but they did annex with a request for B-2 zoning.

Chairman: I could be wrong on this, I believe that the Church of the Apostles and all of that property surrounding it was owned by one individual, from where Enterprise is located and where Home Renewer's was, it was all owned by one individual and I believe she sold the property to Church of the Apostles. If I am not mistaken the property that she owned was annexed into the City. Was it or was it not?

Ms. Jones: I am not sure what property you are talking about.

Chairman: the part that she requested to be annexed into the City or was it just the property on Highway 98 that she asked to be annexed into the City?

Ms. Jones: just the property on Highway 98 says Ms. Johnson.

Chairman: does anyone else have any questions?

Mr. Lamb: let me clarify this. The storage buildings are in the City.

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Ms. Jones: yes.

Mr. Lamb: the Sportsman's Marine along Highway 98 is not in the City.

Ms. Jones: that is correct. It is not. They opted out.

Mr. Lamb: so the little sign there stating Daphne City limits does not mean anything?

Ms. Jones: what matters are Ordinances that have been approved by the City Council, and we do not have an ordinance that says that Sportsman's Marine legal description is within the city limits. They have not made a request to come in. I think they purposely wanted to stay in the County.

Mr. Lamb: it would seem to me that Sportsman's Marine comes to the Planning Commission saying this is what we would like to do and they say okay. They look at it and then they say in 2006 you can build five-feet from the western side, and then two years later the Planning Commission says the Ordinance says you have to build twenty five-feet, well they have already built the building based on the prior submission to the Planning Commission. So it seemed to me that Sportsman's Marine is following the dictates of the Planning Commission, which changes their mind.

Ms. Jones: no. The original site plan approval did meet the zoning regulations for setbacks.

Mr. Lamb: because they said it was an alley.

Ms. Jones: because Mr. Eady, as well as HMR, considered that to be an alley. Mr. Eady went to Public Works in 2008 and I got to be here in 2008, and this book says that setbacks should be thus and so, and if this book says it should be thus and so, then in order for it to be approved by the Planning Commission, the plat would have to say thus and so. Because I know that the Planning Commission cannot grant variances on setbacks then it would have to be by the book. So that is the reason why it is twenty five-feet because the book says it should be twenty five-feet. So it is a matter of Mr. Eady's understanding and enforcement and my understanding and enforcement.

Mr. Lamb: it is our position that we have to correct this misunderstanding.

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Ms. Jones: yes, sir.

Mr. Mayhand: that leads me to ask my question that I have been pondering here in looking through this book, but I have not found it. Could you tell me why this variance is being requested?

Ms. Jones: because they wanted it. Let us ask Stewart.

Mr. Smith: it is kind of a long story. The individual units themselves are being sold or they are beginning to be sold as condo units, they are individually assigned out. In order for the County to acknowledge each individual unit as a private parcel or for them to give it an individual tax identification number itself, clear title has to be shown with the development. From there when they went to the title company, the title company started reviewing all of the information and a lot of this was caught by the title company. So this is the process that we are doing to be able to clear up the title by creating a re-plat of the development to re-record, and then go back through the process of creating the condominium documents.

Mr. Mayhand: thank you.

Chairman: yes, I believe the original plans call for them to be sold as condos, but the economy kind of went south and so they leased some of them out, originally. So now they have gone back to selling the units and that is why they want this variance to get this cleaned up. Are there any other questions? Ms. Jones.

Ms. Jones: yes, sir.

Chairman: I do have a problem with the contractor in building this. It called for twenty five-foot setbacks and they built twenty-foot setbacks. How could the contractor go wrong and go five-feet outside of the setback?

Ms. Jones: before any site is developed there is a survey done. So the property line should have been established. The corner should have been established. So it would have been encumbered upon the contractor to measure from the established boundary lines, to find where the setbacks should have been.

Chairman: so HMR the engineer and whoever the surveyor was on it.

Ms. Jones: they should have. I do not know that for certain. Stewart, can you speak concerning that?

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Mr. Smith: in that particular case the contractor themselves were responsible for staking out the units, and back at this time I do not believe that HMR, I could be corrected with that, but they were not a part of the actual construction staking of the units. They are now and continue to be done by the contractor themselves.

Chairman: HMR was strictly the engineer, PPI, out of Mobile on Moffett Road, I believe was the contractor that constructed the original building. Now I do not know about unit two, the second building, as to who the contractor was on that. Thank you, I appreciate it.

Mr. Cooke: Ms. Jones is it a requirement that anyone from the City verify the location of any buildings or lots or anything of this effect?

Ms. Jones: I do not know this for certain because I have never asked, but I thought that Building Inspections would have to have an Inspector to come out and measure footings that have been poured for foundations. I do not know for certain, but that is what I thought.

Mr. Lamb: well this Board has been told in the past by the Building Inspector that he does not have time to do that. Well I do not know who has the time. Now is it fair to say that PPI assumed that from prior things that there was a five-foot setback, without checking to see if there had been any subsequent changes?

Ms. Jones: what I imagine PPI should have had was a current set of site plan drawings that showed where the setbacks were supposed to be.

Mr. Lamb: but if they did not ask for any changes they made an assumption that it was five-feet.

Chairman: Does anyone else have any questions? Is there anyone here tonight that would like to speak in favor or in opposition of this appeal? Let the record show that there is not anyone here to speak in opposition, public participation is closed. Mr. Lamb.

Mr. Lamb: let me ask one more question. In the event that this appeal is denied by this Board, the next step is Circuit Court, is that correct?

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Ms. Jones: that is correct.

Mr. Mayhand: if the setbacks are approved, would there be a problem with running utility wires, lines or sewerage or anything like that? Would that ever come into effect with the setbacks? Is that not why we have those setbacks?

Ms. Jones: that is a very good point, but because you have the sixty six-feet of right-of-way on McIntyre and Third there is room for utilities along the right-of-way, that is where the utilities are supposed to be.

Mr. Mayhand: is that part of the request for that particular street?

Ms. Jones: yes, what is part of the request is Third and McIntyre, for the setback on Third to be five-feet and the setback on McIntyre to be twenty-feet.

Mr. Mayhand: so if this was approved there would still be room for the utilities?

Ms. Jones: there should be. Yes, in the right-of-way there should be room. Should be, I cannot guarantee it because I do not have a utility plan in front of me to look at, but it should be in theory.

Chairman: somewhere down the line somebody dropped the ball, from preconstruction to construction. Sometimes I feel as if we fall, as a City, we fall far short in our procedures from start to finish, in making sure things are done the way they should be. Because there are times when you are presented or the Planning Commission is presented with a set of plans, and they change them. The contractor or somebody goes out there and does not do it exactly the way that it was approved and it makes them look bad if they are the ones that approved it, when they were not the ones that approved it. Then the contractor comes along and builds it and says what are you going to do, make me tear down the whole construction job that it has cost me a million dollars or more to build. Well I know of places where they have made them take two stories off of a building because they were told it could not go but so high because it was in a landing zone area. Somewhere, somehow, we have got to have something that will hold people accountable, and I am not talking about the City. I am talking about the contractor or whomever. Mr. Lamb brought this up way back last year, that the contractor can be fined for doing this.

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Chairman: and this, oh, I thought that was where it was, the dog ate the homework type stuff went out the window a long time ago. Does anyone have any other questions or comments? If not, the Chair will entertain a motion and it must be made in the affirmative.

A Motion was made by Mr. Lamb and Seconded by Mr. Mayhand to approve Appeal #2013-01, Sportsman's Storage, LLC, for a variance to allow the north rear setback to be twenty-feet, in lieu of the required twenty five-feet, and the west side setback to be five-feet, in lieu of the required twenty five-feet. The property is Lot 2 of Sportsman's Marine Subdivision, which is zoned B-2, General Business.

Upon roll call vote, the motion failed.

Mr. Cooke	Aye
Mr. Mayhand	Aye
Mr. Lamb	Nay
Mr. Robison	Nay

Chairman: your appeal for a variance is denied. You have fifteen days from today to notify Community Development in writing of your plans to appeal this decision with the Circuit Court of Baldwin County. You can pick up your paperwork in the Community Development office in the morning after nine o'clock. Thank you.

New Business:

Appeal #2013-02 Daphne Apartments, LTD & Bay Breeze II, LLC

Chairman: next item on the agenda is Appeal #2013-02 Daphne Apartments, LTD & Bay Breeze II, LLC, a variance request to allow existing setback encroachments and establish setbacks for certain Bay Breeze Apartment buildings located at 29150 Lake Forest Boulevard zoned R-4 High Density Single & Multi-family residential. If granted the setbacks shall be as follows: Rather than reading them please note them on the screen (a) thru (h).

(a) Northeast corner of Building #5, nine point five-feet in lieu of the required twelve-foot side yard setback;

(b) Southwest corner of Building #11, nine point five-feet in lieu of the required ten-foot side yard setback;

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(c) North side of Building #6, nine point six-feet in lieu of the required ten-foot side yard setback;

(d) Northeast point of Building #14, four point one-feet in lieu of the required thirty-foot rear yard setback;

(e) Building #16, fifteen-feet in lieu of the required thirty-foot rear yard setback;

(f) Building #17, fifteen-feet in lieu of the required thirty-foot rear yard setback;

(g) Building #18, fifteen-feet in lieu of the required thirty-foot rear yard setback;

h) Building #19, twenty-feet in lieu of the required thirty-foot rear yard setback. The request, if granted would also permit the use and application of the following parking ratio: 1.5 parking spaces per unit per Article 16-2 of Ordinance 2002-22, as amended in lieu of 2 parking spaces per unit, per Article 16-2 of Ordinance 2012-54, as amended.

Ms. Jones: (displayed a Power Point Presentation of 29150 Lake Forest Boulevard, Bay Breeze Apartments) on your overhead you see Phase I and Phase II of Bay Breeze Apartments. The applicant has submitted a request for variances. You have a letter in your packet from Rowe Surveying & Engineering Company, which is a narrative that accompanies the variance request. I would like to just highlight a couple of things that are in the letter. It says both complexes were constructed utilizing approved site plans. I can affirm that that is correct. It also notes that this application is a request for variance approving the placement of all buildings within Bay Breeze Phase I and Bay Breeze Phase II as shown on an ALTA/ACSM Land Title Survey, which they have provided, which means that they are not asking to increase the number of units or make changes to the site itself, but they are looking for approval of the site as it is currently situated. The letter also mentions that the parking for the complex was built in compliance with the regulations in effect at that time, which is true, and the minimum parking was 1.5 parking spaces per unit. In 2011, the City Council adopted a new Land Use and Development Ordinance and they did increase the parking requirements for multi-family from 1.5 parking spaces per unit to 2.0 parking spaces per unit. It is probably more easily viewed in your packet than on the overhead, but the property is zoned R-4, and R-4, Multi-family has specific setbacks, as noted here on the screen.

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Ms. Jones: here are images taken at the apartment complex. The first on the left is the clubhouse, the one at the bottom right shows the transition from Phase I to Phase II, you can see the property falls a little bit to the south, and it rises on the east side. You can see this embankment in the new phase where topography is an issue. I tried to get a picture of Lake Forest Lake, which is located behind Phase II. Again, as with the first request, in letting each tub sit on its own bottom, I have made a recommendation that you approve this request, subject to the map that has been presented, and I also made a recommendation that you approve the parking to be 1.5 parking spaces, in lieu of, having to conform to our current parking provisions. That is all.

Chairman: Ms. Jones, before the gentleman gives us his name, I do not know what page it is on, but under staff comments, it talks about the parking spaces, third paragraph down. It says the site plan for Bay Breeze Apartments Phase II cites the required parking for 72 units verses or as 108 spaces, 111 spaces were proposed thereby exceeding the minimum standard. In total, there are 186 units and a total of 296 parking spaces, where 279 is the minimum required. What is the maximum?

Ms. Jones: we do not do maximum.

Chairman: we do not do maximum. We just say that this is the minimum that you can have.

Ms. Jones: yes, sir.

Chairman: okay, first paragraph under staff comments going back to Daphne Apartment 1995. A plot plan from Rester & Coleman Engineers is attached for us to review, and it shows the setbacks. You are of the assumption that they were in conformance with the zoning ordinance in place at that time.

Ms. Jones: the way that they were laid out, yes.

Chairman: at that time?

Ms. Jones: the site plan showed conforming setbacks, yes.

Chairman: alright, ALTA/ACSM survey shows that 3 buildings were constructed over the setbacks, so noted on the plot plan and thus encroachments exist in Phase I. Now does that mean that they were already built over the encroachment?

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Ms. Jones: it means that I do not know when it happened. It had to have happened during construction that they encroached. Because again the site plan showed conforming setbacks so if there is a deficiency it was created by the construction of the building.

Chairman: in Phase II, which was built backing up to Lake Forest, the property line is the high water mark on the Lake. The high water mark is the property line, so when they established that property line from the high water mark then they should go back whatever the setback is and build from there.

Ms. Jones: that is correct. It should be measured for their rear setback. The rear setback should be measured from the high water mark.

Chairman: from the high water mark of Lake Forest Lake, so going back from there and it is kind of uphill from the lake, and I have not been out there in quite some time, so when they were constructing them that should have been taken into consideration when they built those units. If there were some problems with them doing that then it should have been addressed at that time. Once again we are coming back on something, and there is one unit in there, Unit 15, there is no setback request on it, it is 14, 16, 18, 19, and then some before them. How did Unit 15 fall within the required setbacks, just the way that the land runs?

Ms. Jones: just the way that the land lays, yes, sir. You will see that it is an irregularly shaped lot and the property does rise coming to the south. The site plan that is on file in Community Development does not show setbacks at all. There is no reference to setbacks, but in looking at the project for zoning certification, if a letter is requested for zoning certification, and in my reviewing, I know that the R-4 setbacks are established. If the front of the building faces the parking lot then the rear is the high water line. In looking closely at the setbacks I realized that most of the buildings were nonconforming for the rear setback. Although we could say that it is justified, yet there was no approval on deviating from the minimum setback requirements. I do have to say that it is a viable development, and it seems that it has been well kept, and that is part of the reason that I recommended approval on it. Because if a storm came through and wreaked havoc on the place, rebuilding it would not be a problem, and it would not cause any detriment to the adjoining properties, but it would be more of an asset for them to be able to rebuild

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Ms. Jones: rather than having to wait and go through the process of getting approval. Another thing that I did not mention is that it is a closed loop community, because there is only one way in and one way out. So their neighbor is the golf course on one side and the sewer treatment plant on the other side, and the lake on the back side.

Chairman: the last paragraph, the application of the minimum area requirement would create an unnecessary hardship. Rebuilding in conformity would shift the buildings in Phase II closer to the parking area out of alignment and into the driveway, the driveway and parking area would need to be shifted to the south into a hill. They are currently aligned and have a symmetrical balance. Well sometimes you have to do these things. It becomes hard for you, but sometimes if you are going to rebuild and I am sure those people up in North Alabama, who had tornadoes blow their houses away, might have had to rebuild and create things that were necessary for them to do, tougher. But sometimes you have to do those things. I am not saying one way or the other that this is the case, I am saying that sometimes those things happen.

Ms. Jones: yes, sir. One thing that I do want to refer back to is the intent of the nonconforming provision. It says to eliminate uses that would cause an unreasonable invasion of established private property rights. I do not see that approving this even now or in the future would be an invasion on anybody's property rights. That is just my opinion.

Chairman: okay. Thank you, Ma'am. Does anyone have any questions for Ms. Jones? Sir, I apologize for your having to stand there while those questions were asked, but would you please state your name and who you represent for the record.

Mr. Rowe: I am Don Rowe with Rowe Surveying & Engineering, we are the one who drew up the survey plat. Ms. Jones would you back up to the survey plat? The hardship here is that these two properties are being combined into one entity or one entity is going to own both phases, and to do that they need financing and to get financing they have to have insurance, and to get insurance we have got to have this variance. Because if the insurance company does not know that the buildings can be put back where they are we cannot buy the insurance and if you cannot buy the insurance you cannot get the financing, so the whole thing is blown up. It is really not as bad as that sounds because the buildings were built according to an approved site plan. It did not have any setbacks on it.

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Mr. Rowe: there were no requirements on the site plan and I think they were probably shooting for ten-feet on the sides, and I think in Phase II probably what is currently being called a back yard was probably thought to be a side yard because it is kind of an extension of the side yard for Phase I. Be that as it may, it would be impossible to rebuild the Phase II buildings to the south, not only because of the parking lot being in the way, but because of the terrain. There is a tremendous hillside to the south of the parking lot in Phase II. So there is a hardship there if we had destruction in just being able to rebuild them. All we are trying to do is get permission to live and let live in the position that the buildings are, and if a bad storm comes along we can take the insurance money and put them back, but without the variance, apparently the whole deal cannot happen.

Chairman: Mr. Rowe, did I hear you say that there were no setbacks requirements when Phase II in 2008 was built?

Mr. Rowe: no, sir, I did not say that. I said there were no setbacks shown on the approved plot plan.

Chairman: Ms. Pat can you read back what he said? I thought he said there were none required on the plat or did I hear him wrong. I heard none were shown.

Ms. Jones: he may have misspoken. There were none shown, but there were applicable setbacks.

Mr. Rowe: that is what I meant to say. I did not mean to say there were no requirements, but there were not on the approved site plan.

Chairman: thank you, sir. Does anyone have any questions for Mr. Rowe?

Mr. Lamb: what does that mean? There were no setbacks on the approved site plan.

Ms. Jones: there were no setbacks listed on the site plan, but there were setback requirements in existence per the Land Use Ordinance.

Mr. Lamb: which takes precedence?

Ms. Jones: I say that the Zoning Ordinance always takes precedence unless you have a variance that has been approved by you.

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Chairman: and who grants variances?

Ms. Jones: the BZA.

Mr. Lamb: in affect the contractor, who looks at the plans?

Ms. Jones: I am saying the engineer presented it without setbacks on it. I am saying that staff reviewed it and there were no setbacks on it and still made a favorable recommendation to the Planning Commission and the Planning Commission took their word and they approved it.

Mr. Lamb: I am trying to be reasonable as to whose responsibility it is. Where does the failure go?

Ms. Jones: I can tell you as of today when a site plan is presented, I check for setbacks.

Mr. Lamb: at this point you were not approving them?

Ms. Jones: no.

Mr. Lamb: now can one reasonably say that since there were no setbacks shown on the site plan and it was approved, even though there is an Ordinance that says there are setbacks that if the contractor then builds buildings that violate the setbacks, can you reasonably say that he was in error?

Ms. Jones: I do not know.

Mr. Lamb: because if he is looking at a site plan with no setbacks would a reasonable person say he was in error or would a reasonable person say well he should have investigated the Ordinance that governed it?

Ms. Jones: the contractor is never responsible for checking the Ordinance. It is the Engineer's job to make sure that they present civil plans that meet the Ordinance. It is not the Contractor's job. The contractor uses the documents that have been designed and approved by the Civil Engineer.

Mr. Lamb: so in this instance would a reasonable person say that it was the engineering company that failed to discharge their responsibility?

Ms. Jones: I say that it would be shared responsibility.

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Mr. Lamb: shared responsibility.

Chairman: the Engineer's and the City.

Ms. Jones: the Engineer's and Staff. Because it is Staff's job to review the civil plans and it is the Civil Engineers job to present civil drawing that meet the Land Use Ordinance. It is what it is and that is where we are today.

Chairman: Mr. Rowe you were not the original engineer surveying this were you?

Mr. Rowe: I sure am glad I was not.

Chairman: I have never heard of having site plans without setbacks on them.

Ms. Jones: neither have I.

Chairman: that is hard to get your arms around. There were no setbacks on the site plan.

Mr. Rowe: there were dimension on where the contractor was supposed to put the buildings. Ninety-eight percent of them are perfectly in the right place. There are a couple of them that are two or three, six inches out of pocket, but for the most part the thing is a rubber stamp of the site plan that was approved.

Chairman: yes, some of them are ten-feet out of pocket. One of them is about fifteen-feet off.

Mr. Rowe: from the currently zoning code, correct, but not from where they were placed on the approved site plan.

Mr. Lamb: there are eight buildings involved and they range in violation of the setbacks from point four to twenty five point nine feet.

Ms. Jones: point four is in Phase I. The more minor encroachments are in Phase I. The more excessive encroachments are in Phase II. Now, I do not know if I mentioned this, but in looking at front and rear setbacks, the front of the building faces the parking lot and the rear of the building is the opposite of that. So I could not find any rationality in saying that the north portion would be a side and the south portion would be a side and the portion that is contiguous to Phase I, would be a front.

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Ms. Jones: and then a portion that is contiguous to, I think, Lakeview Townhomes would be the rear, I could not wrap my mind around that, to say that it was supposed to be. Because in looking and measuring the setbacks for Phase I, I looked at the front of the building, and the opposite as being the rear, so there we are.

Mr. Rowe: all those buildings with the short rear setbacks of course are along the Lake so we are not looking in anybody's window there. We are looking across the Lake to the back of Jubilee Square.

Mr. Cooke: Ms. Jones, the Lake Forest Lake, who owns it?

Ms. Jones: Lake Forest Property Owners Association.

Mr. Cooke: okay and the high water mark is the boundary?

Ms. Jones: yes.

Mr. Cooke: and that was established a number of years ago?

Ms. Jones: it was established more than likely by some recorded subdivision plat. It is kind of like Mobile Bay, where the tide line meanders, but there is a certain mark where they establish as being that boundary.

Chairman: I have a little problem when you go from thirty-feet down to four point one feet, in lieu of, the required thirty-foot rear yard setback, which is on Unit 14.

Mr. Rowe: Mr. Chairman, the one that is four-feet is on the upper left on Phase II and you can see that the property line has got a gash in it. So it is only four-feet right at the apex of the property line, and the rest of the building is fairly normal, but here again that is the way that the site plan was approved.

Chairman: yes, but it says from thirty-feet to four point one foot. So whether it is one little corner of it or whether it is the whole thing it is being asked for the entire building, unless they want to cut the corner off, which they do not, and nobody wants them to.

Mr. Rowe: all we want to do is to be able to put the building back if it gets blown away by something, and certainly I cannot argue with you, for and in lieu of, the rear setbacks.

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Mr. Rowe: I just wanted to point out that it just that little gash. The property line here is established by the twenty-foot contour it is not depending on where the water is. A twenty-foot contour is reasonable though because I know the dam is at nineteen.

Chairman: I have always been told that the high water mark in the Lake was the property line.

Mr. Rowe: well it was probably intended to be, but the deed for this property says elevation twenty-feet.

Ms. Jones: I stand corrected in that then. I did not know that it was the contour that established the property line.

Chairman: any other questions for Mr. Rowe?

Mr. Cooke: Ms. Jones, for the Lake, is this thirty-foot setback completely around the Lake or just for these buildings?

Ms. Jones: do you mean just for this development or any development that is contiguous to the Lake?

Mr. Cooke: is this requirement for any development with this setback?

Ms. Jones: it is for any development that is zoned R-4.

Chairman: yes.

Mr. Cooke: it has nothing to do with the Lake?

Ms. Jones: no, because it is R-4 zoning.

Chairman: you go across the Lake and you have homes over there, on the other side of the Lake, on Ridgewood and they have a different zoning than this.

Ms. Jones: if they have a different zoning then yes they would have a different setback. Their setback would depend upon their zoning classification.

Mr. Cooke: and nothing to do with the Lake.

Ms. Jones: nothing to do with the Lake, just being the front or rear of their property.

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Mr. Cooke: the reason I am asking is because everyone from our Congressional office, to the Mayor, to everyone else that has had meetings over this, and I just wondered to, if this had anything to do with it because it stated here in a October 1995 meeting that this land does not lend itself, because of the excessive grades to any other variation, except for this building. I just wondered about that. It is the third sentence from the bottom there on page five. There have been a number of meetings and issues over the years that you are aware of over this, and I just wondered if this had something to do with it because there is quite a grade there. Now this is concrete, asphalt and these apartments rather than natural vegetation. You know the wooded areas, the grasses, and trees there between the Lake and the buildings. I was just wondering about that and if you had heard any issues about this.

Ms. Jones: from any adjoining owners?

Mr. Cooke: no, at these meetings and so on and so forth.

Ms. Jones: I was not here back then. I came in 2006.

Mr. Cooke: okay.

Ms. Jones: but there were several meetings on the development of this site, and you can see that some were denied and some where they were approved and not developed. Then they finally got a site plan approved that they went ahead and developed in June 2006.

Chairman: Mr. Hoffman, I know in the past we have put caveats on something approved. If this, this and this is done then it is approved. Can it be partially approved? They are wanting money. What they want to do is borrow money. Can half of it be approved or any section of it be approved and the other not? Or can a caveat be put in there that should more than fifty percent of the units be damaged or destroyed they would have to be built to conformity?

Mr. Hoffman: as to that caveat about the fifty percent, I have not researched that issue, but I can. My concern would be that you would be usurping the authority of the BZA, at the time that may come into play. In other words the building has not been blown over yet, but you would be making your decision that it can be rebuilt, and granting basically an additional variance on an conforming structure.

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Mr. Hoffman: and you may not be the individuals at the time dealing with that fifty percent, that would be my initial thought process, but I have not looked at it to see whether or not the Attorney General has allowed such a provision in the past. As for approval, you can approve it with caveats as needed.

Chairman: beg your pardon.

Mr. Hoffman: you may approve with caveats as needed.

Chairman: okay, thank you.

Mr. Rowe: Mr. Chairman, the fifty percent rule is where we are now. The property is grandfathered nonconforming, so if more than fifty percent of it is destroyed now that is where we are, we have to move it. So that is what we are trying to get the variance for so we can put it back like it is if more than half of it is destroyed.

Chairman: right that is what I am saying, yes it is nonconforming now. Correct. If the appeal is approved, and we hope it never happens, but a hurricane comes through and wipes them out, obliterates them, at the present time they could go back on the same slabs back where they are now if this is approved. Is that correct?

Mr. Rowe: yes, sir, that is what we are asking for.

Chairman: thank you. Any other questions?

Mr. Lamb: it is my understanding that the BZA is being asked to approve a series of errors by other people, and it comes down to us because they discharged their responsibility, that the BZA now is asked to look past that and say well that is okay. Am I incorrect in that?

Ms. Jones: you are being asked to discharge the responsibilities that have been vested in you, which are to determine whether there is a hardship or some condition that is particular to this site, and you are to determine whether their request is reasonable or appropriate, rather than focusing on the failures of others in the past. I think your focus should be on the criteria for approving the variance because that is why the BZA exists.

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Mr. Lamb: would it be unreasonable to say that because I did not take the proper steps to ensure that a given action is taken that that is in fact a self-imposed hardship?

Ms. Jones: I would not say that. I would say that the problem is that someone built according to plans that were approved, and they are now asking you to approve the development as it stands, not to expand it, not to do anything to the site, but the ability to rebuild it if it gets destroyed to a point that they need to rebuild it immediately. It is a viable development and I think it would be in the City's best interest that if anything happened to it they would have the right to get in there and put it back the way it should be.

Chairman: is there some way that the Planning Department can ask the City Council to tighten up a few issues, and can the Planning Department ask the Planning Commission to tighten up in a few areas? That the ordinances that they deem necessary, as I say we are either going to control the ordinances or the ordinances are going to control us, and I had rather control them without having one thrown in there like the Alabama Constitution for every time you want to do something they throw in an amendment to it, but I want to help people out as much as I can and fall within that perimeter of these are the issues that you are faced with. It is a little different in this situation than it is in cutting five-feet of a building off. This is a little different. You have got the convoluted type of situation there. So that is why I am asking all of these questions.

Mr. Jones: well what I can tell you for certain is that, I cannot guarantee it and I cannot promise it, but I can tell you that when I review site plans I review setbacks. Upon the completion of a building I require letters from the Engineer and the Landscape Architect to make sure that the design meets the plans that have been approved. Now in the past it may have been a little bit more flexible, and you may get other requests just like this one because somebody did not follow the book. You may. You may get a series of them because everybody is trying to get refinanced, and the title company wants to clear it all up.

Chairman: I know Mr. Merchant before he gives a C/O he looks at certain things that has to do with the building, perhaps it can be put in there whether it takes an engineer or a surveyor or whomever to go out there when it is finished before he gives the C/O and says look you are ten-feet outside of the setback line and I am not giving you a C/O, that would nip it in the bud, as Barney says.

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Ms. Jones: it would be nice to know that once the footing is poured, once the permanent part of the structure is poured to know that it is in conformance with the requirements at that time, so that they do not invest any more money into it.

Chairman: I know that the developer and the builder of the units do not want to have to go through this. They would rather do it right, but if they build it the way the plans had to build it then somebody prior to them is in error. Thank you, Mr. Rowe. Does anyone else wish to address the BZA? Yes, sir, if you would step up and state your name and address for the record, and let us know if you are in favor of or opposed to this appeal.

Mr. Tonsmeire: my name is Skipper Tonsmeire, our office is in Fairhope.

Chairman: well you are certainly in favor of it.

Mr. Tonsmeire: yes, sir. I also would have to say that since I was there with Bill Eady when we came up with this site plan in 1994 that anything that we did wrong back then that I had a hand in, but I had a specific discussion with Bill. Because as Ms. Jones has pointed out it is kind of hard to tell where your side yard and rear yard are on these because the buildings face the parking lot, and some of them are turned at an angle. We felt like at that time when we got the City's Planning Commission to approve the plot plan that we were okay to build like that plot plan, and I think Don Rowe has said and I think Ms. Jones has also said that they are built like the approved plot plan. Now I know that there are some large numbers for these setbacks, but we were thinking we were talking about a side yard. We did not know we were talking about a rear yard for some of those. Like Ms. Jones said it is a viable development. We are pretty much full and we house people from all walks of life. A lot of them work in Mobile. I do not know and it is probably not a big factor, but we have tried to be good citizens of the Daphne community. We have done quite a few developments in this area. We built, at our expense, the ball fields that are out there at what use to be the Boys and Girls Club, which is now the Ruff Wilson Youth Club. So we have tried to make our contributions to the community, and we just need, like Don Rowe said, we do not want to build any more buildings, we do not want to move anything, all we want to do is in the event of some kind of catastrophic storm, catastrophic fire or heaven forbid an airliner lands there and takes all of the buildings out we would like to be able to build back to where they are.

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Mr. Tonsmeire: we do not want to build any closer to anything else, we do not want to build any more units, we would just like to be able to build as we built them to start with. I will say this one more time. We felt like we built like the City approved the site plan, that we should be okay, but I am hearing a lot of different things now, that we did not address back in 1994 with Bill Eady. Do you have any questions for me?

Chairman: does anyone have any questions for Mr. Tonsmeire? Thank you, Mr. Tonsmeire. Is there anyone here tonight that would like to speak in opposition to this appeal? Let the record show that there is not anyone here to speak in opposition of this appeal, public participation is closed. Does anyone else have any questions or statements? If not, the Chair will entertain a motion. Once again the motion must be made in the affirmative.

A Motion was made by Mr. Mayhand and Seconded by Mr. Lamb to approve Appeal #2013-02, Daphne Apartments, LTD & Bay Breeze II, LLC, a variance request to allow existing setback encroachments and establish setbacks for certain Bay Breeze Apartment buildings located at 29150 Lake Forest Boulevard zoned R-4 High Density Single & Multi-family residential. If granted the setbacks shall be as follows:

- (a) Northeast corner of Building #5, nine point five-feet in lieu of the required twelve-foot side yard setback;
- (b) Southwest corner of Building #11, nine point five-feet in lieu of the required ten-foot side yard setback;
- (c) North side of Building #6, nine point six-feet in lieu of the required ten-foot side yard setback;
- (d) Northeast point of Building #14, four point one-feet in lieu of the required thirty-foot rear yard setback;
- (e) Building #16, fifteen-feet in lieu of the required thirty-foot rear yard setback;
- (f) Building #17, fifteen-feet in lieu of the required thirty-foot rear yard setback;
- (g) Building #18, fifteen-feet in lieu of the required thirty-foot rear yard setback;

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h) Building #19, twenty-feet in lieu of the required thirty-foot rear yard setback.

The request, if granted would also permit the use and application of the following parking ratio: 1.5 parking spaces per unit per Article 16-2 of Ordinance 2002-22, as amended, in lieu of, 2 parking spaces per unit, per Article 16-2 of Ordinance 2012-54, as amended.

Upon roll call vote, the motion failed.

Mr. Cooke	Nay
Mr. Mayhand	Aye
Mr. Lamb	Aye
Mr. Robison	Aye

Chairman: your appeal for a variance is denied. You have fifteen days from today to notify Community Development Department in writing of your plans to appeal this decision with the Circuit Court of Baldwin County. You can pick up your paperwork in the Community Development office in the morning after nine o'clock. Thank you very much.

Mr. Lamb: Ms. Jones, could I request that we find out who in the City is responsible to check setbacks.

Ms. Jones: I can ask.

Mr. Lamb: I am not sure who does it. I have been told that the Building Inspector does not, and maybe there is nobody that should. Maybe it should be up to the contractor, and subsequently there are no penalties if he does not build within the setbacks. There is no financial penalty. So in other words if he builds over the setbacks, sorry about that, BZA will approve it, that is where we are right now. The BZA is a last resort and people think well you are not going to not approve it, I mean we have already built it, what is the matter with you, but I am operating where I do not know who is supposed to do that, if anybody, and if not, why not. I know when you build the building the financier always makes sure of did that building get built within the setbacks, because they are not going to sign off to have it surveyed again, and that is when they come to us saying, oops, I built over the setbacks, and I cannot get the loan, you have got to approve it. We are the bad guys if we do not approve it, no you are the bad guy because you did not do it right, but I would appreciate your asking that for me.

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Mr. Mayhand: there is no incentive to get it right.

Mr. Cooke: my house was constructed in 1992 and the C/O approved in January of 1993. The stakes on the property was laid out when I measured them from the property boundaries and this, that and the other for the correct location. Before the concrete was poured into the form, the City Building Inspector came to my property. He did not take any measurements. He just looked at the stakes, this, that and the other. He could see that my setbacks were okay. I do not know that in 1992, that is, if they did any measurements, but he came before the concrete was poured for the slab.

Chairman: I believe Mr. Mayhand has something before we adjourn.

Mr. Mayhand: I was just going to reiterate what Mr. Lamb said earlier. We need to find out if there should be a penalty for them missing a setback on a newly built structure. The old stuff I understand all of that, but we need to do something so that twenty years from now the people sitting here in these chairs will not be confronted with what we are because nobody checked, that is all I wanted to say.

Chairman: Ms. Jones, Ms. Pat, and Mr. Hoffman, we are still in session, so what I am about to say is business. However, minutes only reflect an action taken that is what minutes reflect. So if there are no actions taken normal conversation does not have to be recorded, and of course, we destroy the tapes after the minutes are approved. Is that correct? Do we get rid of the recorded tapes?

Ms. Johnson: no, I do not keep them.

Chairman: do we re-record over them or something?

Ms. Johnson: once I heard in our class that by law we do not have to keep them, and then I do not keep them anymore.

Chairman: but they should be kept until the minutes are approve? Right? Once the minutes are approved they become official, so with minutes reflecting actions taken not necessarily the discussions made.

Ms. Johnson: I do not keep them after the minutes are approved.

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Chairman: if there is no other business, the Chair will entertain a motion to adjourn.

Adjournment:

A **Motion** was made by **Mr. Lamb** and **Seconded** by **Mr. Mayhand** to adjourn.

The motion carried unanimously.

There being no further business the meeting was adjourned at 7:25 p.m.

Respectfully submitted by:



Pat Johnson, Recording Secretary

APPROVED: June 6, 2013



Willie Robison, Chairman