

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

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

Call of Roll:

Members Present:

Jeri Hargiss, Secretary
Glen Swaney
Willie Robison, Chairman
Jim Moss

Members Absent:

Barry Taylor
Billy Mayhand, Vice Chairman
Frank Lamb

Staff Present:

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

The Chairman stated thank you. Next item on the agenda is the approval of the August 6th minutes. Has everyone read the minutes? The Chair will entertain a motion to approve the minutes as written.

Approval of Minutes:

The minutes of the August 6, 2009 meeting were considered for approval.

The Chairman will entertain a motion to approve the minutes as written with no amendments or deletions.

A Motion was made by Mr. Swaney and Seconded by Ms. Hargiss to approve the minutes as written.

Mr. Moss stated I abstain since I was not present at the last meeting.

The Chairman stated the approval of the August 6th minutes will be carried over to the next meeting since we need four affirmative votes to approve them.

New Business:

Appeal #2009-07 - Angela Liu

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

The Chairman stated next is new business on the agenda, Appeal #2009-07, Angela Liu, a special exception request to allow the operation of an integrated sports medical/acupuncture clinic at 6975 Wedgewood Court located in the Wood Forest Subdivision, which is an R-3 Single Family, High Density, Residential Zone.

The Chairman stated Ms. Pat, tonight all four votes will have to be in the affirmative? Everything has to be a super majority so any votes tonight will have to be all four in agreement?

Ms. Houston stated yes, sir.

The Chairman stated okay, thank you. Ms. Jones, are you ready?

Ms. Jones stated might as well be. Ms. Jones displayed a Power Point Presentation of 6975 Wedgewood Court, the home of the request for a special exception to operate an integrated sports medical/acupuncture clinic. She stated you have already done the introduction so I will not go over that again. What I will cover are a couple of definitions, and I will not read all of it because you have them in your packet already. The thing that is being requested is a special exception. According to the Land Use Ordinance a special exception is a land use which may be permitted, that is not similar in nature to the uses permitted in a district, but that is desired in the community and for which a suitable district is not available. As you have said, the property is R-3 and the request for an integrated sports medicine and acupuncture clinic would fall under this requirement. Also being requested since this is not a full fledged clinic, it is being requested as a home occupation, which is defined as any occupation for gain or support customarily conducted entirely within a dwelling and carried on solely by the inhabitant thereof. I will not finish that because you have seen a request for a home occupation before so I will not go any further than that. This slide is showing you an aerial photograph. It is a residential neighborhood that sits within the Lake Forest Subdivision. The property is the first house on the left once you drive into the Wood Forest Subdivision and this is the plot plan for the house. This slide shows you pictures from our site visit. The subject property is in the middle and you can see a property view to the west, as well as, to the east. This is the floor plan for the first floor of the residence and the highlighted portion is that which is being requested to be used as a treatment area. Here is a closer view of that treatment area slash office. It is the dining room that Dr. Liu is proposing to use. These are pictures of the interior of the home. The one on the right shows you the entry way to the dining area. The top left shows a view towards the front of the house and the bottom one shows the view towards the kitchen area. As you see there are tables already set up, a supply area already established and somewhat of a waiting area established as well. These are some of the standards listed in the Land Use and Development Ordinance for a home occupation. I will just touch the highlights. A home occupation should be incidental and have the same residential character of the dwelling.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Ms. Jones stated no home occupation shall be permitted which might interfere with the general welfare of the surrounding residential area due to potential noise, increased pedestrian and vehicular traffic, or any other condition which would constitute an objectionable use of residentially zoned property. There are limitations to a home occupation. It should not be more than twenty percent of the gross floor area, which in this case it does meet that requirement. It shall be confined entirely to the principal building and it meets that requirement. Employment limited to members of the family residing in the dwelling, and it meets that requirement because Dr. Liu has indicated that she will be the only person working in the clinic. No internal or external addition, alterations or remodeling of the dwelling is permitted in connection with the home occupation and it meets that requirement. No chemical, mechanical, or electrical equipment that creates odors, light, glare, noises or interference in radio or television reception detectable outside of the dwelling shall be prohibited. No display of products shall be visible from the street and only articles made on the premises may be sold; except non-durable articles, consumable products, which are incidental to a service or which service shall be the principal use in the home occupation may be sold on the premises. Instruction in music, dancing, and similar subjects shall be limited to two students at a time. The activity carried on as a home occupation shall be limited to the hours between 7:00 a.m. and 10:00 p.m. and it meets that requirement. The information that Dr. Liu has provided a statement that she meets each of those requirements. There are some things that are prohibited as a home occupation. I will not list them all, but I would like for you to take a look at number three, which is the barber shop and beauty parlor, as well as number seven, which talks about the treatment of animals, cats, dogs, etc. I will tell you why in just a minute. Section 13-3 of the Ordinance requires a recommendation from me, as well as, the Code Enforcement Officer in the review of a special exception. The Code Enforcement Officer is Lonnie Jones and he has provided us with a letter that is in your packet and he recommends that the request be denied.

Mr. Swaney stated I am sorry. Would you say that again please.

Ms. Jones stated Lonnie Jones recommends that the request be denied. He is the Code Enforcement Officer. Now in making my recommendation these are some of the things I looked at in doing so. The Land Use Ordinance does not specifically say it prohibits medical facilities as a home occupation. However, do we want to establish that as a precedent? Also, would the introduction of medical practices into a residential community be appropriate? If a barber shop or a beauty parlor cannot operate in a residence should a medical practice or acupuncture clinic be allowed to do so? Similarly to uses that are prohibited as a home occupation, as I mentioned before, such as the treatment of animals, could the treatment of humans be considered along those same lines of thought. For me the answer would be yes, it would be considered along those same lines of treatment similar in nature to that which is prohibited.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Ms. Jones stated as to the answer to the other question, no, I do not think it would be good to establish a precedent for a medical facility in a residential neighborhood and with that my recommendation would be unfavorable.

The Chairman stated thank you, Ms. Jones. Dr. Liu.

Dr. Liu stated yes.

The Chairman stated would you like to address the Board tonight in favor of your appeal?

Dr. Liu stated yes.

The Chairman stated okay. If you would step up and speak directly into the microphone and give us your name and address because this is being recorded.

Dr. Liu stated I do not need a microphone.

The Chairman stated it is being recorded so we need you to speak into the microphone.

Dr. Liu stated thank you to the Board. Thank you for the City giving me this chance. Thank you for all of my neighborhood coming to this meeting. Thank you. Thank you everyone. Thank you for your time. I think that I speak not only for myself, but now this is regarding our country's economic recession and everyone knows that. How to save small businesses is my project, not only for Dr. Liu, not only for my business, not only for my acupuncture clinic, but how to save all small businesses. This is first. Secondly, what is my business nature? My business nature is medical. Medical performance, this is according to Alabama Land Use and under City Land Use Ordinance. Residential lot cannot do business, but have some special exceptions. What is special exception? It is engineering and medical practice. I am medical practice, so according to these documents which are not only the City of Daphne, but the whole Alabama, okay, I researched and visited a lot of cities. I have patients from all over the Country. My patients include several lawyers, medical doctors in Mobile. Mobile is a city, a residential area, in a subdivision a Chiropractor can set up. They have Chiropractor clinics in a garage. In the City of Fairhope, I visited Fairhope and they said if you buy property in Fairhope, if you set up a clinic in Fairhope, an acupuncture clinic, I specified acupuncture clinic and they said I can set up in a residential area without any problem and they give me application to allow me to practice. They said I can set up immediately to practice. In Daphne, we have Ashley Gates, Mr. Cliff he is my neighbor, he originally live in Ashley Gates Apartments, and then he move to my subdivision and become my neighbor. In Daphne, in Ashley Gates they have a massage therapist working in her apartment on the first floor because my patient the lawyer was her customer.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Dr. Liu stated my patient, the lawyer told me one time that when he come earlier than his appointment he saw that they had a sign put on the door now in session please do not bother, and that was in Daphne Ashley Gates. In Ashley Gates massage therapist stayed in business over ten years. I am not massage therapist, I am acupuncture. I am also not an Acupuncturist, I am an Acupuncture physician, an Acupuncture doctor. Oriental medicine doctor. I am a national board certificate and under Florida license an acupuncture physician. I have a clinic in Pensacola and Milton. I work in Pensacola and Milton in a medical doctor's office. Every week I have around two days of working in Florida and the rest of the three days I want to set up clinic in my home. The rest of the three days I do not have too many patients. Do you have experience for acupuncture?

Mr. Swaney stated no.

The Chairman stated no, I am afraid not.

Dr. Liu stated no one. Actually very, very few people understand acupuncture. All of my patients referred by medical doctors, that is MD referred because a lot of times you know Americans take too much medication. So a lot of times patient medication does not work. Then doctor says Dr. Liu, fix my patient and they send them to me. I fix it and that is why I practice acupuncture in Daphne almost twenty years. My patients include people all over the Country, some from Boston fly here to my clinic. So since this is like a specialist practice and not like MD who treat twenty, thirty, forty patients each five minutes, I not like that. I treat each patient at least one hour. So you can imagine the whole day I can have how many customers. It is just myself okay. Plus I work in Florida. Florida MD office. In Florida when they have a patient that needs my treatment they call me and I have to go immediately. So if that was the case in my home I can work a guaranteed two or three days. Guaranteed two or three days. I do not have a full schedule to treat patients because I do not have too much patients right now. Americans do not understand acupuncture, but I do have referrals.

The Chairman stated Dr. Liu, over an eight hour period or whenever you are open. What did you say Tuesday, Wednesday and Friday? How many patients would you see in a normal day?

Dr. Liu stated let me tell you my clinic in Daphne I rented an office for seventeen years. Just recently I moved home. In my office across the street from the fire station in the lawyer office, upstairs was lawyer office and downstairs was my office. In my office I treated patients every week, some days zero, okay, some days zero, some days one, some days two, three, varies. Actually I am low income. If I had a lot of patients I would be rich. No one wants to set up a clinic in their home. No one wants their home exposed to the public. No one. Everyone wants to keep home address privacy. So I fully understand my neighbors coming here concerned about that part of it.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Dr. Liu stated I understand them, if they are against me. I still understand that, but please understand me. My patients are referred one hundred percent by MD, first. Secondly, my patient must be able to afford this treatment. So this is not your Medicare covered patients, and some insurance do not cover this. So people who do not have money cannot get this treatment. My patients are MD's, MD's wife, lawyers, lawyer wife, MD wife pregnant. Pregnancies with morning sickness who cannot take medication and I use acupuncture to cure things like that. That is an example okay.

The Chairman stated Dr. Liu the needles and things of that nature that you use in your practice how do you dispose of those or any medical equipment that you need to dispose of? How will that be handled?

Dr. Liu stated good question. That is a very good question. I am a National Board Certificate Acupuncture Physician, so according to the National Board in Florida, Florida Board we use, like MD, disposable needles. After use put them in container and a special agency come to my office to take them and I have to pay fees. So you simply think that my practice like MD, like your Family MD practice, but the difference is that MD use medication to treat you and I use acupuncture to treat you. Natural therapy, Chinese medicine to treat you so this is different. The difference is the medication system is different, but now day acupuncture it is very popular, especially when acupuncture works when medication does not work after surgery, when patients still have a lot of problems and pain that is my work.

The Chairman stated does anyone on the Board have any questions to ask Dr. Liu?

Mr. Moss stated Dr. Liu do you have a City license for your business?

Dr. Liu stated I have a State. I got a State license. I got a City license. I got a National Board Certificate. I got a Florida license. Another thing is one time, I am afraid I might forget this point, at one time I just receive one customer. For example, my customer if they made an appointment would be one at a time because my home is number one home, number one lot in my subdivision so patients come in and drive into my driveway, my driveway is two car garage driveway so it is very wide so my car will be parked here and patients will be parked beside me and that is enough. My patients do not loiter, this is my rule okay, and my patients do not loiter. Come into my subdivision, I am the first house, after treatment you have to go away, okay. Do not bother my neighbor, so my neighbor, do not worry. So my neighbor does not worry and think my patients will be parking here or parking there. No, first of all my patients are highly labeled and secondly, they would not break the rule, they respect me. They come because they trust me and my treatment. They have to respect my rule. I have my rule. What is my rule? It is you park in my driveway. Third, you go out and that is it.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

The Chairman stated thank you. Ms. Jones.

Ms. Jones stated I think according to Cornell Smith, our Revenue Officer, a Daphne Business License has not been issued. They are waiting for your decision tonight.

Mr. Moss stated so a Daphne Business License is required, it just has not been issued.

Ms. Jones stated that is correct. It has not been issued at this time.

Dr. Liu stated I have a City license over seventeen, since 1994. I got a City license and a State license at my home address that was in my rented office. Recently, I move to my home, at my home address I got State license because I talked to the State Governor, Bob Riley face to face. Bob Riley visited China and we talked about doing Chinese business. I called Bob Riley. I emailed him several times, and then with his help I got State license at my home address now. I am waiting on my City license.

The Chairman stated you are waiting on the decision of this Board before the City of Daphne will issue you a business license. Is that correct?

Dr. Liu stated yes. I am waiting for a City license. I already have a State license.

The Chairman stated you have a State license already.

Dr. Liu stated I am President and CEO of Alabama Association of Oriental Medicine. So I often have some state meetings in Montgomery with Governor.

The Chairman stated yes, madam. Thank you very much for your presentation to us and the Board thanks you. Is there anyone else that would like to speak in favor of Dr. Liu's appeal? If not, is there anyone that would like to speak that is in opposition of this appeal?

Dr. Liu stated thank you for giving me a chance. If you have any questions you can ask me, anyone can ask.

The Chairman stated thank you, yes madam.

Dr. Liu stated I fully understand that everyone is worried about the subdivision safety. I totally understand. I love my neighbors and I understand them. I hope they understand me.

The Chairman stated yes, madam. Thank you. Is there anyone that would like to speak in opposition of this appeal? May I see a show of hands please? If so, please step to the microphone and state your name and address for the record.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Scott stated I am Ron Scott and I live at 133 Lakeshore Drive. I do represent this area of District 5, which is the Wood Forest Subdivision. I have received several calls from neighbors and I have received emails from Dr. Liu back when she originally approached the City about moving her operation from North Main Street into her home. The research that I did was to look up on the County Probate records the original deed of when Dr. Liu purchased her property. It shows up as Lot 1, Unit One of Wood Forest some time in 2000. In this warranty deed it says this covenant is made subject to the following and number two is Restrictive Covenants says contained in this instrument dated January and it references the book. I went to the Probate site where these so referenced covenants were located and I point out that on number two on the second page it says under number three, second paragraph, all lots in the subdivision shall be known and described as residential lots and no residential lot shall be used except for residential purposes. Now I mention that knowing that according to the Daphne Land Use Ordinance a restrictive covenant is defined and it is a private regulation recorded with the final plat which limits or otherwise governs the use, intensity and development patterns of the land within a subdivision or parcel of land for a specific time and it is a private and not something to be enforced by the City. However, when you look at your criteria for granting a special exception, and let me point out that I am very happy to have Dr. Liu live in my District. I think she is a very well known and respected person of the community and this is no reflection at all on her practice of acupuncture. We are looking at a medical clinic and I would have the same opinion if this was Dr. DeBaky and he had a heart clinic there. It is either appropriate use or not appropriate use, and this is in the midst of a subdivision. This is a subdivision off of a subdivision and it is on a road that is a cul-de-sac. A very small private community and it is not, in my opinion, an appropriate use in a residential area. Now are there places where a medical clinic in a residentially zone areas could be appropriate? I would say yes, we have some residential zoned areas on North Main Street that might be very well possible. I would have a different opinion if that was not were the location was. I will be glad to answer any questions and I appreciate your time.

The Chairman stated thank you, sir. Anyone else? Again, please give us your name and speak directly into the microphone.

Mr. Spano stated thank you for the opportunity to express our opinions in this matter. My name is Anthony Spano. I am the Vice President of Wood Forest, where we live, the President could not make it so he asked me to speak on his behalf. We have no objections for Dr. Liu having her practice, but we do have an objection for her practicing in our residential area. Our objections are very simple. There will be times when there will be delivery of equipment. There will have to be disposing of medical equipment. The regular trash hauler does not pick this up. It needs special people to pick this up and I understand they do not come to residential areas.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Spano stated another fact that is involved in this is that we have children that live in the area. These children are mostly girls, some of them are thirteen, and the majority is mostly under thirteen. There are times they do catch the bus and with the additional traffic in the area and the additional parking it could jeopardize these kids health. We are concerned about the medical waste and could it eventually affect our children and could it eventually affect us. I am sure Dr. Liu does take care about that, but I do not know how. Most of the people in the area that live in Wood Forest signed the objection of having Dr. Liu to have a commercial license to practice in our residential area. We would appreciate very much if you would take this into consideration why we are opposing this. Like I said we oppose it and that is where we stand at the moment.

Mr. Swaney stated how large is that particular subdivision within a subdivision? How many homes?

Mr. Spano stated it is in Lake Forest. There are twenty-six homes and it is a cul-de-sac. There is only one entrance in and one entrance out.

Mr. Swaney stated thank you.

The Chairman stated any other questions? Thank you, sir. Appreciate your time. Anyone else that would like to speak in opposition of this appeal?

Mr. Winston stated my name is Ed Winston and I live at 28600 Oakwood Court in the first cul-de-sac in Oakwood Forest. I am new to Alabama. I have not been here all my life. I am a retired music teacher at the university level. I have a doctorate and so on and all of that. I only tell you that because I have lived several places in the Country, Boise, Idaho, and Clemson, South Carolina, Ruffston, Louisiana, Baton Rouge, Louisiana and in North Carolina. In no place that I have seen has a residential area where there was a business. I moved here three years ago from Baton Rouge when I retired. I looked around, pretty much the reason I choice this neighborhood was because it was quiet, off the beaten path, and a nice residential area. There are children, but I have grandchildren of my own and I love children. So I have noticed that there are kids on each side of the corner as you enter into the subdivision, as well as, throughout the subdivision. It is not only at the school bus time that they are around, but there are many days that they have off for a holiday at school. I was asked by some people that teach private lessons in music, I do not do that out of respect for my neighbors, I would probably teach one at a time, but I go to the schools to teach them, if they want me. I have been to Spanish Fort and different places like that, but as sort of a consultant after school. So I guess the biggest reason is that I think it sets a bad precedence for a residential area. I have nothing against Dr. Liu or what she does, but I have noticed some pain clinics on the opposition side of the street from her former office.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Winston stated on the same side as the Fire Department. They advertise as pain clinics, chiropractic clinics. They look like huge buildings and I am not suggesting that she should go there, that is not my purpose, but just to voice my opinion as a new resident. I love it here by the way. Alabama has been most welcoming to me, and the neighborhood is just beautiful. So that is all I have to say. Thank you.

Mr. Swaney stated thank you.

The Chairman stated anyone else wish to speak? Yes sir.

Mr. Barrow stated thank you for having us here tonight. My name is Gerald Barrow. I live on the west end of Dr. Liu. The question I have is does she follow the covenants in her neighborhood that are already established? Is she one that already obeys the rules which are already set up for her before this ever steps into play? If that is a question that can be answer then we can step forth from there, but if you do not follow what is already set up for you to follow then how are you going to move forward with something else added in on top of that and say you are going to follow that then, because your tract record is what you need to look at. So let us look at the tract record. If that has not been followed within her own neighborhood, and you are here trying to buck what has already been done, then this is a thing that needs to be addressed and say no, this is not going to work because what is going to be set up now will not be followed then either. Being with small children, I have three small children, and I have had issues, but my deal is she may be wonderful, her patients may come and leave. How many beds are set up? How many people can she accommodate at one time? May be slow now, may pick up, but if she has already set it up and business does pick up then she has got to accommodate those new customers and where are we going to go from there. So just look at the tract record and see if she is following what is already set up for her to follow, as do the other people in her neighborhood and you will probably be surprised with the answer you get and you all make your decision from there. Thank you very much for your time.

The Chairman stated yes, sir. Thank you. Anyone else?

Mr. Robinson stated how are you all doing? My name is Bruce Robinson. I just recently moved over here from Mobile County. I lived up in Satsuma for several years, about six or seven years over there. I have been here for about a month. One of the things that brought me to this residence and you can see we pretty much have a diverse group of people that live there from young parents with small kids to retired individuals. It seemed like a very quiet neighborhood. I have two small children I have one seven and one seventeen months. My seven year old is scared of her shadow, but my seventeen month old boy will get into anything. My wife is also a registered nurse and one of her concerns on this would be the disposal of medical equipment. Speaking for my girl she would not touch it, but my boy.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Robinson stated anything that could fall on the street he is going to be all over it. If we set precedence and allow Dr. Liu to set up a clinic there are several other residences that are up for sale and what is to stop somebody else from coming up in here and purchasing one of these other houses there for the sole purpose of setting up another clinic. One may not be bad. I am against it, but if it became more than that I can foresee it being a problem. Allowing this would set precedent for any one of these houses to become another clinic. That is all I have. Thank you.

The Chairman stated thank you. Does anyone have any questions? Anyone else? Yes, madam.

Ms. Wolfe stated my name is Rebecca Wolfe and I live at 28603 Oakwood Court. Pretty much everything has been said that I wanted to say myself except one thing concerns me. Quite frankly it was not made clear to me how many patients Dr. Liu anticipates, but I am also concerned not only with traffic and that safety, but parking. I believe that there is actually, under the Land Use Ordinance, a requirement of one parking space per two hundred square feet of floor area used for offices and similar purposes. So we are talking about just a driveway here or parking along the side of the lot or probably her neighbor lots. First of all that is not what I understand to be parking spaces, and the other thing is in Wood Forest you are not suppose to use adjacent land owners land in front of their homes or indeed in front of your own. You are supposed to stay within your own garage or driveway. So that is it.

Mr. Swaney stated thank you.

The Chairman stated thank you, madam. Anyone else? There is no one else who wishes to address the Board? At this time the Chair will entertain a motion. Any motion that is made must be made in the affirmative.

Mr. Swaney stated Ms. Liu would like to speak again.

The Chairman stated Dr. Liu, we do not normally do this, but I will allow you to speak for two minutes.

Dr. Liu stated I appreciate it.

The Chairman stated thank you.

Dr. Liu stated I fully understand peoples concern about the medical equipment. I use acupuncture needles, disposable needles and after use I put them in a specific container. Not bother anyone. Not allowed to put them in general trash can okay. Neighbor, neighbor, neighbor we have a special container just like when you go to MD office. It is the same container. Do not worry about this. Not bother children, not bother anyone. Okay, no one touch that.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Dr. Liu stated secondly, about the traffic and parking because I have a very, very, very few patients, it will not be a bother about traffic. Not a bother about the parking so my patient only will park in my driveway. Even my driveway does allow one patient parking. Not bother anyone. Do not allow parking anywhere else. So that does not affect subdivision traffic or parking. Not affect any children. Okay. Thank you very much.

The Chairman stated thank you, Dr. Liu. As I was saying a few minutes ago, the Chair will entertain a motion and once again it must be made in the affirmative.

A Motion was made by Mr. Swaney to approve Appeal #2009-07, Angela Liu, for a special exception to allow the operation of an Integrated Sports Medicine/Acupuncture Clinic at 6975 Wedgewood Court.

The Motion failed due to lack of a second.

The Chairman stated the appeal is denied due to the lack of a second. Thank you for your time tonight. Next on the agenda is Appeal #2009-08, TimberCreek Property Owners' Association.

Ms. Jones stated Mr. Robison would you please explain to Dr. Liu the appeal process.

The Chairman stated will you ask her to come up here so I can explain it to her. She is not gone, her purse is right there. Dr. Liu, you have fifteen days for which you can appeal this decision. You have fifteen days to put it in writing to the Community Development/Planning Department, if you wish to appeal the decision of this Board, to the Circuit Court of Baldwin County.

Dr. Liu stated fifteen days.

The Chairman stated fifteen days to put it in writing to the Planning Department, Ms. Adrienne Jones that you plan to appeal the decision of this Board.

Dr. Liu stated so you denied me.

The Chairman stated it was denied for lack of a second.

Dr. Liu stated what?

The Chairman stated no one seconded the motion so it was denied for the lack of a second. The appeal is denied so if you wish to appeal our decision with the Baldwin County Circuit Court you have fifteen days from today to do so by letting Ms. Jones know in writing that you plan to appeal.

Dr. Liu stated okay. I have to pay over two hundred and fifty for Federal Court.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

The Chairman stated I do not know how much it is.

Dr. Liu stated yes, I know.

The Chairman stated I do not know, but you have fifteen days to appeal. Thank you, madam.

Mr. Swaney stated thank you, madam.

Dr. Liu stated I know. I appreciate you, Robison.

New Business:

Appeal #2009-08 - TimberCreek Property Owners' Association ARB

The Chairman stated next on the agenda is Appeal #2009-07, TimberCreek Property Owners' Association ARB for an administrative appeal to allow the TimberCreek Architectural Review Board of the TimberCreek Property Owners' Association, Incorporated to grant setback variances within the city limits of Daphne, Alabama in lieu of the Board of Zoning Adjustment, which is a R-3 High Density, Single Family Residential Zone subdivision. Ms. Jones would you like to bring us up to speed.

Ms. Jones stated I will start with a discussion about the appeal procedures. The Land Use Ordinance states that an administrative appeal may be made by anyone who is basically aggrieved with the decision that I or another administrative official involved in the enforcement of the Land Use Ordinance have made and Article 21-2 states that the appeal is to the Board of Adjustment. Article 21-3(c) states that persons aggrieved by the decision of the Board may then make an appeal to the Baldwin County Circuit Court. Here I have five points that I made in regards to TimberCreek granting variances to subdivision setbacks with the Daphne jurisdiction in lieu of the Board of Adjustment, but before I go through those I would like to back up and give you a little history of how this even came to me. Last month the BZA heard an appeal from TimberCreek, two appeals actually, Mr. Ruble was one and Dr. Gupta was the other one. Well Mr. Ruble went to the Building Department to get a building permit and at that time the Building Official requested a letter from the Board of Adjustment showing that they had a variance to their setbacks. They called our department and Ms. Houston did a search of our records to see whether a variance had been granted by the Board of Adjustment and no record was found to that effect. The Rubles then presented a letter from TimberCreek's Architectural Review Board which showed that they had granted a variance. Mr. Merchant, our Building Official asked me if I thought that it was valid and at the time I told him that I did not because my position is any variances that are granted in the City of Daphne should be granted through the Board of Zoning Adjustment.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Ms. Jones stated so that is how the Rubles came to Community Development, having started with a dispute of sort with the Building Official. So the Building Official's position is the same as mine, any variances granted should be by the Board of Zoning Adjustment, and at this time they will not give any permits for any lot that has a variance that has been granted by any Board or anybody other than the BZA. So now I will get to the points that I made in my letter of making it official to the TimberCreek ARB. I will not read all of them because you have them all in your packet. I guess I will hit certain points just for the record. Article 11-52-80 of the Code of Alabama establishes the Board of Zoning Adjustment as an entity responsible for granting variances to setbacks, and this is also provided to you in your Land Use Ordinance as well, and 2. Setbacks noted on the TimberCreek's record plat are to be upheld by the City of Daphne Community Development Department as well as the Building Inspections Departments and variances thereto should be considered by the Board of Adjustment, and 3. The note that is on the record plat, on several of the record plats for TimberCreek, they note as follows, "listed below are the typical minimum setback standards for TimberCreek. Setback limits can be changed by the ARB on a case-by-case basis provided it does not violate the City of Daphne requirements. 4. Any changes, and this is my position again, any changes to setbacks approved by the ARB (in lieu of the BZA) in itself is a violation the City of Daphne's requirements. 5. Finally, The note on the record plats stating that the ARB has the right to grant variances to setbacks does not supersede Article 11-52-80 of the Code of Alabama or Article 21-1 of the Land Use & Development Ordinance of the City of Daphne. Before requiring the Rubles to come to the BZA last month I asked Mr. Hoffman his opinion of the matter and he did provide an opinion and I will let him pick up there.

Mr. Hoffman stated Board members, I went ahead and looked at the law, and well I did not at the time see the actual plat I did prepare an opinion letter that I think was provided to each of you. Basically what happened is, and this is my interpretation of the law, is that once a plat is adopted by the Planning Commission it becomes an amendment to the Zoning Ordinance. In this case it is my understanding based upon representations made to me that the plat for TimberCreek that is in question was adopted after the Zoning Ordinance. So when the Planning Commission adopted or approved that plat it became an amendment to the Zoning Ordinance. My interpretation of the law is also that the BZA is the sole authority to hear appeals and the Planning Commission is also the sole authority to make determinations as to the decisions on the zoning issues and those cannot be delegated to other persons. In other words you cannot delegate your authority to me to make a decision, you would have to make them yourself as a Board. For that reason because it was an amendment to the Zoning Ordinance, it was adopted after you would then have to address the larger Zoning Ordinance, the larger setback lines. Those setback lines that are there for the purposes of TimberCreek would then become the minimum requirements allowable by the BZA.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Hoffman stated the Architectural Review Board listed in that language, although I did not have it at the time, I would have to say that they have the right to make recommendations to change those, but then the BZA would have to make the final decision on that on an appeal.

Mr. Moss stated I would like to ask a question. Number one I am surprised that after all these years that this has not come up before. I was on the Lake Forest Architectural Review Board for three years and the way I am hearing this is with Ms. Jones statements that any variations in the City of Daphne, she did not specify TimberCreek would be the BZA or all the architectural boards of the different subdivisions, and if that is not true every time another subdivision changes a plat and applies is this Board going to have about eight different sets of zoning setbacks to look at, and if so we are going to start meeting four times a week ten hours a day.

Mr. Hoffman stated that is an issue and the answer is if it is on the plat. My understanding is that some of the other subdivisions that you have mentioned like Lake Forest would have been adopted before the Zoning Ordinance was actually adopted so that takes that out of the equation. The second issue is, my understanding is, that not all of the plats have it, not all the plats list a higher restriction. It is done in a restrictive covenant and Councilman Scott was correct that it is a private issue. My understanding in this case is that it is done in restrictive covenants so there is a private battlefield that can be done because restrictive covenants are there, but there is also the Zoning Ordinance which then adopts it.

Mr. Moss stated I think I understand. The restrictive covenants are one thing, but an actual plat once it is platted then it is an amendment to the Ordinance.

Mr. Hoffman stated the plat itself becomes an amendment. If it was not on the plat itself it would be solely a restrictive covenant and that would be a private issue among fellow land owners.

Mr. Swaney stated so I guess my question would relate to would this be the only consideration in the restrictive covenants for TimberCreek that are in variance with our Land Use Ordinance.

Mr. Hoffman stated I cannot answer that question since I have only been informed what the restrictive covenants say. I have not actually read what those covenants say even to this day.

Ms. Jones stated let me say one thing. There is a difference between restrictive covenants and setbacks. Setbacks are required for every subdivision plat around the country. So although they may be listed in the restrictive covenants all setbacks should be listed on the plat and they are separate from the restrictive covenants.

Mr. Swaney stated okay. Thank you.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

The Chairman stated thank you, Ms. Jones. Does someone wish to speak in favor of the Architectural Review Board?

Mr. Pittman stated good evening, my name is James Pittman, I am an attorney in Daphne. I represent TimberCreek Subdivision and the Property Owners Association and I also represent the Architectural Review Board. I have represented them for about eight or nine years and I am accompanied this evening by Stu Allhands who has been a member of the Board of Director's and the ARB for TimberCreek for a number of years, as well as, John Strange who has been there, I think, even longer than Stu has. As Ms. Jones said, to give you a little bit about the history, the first plat in TimberCreek Subdivision was platted in 1993. I had created a bunch of packages and then I was under the impression that I could use some overheads. I do not know if I give you these can you project them for the Board.

Ms. Jones stated no. I can only do PowerPoint.

Mr. Pittman stated I apologize because I thought I was going to be able to put this up and you could very clearly see it.

Ms. Jones stated Ms. Houston can make copies if you all would take a quick recess.

Mr. Pittman stated if I could proceed and if you would like a copy of these things then perhaps I can approach the Board if any of you would like to actually read it. There are about fifteen or eighteen different recorded plats in TimberCreek Subdivision. The developers developed it in phases. Some phases had sub-plats within them. So I have a copy of a plat here that I have got a transparency for. This is for TimberCreek, Phase One, Part D, okay, and on that plat the developer choice not to put any setbacks on it whatsoever, okay as far as on the actual lots themselves. Now bear in mind that at the time it is my understanding that the City had its own setbacks. There is on there a notation that says minimum building setbacks, says listed below are typical minimum setbacks standards for TimberCreek, setback limits can be changed by the Architectural Review Board on a case by case basis. All building setbacks are measured from a perpendicular angle to the property lines and it says a fifty-foot front yard setback, fifty foot rear setback and ten side yard setback, fifty side yard setback from side street property line on corner lots. It also has a notation down at the bottom that says easements see restrictive covenants for complete easement information and this plat was signed by the then Planning Director of the City of Daphne. There are a number of plats similar to this that do not actually make the notations of the more restrictive TimberCreek setbacks. When it says more restrictive, Daphne has one set, TimberCreek Subdivision is more restrictive than the City of Daphne in every way, shape or form. The first day of property class in law school we are taught that private restrictions can always be more restrictive than a governmental body, they just cannot try to circumvent them.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Pittman stated if Daphne has got a thirty foot side setback I cannot plat a subdivision or try and make a conveyance and say no there is only a twenty-foot front setback, but I can say no there is a fifty-foot front setback. I will read to you just briefly some blurbs from a few cases. Frankly a lot of the law in this area of property is really, really old and I think it is because it is such a well settled area of law that it is not within the per view of a Board such as yourself to get into the business of, what Mr. Moss was concerned about, of telling people what they can and cannot do with private use restrictions. The case of Dauphin Island Property Owners Association vs. Pitts, a 2008, Alabama case says that private restrictions may be more but not less restrictive than valid zoning provisions. I have a case Alabama Supreme Court for 1966 Brown vs. Morris where our Supreme Court said that the restrictions placed on the property by the owners where it was subdivided are more restrictive than those prescribed by the Zoning Ordinance, private restrictions subsequent to valid zoning restrictions may be more but not less restrictive under such circumstances the restrictions here at issue will prevail. Statutes or ordinances which impose restrictions on the use of private property are strictly construed are there scope cannot be extended to include limitations not therein included or prescribed. Last a case from 1970 out of the Alabama Supreme Court that quotes the United States of America Supreme Court which says that the restriction covenant was a matter of contract between the grantor and the grantee, in our case the developer of TimberCreek and anybody that buys a lot in there, it is our conclusion that the contract between the parties created a covenant running with the land, the obligation with this contract cannot be impaired by a law or enacted by the State. In this instance the State or the City of Daphne. Obviously at some point the developer who only sold to a hand full of builders in TimberCreek for whatever reason, whether it was requested by the City of Daphne or because there had been some confusion, began in later phases actually showing the dotted setback requirements, the more restrictive private setbacks and in those plats forward the language that Ms. Jones read was included. I will read that to you again if I may. It says listed below are the typical minimum setback standards for TimberCreek. Setback limits can be changed by the Architectural Review Board on a case-by-case basis provided it does not violate City of Daphne requirements. Period.

The Chairman stated Mr. Pittman, a question. Are you saying that this is settled law? I have heard that mentioned a lot lately in the last several weeks dealing with a certain Supreme Court nominee on settled law and you were about it.

Mr. Pittman stated sir, I do not know if there is ever anything such as a settled law because if there was there would not be so many of us darn lawyers.

Mr. Pittman stated but I think this is as well settled of an area of law that you can find. I have spoken with Mr. Hoffman, and Mr. Hoffman is a bright and fine lawyer.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Pittman stated and I asked him to tell me what authority he and the City relies on, and Tony will correct me if I am wrong, but I believe it is this 11-52-80 that says basically the City of Daphne is the only one that can approve or allow the recordation of a subdivision plat within its corporate limits and then it sounds like there is some other authority that may say similarly it is the only one that can allow exceptions to that plat once it is recorded. I think what has happened here is that the difference between public use restrictions, which you all oversee, and private use restrictions, which Mr. Strange and Mr. Allhands oversee, has been blurred here. This plat and every one has been signed by Bill Eady, the then Planning Director of the City of Daphne. Now I have represented enough clients that have asked for exceptions to be made or changes to be made in Mr. Eady's office and sometimes they get what they want, sometimes they are told no, but I would submit to you all that Daphne's allowance of the language that I have just read to you, which very clearly states, that as long as TimberCreek does not step on your toes meaning try to give someone a variance that exceeds the minimum setbacks for Daphne that is within their per view. You do not have to be a lawyer to know that private use restrictions are private and public use restrictions are for you all to determine. Councilman Scott just said hey I know that these subdivision restrictions are not something that you are suppose to concern yourself with. So we all know that very clearly. Now I will say one thing sir in response to your question about well settled law. I have tried to find a case anywhere in the United States of America where a municipality or Alabama, for that matter, where a municipality has taken this position and I cannot find one anywhere, and I think it is because no municipality in the United States of America has ever taken this position that because private use restrictions are found somewhere on this plat now you guys are the one that can grant a variance.

The Chairman stated Mr. Pittman, excuse me. How do you approach that where it says once a Planning Commission accepts a plat it then becomes part of the City Ordinance? It must fall under the City's Ordinance so therefore TimberCreek's fifty-foot setback front and back and ten on each side once it is accepted by the Planning Commission it became a part of Daphne's Zoning Ordinance. All be it, even though it is just TimberCreek in this particular situation it now comes under the Land Use Ordinance of the City of Daphne. So any variances from the fifty-feet would not be private, but would be public.

Mr. Pittman stated I understand and I would tell you a few things. Since 1993 the Architectural Review Board has been granting variances to this and only until a couple of months ago has the City ever taken the position that whoa, whoa, whoa you guys cannot do that. This language, in my opinion, is a contract between Daphne and TimberCreek when it says the Architectural Review Board can change these setbacks.

Mr. Pittman stated now I know the Mr. Eady could have said to Allen Cox, who recorded this plat, Mr. Cox you are going to have to take that language out because once that plat is recorded it is all us.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Pittman stated we are the sole ones that have the right to grant a variance. Now I know what Allen Cox would have done, he would have said well I will take all reference off as to any setbacks, any private use restrictions and what have you. One concern I would have, if I were the City, is the converse of it, which is now, if this is correct, then you all are treating people in TimberCreek, whose property is zoned R-3, R-2 whatever it make be, dispersedly from people that are in a subdivision whose plat does not this language on there or does not reference the more restrictive covenants or setbacks on their plat. The other thing that I would submit to you all is I read that language to you that says as far as easements, which I think Ms. Jones would agree, is also within the per view of a public Board such as yourself if they are public easements. It says easements, see restrictive covenants for complete easement information. So I would submit to you all that this could open Pandora's Box because it references our restrictive covenants and it is on the plats. So if the Board wants to take this position then my recommendation to these gentlemen is our restrictive covenants prohibit tree houses in back yards. They prohibit the brightly colored plastic play structures, they are very, very restrictive. We have got a pending lawsuit that has been very contentious with a gentleman that built a retaining wall out of railroad ties, which is prohibited in a lot of parts. So if anything that is on this plat is only the responsibility of the City of Daphne then my position will be that we need to make demand upon the City that it start enforcing all of our restrictive covenants on a daily basis. Along the lines of what Mr. Moss commented on, one other concern that I have is this, these people entered into purchase agreements to sell their property and the buyer said that this purchase is contingent on our ability to get a variance from the TimberCreek ARB. They went before the ARB, they got the variance. When they came to Daphne its Planning office said no. ARB for the first time in years, and even though they have made an issue of it, and even though Mr. Eady signed off on this language along with a number of other Daphne representatives, these people had a very short time frame within which to close their contract purchase. If that process is going to be delayed another thirty or forty-five days by someone having to go to the ARB and go to you all. It could create a situation where someone, a buyer, who maybe gets cold feet for some other reason, says I was not able to close in the thirty days specified by my purchase agreement because of the City of Daphne and I can walk away now and I think you have opened yourselves up again to potential liability that could stem from an interference with a private contractual right because of this position. So I hope that that answers your question. If it is just simply showed the more restrictive covenants without this language, which clearly says private restriction, private easement, we retain the sole right to grant variances as long as we are not exceeding Daphne's minimum setbacks then there would be some more appeal to that argument.

Mr. Pittman stated I will say this, Mr. Hoffman and I have spoken. Fortunately in the situation that I have mentioned before, those individuals came to you all and you granted the variance.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Pittman stated and even though they were then outside of their timetable within which they were suppose to close and buy that house they went ahead with the transaction anyway, but in speaking with Mr. Hoffman and Jay Ross, you know we talked about the difference of opinion, there was talk about Daphne possibly requesting an Attorney General's opinion over this issue. We cannot and in speaking with Mr. Hoffman, I do not know if your Board can, but I think the Daphne City Council can because if you all deny TimberCreek's appeal of Daphne's very recently taken position that it gets to control these things then our only other step is Circuit Court, Alabama Supreme Court. Frankly, TimberCreek does not want to spend that money fighting over that issue. As a business owner, in Daphne, I do not want my tax payer dollars going to pay lawyers to litigate that issue. So I would ask you all to consider if you are incline to deny our appeal, with Mr. Hoffman's fine counsel, to consider, tabling the matter. We would be willing to withdraw our appeal without prejudice while we embark on this request for an Attorney General's opinion, but I think it is real simple. TimberCreek is one of your nicer subdivisions. It is because they are very restrictive and they have got very intelligent, highly educated people that watch their subdivision like a hawk because they want to maintain their property values. If it ain't broke do not fix it, I would say, so we would just ask you to grant our appeal and understanding Mr. Hoffman's position I think that you could similarly find because this language on our plat clearly that we reserve this right to ourselves and Mr. Eady, who could have said change the language, signed off on it and agreed to it that I think that our appeal is due to be granted.

The Chairman stated it is scary when I start thinking like an attorney.

Mr. Pittman stated it is so many of us here in Baldwin County that it is hard not to sometimes.

The Chairman stated it was going through my mind the possibility of you withdrawing your appeal and finding out if we can get an opinion from the Attorney General's and I said that is scary when you brought that up.

Mr. Swaney stated I wonder if that is not the province of TimberCreek not to get that opinion from the Attorney General.

Mr. Pittman stated we explored that and Mr. Hoffman has done the research and determined that a private entity or individual cannot do that and that perhaps even your Board may not be able to, but if you all recommended to the City Council they then maybe can request it.

Mr. Hoffman stated that is correct. The procedure is a private entity cannot request an Attorney General's opinion. This Board may or may not, that is sort of a gray area. The City certainly can because it is a municipality request for an AG's opinion.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Hoffman stated the Attorney General's opinion is not necessarily binding on anyone, but it is considered to be authoritative and people have followed it over the years.

Mr. Moss stated as you stated, Jerry Speegle or somebody at your firm, that this is a case of first impression. An Appellant Court could throw it out in a New York second and it was recommended in this letter from Speegle and you guys.

Mr. Hoffman stated that letter was from me.

Mr. Moss stated you guys that we strongly consider getting an opinion from the Attorney General. I strongly think we should for the simple reason of sixteen years of past history here. To be honest with you the City of Daphne cannot enforce its own laws. I do not want them to try and enforce mine or yours.

Mr. Hoffman stated I understand that is why my recommendation was included in there. Again the City Council, the City itself would have to make that decision. The way I reviewed the law as that you can make a request jointly as a Board. It does not mean that the City has to actually follow through with it, but you could make that request and the City could then file for an AG opinion which would be through Mr. Ross's office. I will say that if the Board does consider this as either a grant or denial, as I think that was what was proposed by Mr. Pittman. Consider granting it and if you do not grant it then consider tabling it. If it is put before the Board then the Board has to render a decision one way or another within forty-five days from the date of this hearing. As I understand the statutes of the Ordinance it would either have to be withdrawn voluntarily at this point or be submitted to the Board for approval. Adrienne, do you agree?

Ms. Jones stated it is up to you. I had another couple of points that I wanted to make.

Mr. Pittman stated I apologize I am a typical long winded lawyer. Mr. Strange and or Mr. Allhands may wish to address you all also.

Mr. Swaney stated I have an additional question. I have had the impression from quite a few meetings with the group from Northern Alabama, in seminars and such, that the BZA did have the right to obtain an AG opinion. I would hate to give up that right and say the City has to do that.

Mr. Hoffman stated I have looked at that issue, but not in full depth. I just looked at it because I know that a municipality does have the authority. It is a little grayer area like I said when am extension of a municipality like the BZA is requesting. I am not saying that it cannot be done.

Mr. Hoffman stated I am just saying that at this point in time it is grayer, if that answers your question.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Swaney stated and your recommendation again is?

Mr. Hoffman stated my recommendation is that an AG's opinion is wanted or desired by the Board and by the Architectural Review Board of TimberCreek then I would say the only way to obtain that before ruling is by the ARB withdrawing their appeal request.

Mr. Moss stated if they withdraw voluntarily.

Mr. Hoffman stated then this Board adopts the position to request the City Council of the City of Daphne to obtain an AG's opinion.

Mr. Moss stated I am with him. One of the last seminars I went to at UNA, BZA has that authority.

Mr. Hoffman stated again it is a gray area. I have looked at it, but I have not looked at it in depth.

The Chairman stated we are not moving in that direction right now because I believe Mr. Strange would like to say something. However, I will say this now that if the appeal is not withdrawn and for some reason, and I do not know which way it is going to go, one way or the other, but if it was denied then you could not come back in front of the BZA for a year with that. You do have the appeal process up the ladder through the Courts. Mr. Strange if you would give us your name.

Mr. Strange stated I am John Strange, I live at 30653 Pine Court in Daphne, in TimberCreek, and I served as President of the POA for two years I think, may be even more, I cannot remember, and Treasurer for a number of years, and on the Architectural Review Board now for five or six. One of the things that I think is very important to note is that the Ordinance, which is quoted, number one, goes on to say to the Ordinance, an amendment to the Ordinance. So you all are restricted to making exemptions or modifications or changes, not modifications, but exemptions to the Ordinance. That then means how do you bring in under the Ordinance any other restrictions, and if I understood Mr. Hoffman correctly, I could not hear very well so that is why I moved up next to his desk, he said that it was his opinion that the plat if it was platted with restrictive language in it becomes an extension of the Ordinance, and I have not seen the language which in fact brings that into existence, but I will assume that he is correct on that. So only when that plat has absolute restrictions, if he is correct. I am not saying that he is not, but I am not agreeing with him because I have not seen the law myself, but only when there are restrictions, did I quote you correctly, that it becomes an extension enforceable by the City. One of the things which we have here are the plats and they do not contain specific restrictions. Except in a number of them.

Mr. Swaney stated can I interrupt you for just a moment?

Mr. Strange stated yes, sir.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Swaney stated I thought the first plat that you talked about or that Mr. Pittman talked about did contain language and not necessarily dotted setback lines, but language that indicated setbacks.

Mr. Strange stated no, they were typical. The language is exactly the same as listed number three here. They are typical. It does not say specifically for any particular lot or that they apply to every lot or they do not. If you look at all the plats, which I have done in preparation for this, there are some lots, corner lots in one area which is called the cottages, in which is where I live as a matter of fact, in which there are specific set amounts on the plat. Our Board that I am on, the ARB has taken that to mean that we cannot change those, that the developer specified those for a reason and we have never altered any of those and we would not. If they are extended into the City Ordinance then we are in agreement that those are not to be touched, but where it says typical or they have not been set and where the language also says that the ARB is the one to make alterations to these private agreements, I do not see why any appeal to the Attorney General is necessary at all. It seems to me extremely clear cut that you all deal with the Ordinance and if the Ordinance is extended by specific language in the plat that specifies an area then we are okay with that because we have not made any modifications to it, but if it says typical, it is typical, and that is left as a private agreement just as Mr. Scott said earlier today. I do not think you want to be in the enforcement of it, but if you do we have got a number of cases that we sure do need the City's help on to try and get people to cooperate. I would like to see the City, you know, start bearing the burden if that is the case of our efforts to enforce these agreements and pay the money for it ourselves.

The Chairman stated Mr. Strange there is one difference in whether you can have a stone bunny on your front porch or whether you can put up railroad ties for a bulkhead behind your house verses a Planning Commission accepting a plat and it becoming part of the City Ordinance, an amendment to or an addition to. The other things you are correct that is private, and those are you all restrictions in there that you do not allow balloons in your yard or things of that nature I understand all of that, but my understanding is once the Planning Commission accepted the plat then it becomes part of the Daphne Ordinance and any variation from the Daphne Ordinance must come before the BZA.

Mr. Strange stated I agree wholeheartedly.

The Chairman stated that to me would be a public issue and not a private issue.

Mr. Strange stated but if the plat does not have any restrictions on it and it is incorporated in I do not see how there become any restrictions on a plat that has no restrictions on it. Do you see what I am arguing there?

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Strange stated these plats do not have restrictions all they have is, with the exceptions that I said earlier on corner lots in one area, there are no restrictions on these plats.

Mr. Swaney stated a typical.

Mr. Strange stated the language says typical. It does not say specific. It says typical and typical is not an absolute, in my opinion.

Ms. Jones stated in my opinion it is. Also while I have got a second to interject, I have one plat here from TimberCreek, Phase 2B, that does not, does not have the language about the ARB being the Board to grant variances and I will pass this out to you. It is a recorded plat as well.

Mr. Pittman stated that language is not contained on the one that I read to you all.

The Chairman stated Mr. Pittman we have to record this so if you will. We need to make sure everything is recorded as well as can be recorded.

Mr. Pittman stated we Pittman's usually talk so loud nobody ever ask us to speak into a microphone. The plat that I read to you from, the Phase One plat does not say about setbacks can be changed. Hold on John. It says listed below are the typical minimum setback standards for TimberCreek. For TimberCreek. So the fact of the matter is that they were all across the board. The developer probably from phase to phase made changes at the request of Mr. Eady. Sir you mentioned that concrete bunnies on porches are different than more restrictive setbacks. I would agree with you, but these plats reference and adopt and incorporate in the private restrictive covenants. So I would submit to you all that if it shows it on here, if Daphne is correct, then that is your responsibility and only yours and I would similarly submit to you that if somebody has got a concrete bunny on their porch, and it is referenced on this plat then you all have the obligation to do it or enforce it and can only enforce it. The last thing that I would submit you, and you do not see it as much these days as you use to, but it use to be that the only restrictive covenants that were done with subdivisions were all listed on the plats. So things like no pigs, no horses, no mud bogs, no whatever it might be, and you see that from time to time where those private use restrictions are actually listed one, two, three, four, five, six, seven on the plat. If Daphne's position is correct then you all have the responsibility to enforce those things. Last I think Mr. Allhands would like to briefly address you all. Thank you for your time.

The Chairman stated thank you.

Mr. Allhands stated hi, I am Stu Allhands, we spoke last month at Mr. Ruble's and Dr. Gupta's issues.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Allhands stated Mr. Moss brought up a great point, and that is, again, we are looking at a subdivision that has been very successfully run since 1993 until present. Arguably one of the nicest looking subdivisions in the City of Daphne. If there was a question that is to be put before the Attorney General's office from this Board about this matter it would be my thinking that this question should have been placed before the rules were changed. You changed the rules on us ninety days ago. Now we are going to try and cover up and run to the Attorney General and see if that rule change is actually correct. I think we ought to go back to doing the way we have been operating for the last fifteen years, very successfully and check your rule out. Thank you.

The Chairman stated thank you.

Ms. Jones stated I would like to speak to that real briefly. As you all know I started in this position in November of last year. In no way do I feel an obligation to try and fill Mr. Eady's footsteps, his shoes. There are some things that were done in the past there were not necessarily the best thing to do and especially on issues that I truly believe are wrong and inappropriate. I definitely will not continue in the same path that was established in the past. I will follow trends and patterns that were good and right, but I will not follow those that I do not believe are appropriate. So this is my stand, this is me sticking up for the BZA and the BZA's authority. Now the plats were signed by Mr. Eady, and they had to be approved by the Planning Commission as well, but I was not there. I do not know whether they realized that language was there or not. They may have thought okay this is another TimberCreek, just rubber stamp it. As far as, the setbacks being shown on the plat, and when I mention setbacks I mean the language that is provided in the note. I am not talking about it being drawn on the lots.

Mr. Swaney state exactly.

Ms. Jones stated so the issue of a restrictive covenant being brought up is wrong because I am not talking about a restrictive covenant. I am talking about the setbacks that are noted on the plat. So let us not cross hairs and draw straws and try to confuse the situation. I am speaking directly to the situation of setbacks. Period.

Mr. Swaney stated I understand.

The Chairman stated Mr. Allhands.

Mr. Allhands stated I am sorry. I lost my train of thought there for a moment.

The Chairman stated that is okay. I do it quite often.

Mr. Allhands stated I do. I do. I guess you have to learn to like it because that is the way it is going to be for the rest of the show.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Allhands stated so if you would give me a moment I could collect my thoughts. I had one concern here. Yes. Why is the ARB all worked up about this? What is it to us? It is a hundred and fifty bucks and six weeks of somebody's time. What is the big deal here? What the big deal is is it gives somebody the right to come before you with a request to set back a house thirty-feet off the front street that meet Daphne Ordinances and we may not be in favor of that at all. That is not a good thing for TimberCreek, but if they can come to you with the Ordinance here that says R-3, thirty front, thirty rear by God that is what I want to build then we are out of the picture and I do not think we want to do that. I do not think you want to do that either. Thank you.

The Chairman stated thank you, sir.

Ms. Jones stated let me jump in there real quick. The setbacks that are being upheld are the setbacks that are recorded on the plat. Not the typical R-3 setbacks that are established in the Ordinance. As Mr. Robison stated before when the plat was recorded it became part of the Ordinance for the City of Daphne, Land Use and Development. So when someone comes in for a variance to TimberCreek's setbacks for a lot in TimberCreek it would in accordance or the deviation would be from the fifty-feet or from whatever the side or front, but I think it would be appropriate, and this is my last thing, that the variances be granted by the Board of Adjustment.

Mr. Allhands stated the onus then in that situation places the burden back on the ARB, whoever may be on the ARB at that time, to come down here to stand in opposition, verbal opposition to that person's application for a zoning variance. It is just a lot of work. It is a lot of government that we do not need. I guess my libertarian heart is showing here, but it is just a lot of stuff that we do not need. Like Mr. Pittman said if you have got something that works do not try to fix it. Thank you.

Ms. Jones stated it does not work for me.

The Chairman stated thank you. Mr. Pittman, do you have anything else that you would like to say?

Mr. Pittman stated I would just like to say two things. One, to Ms. Jones, I respect her position. I respect her opinion. I see to often these days in municipal and county government, I guess I should say that I feel like people take it as a personal affront to them, when private land owners like these gentlemen are concerned about government stepping on the toes of private restrictions that the property that they have bought after years of hard work and invested in. So this is not personal to affront to Ms. Jones in any way. I would again point you out to, that if this is the City's position then you all are treating everybody in TimberCreek, you are being more restrictive with them, you are treating them more dispersedly, unequally.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Pittman stated and I think it is a due process and an equal protection violation. Because if Mr. Strange's lot is zoned R-4 Daphne's regulations say thirty-foot front setback, but the private restrictions say fifty-foot front setback. So now because Daphne has taken the position that the private restriction is their public restriction then you are now treating TimberCreek residents differently then somebody whose designated R-4 in a subdivision that does not have more restrictive covenants or who just owns a piece of property that is zoned R-4.

Mr. Swaney stated I understand.

The Chairman stated yes, sir. Are you saying that in no shape, fashion or form that this as we are saying becomes part of the Daphne City Ordinance, Daphne Land Use Ordinance that it does not in any shape, fashion or form once the Planning Commission approves it that it comes under the auspice part of the Daphne Land Use.

Mr. Pittman stated that is exactly what I am saying. What I am saying is, and there is no authority anywhere in this country that supports Daphne's position, and I can assure you this, if a city had ever taken this position anywhere in the United States of America somebody would have appealed it up to a Court and there would be lots and lots of opinions on this, but that is exactly what I am saying. Because these plats make it very clear that these are private restrictions, private restrictive covenants, and state that TimberCreek's ARB is reserving that power to itself. Daphne could have said we will not allow you to record that plat with that private use restriction language in it, and Allen Cox and TimberCreek Land Development Company could not have recorded those plats, but when Mr. Eady and various officials with the City of Daphne, signed off on that, after having read that language that is a contract. I mean you can lawyer it up all you want that is an agreement. They are giving TimberCreek their word that as long as you do not step on our toes and try to allow people to only allow people to only have a twenty-foot front setback then as long as you are between thirty-feet and fifty-feet then that is your Bailey Wick. You step on our toes that is ours. So absolutely I am telling you it is my position that those are private restrictions and private restrictions only.

The Chairman stated I am just trying to gather information. How do you explain where the Alabama Code says once the Planning Commission signs off on a plat then it becomes of the Land Use Ordinance as an addition or an amendment to it? I am seeking information.

Mr. Pittman stated good question. That is a great question. Because it was the legislators intent for a city like the City of Daphne to deal with life, safety, police power type issues. Created by something like a setback making sure a house is not too close to a street. Never was it the intent of the legislators when they passed that ordinance that anything that is on the face of a plat private or otherwise becomes only within the per view of a municipality.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Pittman stated and the reason we know that is because I have read to you language from Alabama Supreme Court, the Alabama Court of Civil Appeals, United States Supreme Court of this Country, which is the highest court in this land, and it says private restrictions are here, public restrictions are here, and never the two shall cross, and it is not allowed for a public body to stick its nose in private affairs. It is the reason our forefathers started a revolution is because they got tired of people and governments telling them we are going to control you.

Mr. Swaney stated did not you state earlier Mr. Pittman that you have not found any case law relating to this.

Mr. Pittman stated right. There is not a case in the United States that says that a municipality taking this position or the recordation of that plat makes a private restriction public. There is on the other hand thousands of cases, I just read you four out of the State of Alabama, but there are hundreds in every stated and most of them date back to the 1800's because nobody has ever taken a contrary position since that say private restrictions are private and public restrictions are public.

The Chairman stated you were talking about all the way to the U. S. Supreme Court for some cases. That probably would not be a good example since they totally wiped out the immanent domain thing with allowing a shopping center to take over something because it would make more money than the man that lived on that piece of property. It was not the government that needed that property.

Mr. Pittman stated that is a good point. In Massachusetts or wherever that case came out of there are a lot of governments doing a lot of things. Fortunately in Baldwin County Alabama where people still have the some sense I would submit to you that municipalities stay out of private affairs like they should.

Mr. Moss stated I would like to ask question.

Mr. Pittman stated yes, sir.

Mr. Moss stated if a plat that is recorded becomes part of the Ordinance, is it just part of that plat or is it just the notes and all parts of that plat that become part of the Ordinance?

Mr. Pittman stated that is a good question. Where does it stop?

Mr. Moss stated is it just the numbers that are down there? Or is it the notes and the agreement that Bill Eady signed off on that your Association would reserve the right to alter as your own as long as it did not step on the toes of the City of Daphne? Now is all of that part of the new ordinance or can we cherry pick what we want? That is what is happening.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Pittman stated I think what I am hearing is that Daphne can just cherry pick front, side and rear yard setbacks, but it can distance itself from private use restrictions and private easements, which are also contained in the language of the plat. So I would submit that it is one or the other. You either have got to take the good with the bad and take the whole shooting match or you have got to say anything that is private whether it is on that plat or not is not within our planning jurisdiction.

Mr. Swaney stated looking forward. What would be the path forward here as regarding TimberCreek? What would you like to see done this evening considering that this Board who has to have a supernumerary vote, if you will, no dissenting votes, if they would deny the appeal, then that forces you, as I see it, to proceed through the courts as you said. Is there some alternate that would best be pursued as far as TimberCreek is concerned?

Mr. Pittman stated good question. The court system is extremely expensive and it is time consuming. We want to avoid that and I think that you all would like to avoid that. The motion that I was hoping to make when the Chairman asked for one, and I think that you all have the right to do this, is to poll yourselves prior to voting yea or nay on it as to what you all feel on an individual basis. Then at that point I will speak with my clients briefly and we will consider whether we want to withdraw without prejudice meaning that if we went the AG Opinions route and it went against TimberCreek they would then still have the right to come before you all and get your opinion and then proceed through the court system if they chose to. They do not want to do that. It is going to cost a lot of money and they want to use their Property Owner's Association dues to make sure people are following the rules, and not pay lawyers to fight things out in court.

Mr. Swaney stated as far as polling ourselves, in essence, what you are asking us to do is deny our legal counsels opinion, and in essence, write our own and permit this.

Mr. Pittman stated that is a good point and again Mr. Hoffman is a fine lawyer and I am not to detract from him. I do not think you have got to get to the legal side of it at all. I am asking you gentlemen to use your common sense, which you all have, that is why you are there, and lady, excuse me, and if you think that this is fair and right for the City to take this position then you have got to do what you have got to do. I do not think it is and I think that if you look at the Pandora's Box that you are opening the City just does not want to take something that ain't broke and try to fix it.

Mr. Strange stated may I say something.

The Chairman stated yes, sir Mr. Strange.

Mr. Strange stated the question was asked why we are so concerned about this particular issue. There is a very good answer that has not been given yet

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Strange stated and that is, as an owner in TimberCreek it make a lot of difference to me whether or not people build according to the covenants and restrictions that we have adopted or to the general Ordinance that has been established in the City of Daphne. Down the road you all are not on the Board, somebody else is on the Board or the position has been taken that it is operating that way that you all have incorporated our private restrictions into the Ordinance. The new Board comes in and they say oh you know what thirty-feet is too much, twenty-feet is good enough for the rest of Daphne it is good enough for TimberCreek, and therefore the Board of Zoning appeals can under the advice, of which, you have been given tonight, you can say yep that is, we are going to do it this way, none of us live in TimberCreek, does not make any difference. If twenty-feet is good enough for the City, it is twenty-feet is good enough for TimberCreek, and that is it. That is a very troublesome matter to me. First of all, I am not sure why you have to take a position that we are going to change what we have been doing for a long time, when it in fact, helps the City of Daphne. It does not undermine it in any way that is what you are here for. Are we going to uphold the rules? We are tough as blank, and have been from the start and will be because it means a lot for our property values that is why we are here. There is no specific language in the plat when it is adopt specifying except for one exception and that is the cottages in plat two. They are specified and we have upheld those, absolutely, as if they were in the City Ordinance because we do not want them backed up any more. A few little, there are about four or five different ones that are on corner lots that say thirty-four feet, forty-seven feet whatever because of the shape of it, but no where else is there an absolute specification of setbacks. The language is all typical. Typical, and that means that there are variations within it, but it is typical. The language is also there that the POA Board is, in fact, is the one, to do it. I think that it was intentional. I think it was to keep the City out of the business of having to hear every single appeal that might come. Now we have not had a whole lot, but we certainly need, I think, to have some sort of efficiency in that governmental process. I was on a city council as a Councilmember one time, and I know that we wanted to try to avoid as many possible sort of conflicts between the residents, instead of saying bring them all to us and we will settle them. No it is better if you settle them yourself and do not come to us and if you have a big one then we may have to deal with it, but otherwise take care of it yourself. Thank you very much. Appreciate it.

The Chairman stated thank you.

A Motion was made by Mr. Swaney and **Seconded** by Mr. Moss **to pursue an Attorney General's Opinion.**

The Chairman stated Mr. Hoffman do they have to withdraw there appeal in order for us to do this?

Mr. Hoffman stated Mr. Chairman I would say that regardless of what you want to do at this point.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Hoffman stated if the appeal still stands as it is brought before the Board, then the Board has forty-five days to make a ruling on that appeal one way or another. I can tell that I do not believe that we would get an AG' Opinion before forty-five days.

Mr. Swaney stated could you say all of that again I could not hear all that.

Mr. Hoffman stated according to the Ordinance you have forty-five days to after this hearing to make a ruling on an appeal that is brought before the Board. So if the Board made a decision to pursue an AG's Opinion either by itself or through the City of Daphne, whichever one that can happen that will be forward regardless if it is approved, but then you still have the issue of the appeal and the appeal would have to be ruled upon within forty-five days.

The Chairman stated but if they withdraw their appeal we do not have forty-five days they can come back at a later date by going through the process they went through to come here tonight. Is that correct?

Mr. Hoffman stated that is correct. If they withdrew their appeal at this time then that would have the right to re-raise the appeal at a later date.

The Chairman state if they withdraw their appeal and in the meanwhile we are seeking an Attorney General's Opinion they may or may not have to come back before this Board.

Mr. Hoffman stated that is correct. Well procedurally they may or may not have to either way because what would happen is, if they withdrew their appeal, they would then file again with Adrienne's office, and Adrienne's office would make a decision, which they may or may not then decide to appeal. So that is correct.

The Chairman stated Mr. Pittman, Mr. Allhands, and Mr. Strange you all heard that.

Mr. Swaney stated there is a motion on the floor.

Mr. Allhands stated one quick question.

The Chairman stated just a moment we have a motion that we have got to take care of. Are you withdrawing your motion?

Mr. Swaney stated yes.

The Chairman stated motion withdrawn.

Mr. Swaney stated for discussion.

The Chairman stated okay.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Allhands stated my question is simply, what happens in the interim while you all are researching the Attorney General's office for clarification on your position? What happens between, I am not anticipating, you know building is slow in TimberCreek just like it is every place else because of the economy, but because of the configuration and the slopes of some of the lots that we have left in the subdivision, were we to have someone to come before us asking for a front or rear variance because of physical conditions on the lot, which may happen or may not what do we do in that case, if the Attorney General's Opinion has not allowed us clarification.

The Chairman stated can an expedited appeal to the Attorney General be made. I know in the past I have heard where some have asked them to please expedite this, but they sometimes like anything else they look at it and they take their sixty, ninety to a hundred and twenty days or whatever to do it usually.

Mr. Hoffman stated if the Board was to request an Attorney General's Opinion it could be requested of the Attorney General to expedite a response, but that is within the per view of the Attorney General's office. I have not heard of an Attorney General's Opinion being granted within forty-five days.

The Chairman state but it is getting close to election time.

Mr. Hoffman stated to answer the question. I believe procedurally those decision would then be made based upon the current ruling of the Planning Committee. They would then be brought before Ms. Jones office, and then they make a decision, and if those homeowners then had a problem they would then bring it to you on appeal is the way I see it.

Mr. Moss stated in other words any interim would be as stands until we got an opinion.

Mr. Allhands stated it would be what?

Mr. Moss stated it would be just as it stands now. However, I do not think that anyone here from the Planning Department or anyone else wants to really cause any hardship. We all want the City of Daphne to be a better place to live and that is what we are working towards.

Mr. Mr. Strange stated I would much rather that you make a decision tonight in our favor, but if you think that you would feel better consulting with the Attorney General I personally would say as long as this Board takes that position to appeal to the Attorney General rather an say hey we cannot do it somebody else has got to it. I personally would say go for it. There is some question about whether you can do it or the City.

The Chairman stated Mr. Strange having been in the same.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

The Chairman stated if you want to call them seminars, schools or whatever else as these two gentlemen to my left and right have been, I also understood the gentleman from UNA to say that BZA has the right to ask the Attorney General for an opinion and that is why I got out of it.

Mr. Hoffman stated I am not naturally in disagreement, but I cannot tell you that is a guarantee just because somebody else said it and I agree because I have not looked at the issue.

Mr. Pittman stated after conferring with my clients, I think, what they would like to do is withdraw their appeal without prejudice, meaning without prejudice to any of their rights to continue to pursue this. I think Mr. Hoffman and I are in agreement that they can do that without prejudice to any of their future rights, and that we file a mutual Attorney General's Opinion. It is my understanding that recently Mr. Hoffman had issued an opinion to Mr. Ross, who is the City Attorney. I have asked Tony if I can have a copy of that and of course he has said that he would have to get permission from the powers that be meaning you all. The way I operate at least is let us all lay our cards on the table. So what I envision is that Mr. Hoffman would share your position with me and I will share our position with you. I just want make sure that we too have the opportunity to weigh in and make our submission, present our legal authority and all of those things.

The Chairman stated are you in agreement with that Mr. Hoffman?

Mr. Hoffman stated I can tell you that private citizens cannot request an AG's Opinion. I am at your disposal. So I will ask the questions that you want asked, and I would suggest that if need be I would prepare something, but the Board ultimately would have to make the decision of what is being requested of the AG's office. I can only make a suggestion, and if you would like me to do that with the input of the City and TimberCreek, I would be happy to do that as well.

The Chairman stated I will not divulge my opinion as to how I feel at the present time about the City Ordinance things. I have expressed a lot of thing, but I will would like to know from the Attorney General's is the City of Daphne legally correct in saying what they are saying.

Mr. Pittman stated what I am saying is this and I am not doing a very good articulate job in relying to you all is that I want to make sure that we get a chance to tell our side of the story too, that what is going to the Attorney General's office is not just Daphne's side of the story. If that is all the Attorney General is going to have the benefit of, then I would say let us get a ruling tonight on our appeal and then we can go to Circuit Court and take it on up, but I think what I believe you all are trying to accomplish is let us lay all the facts, all the law, and all the authority in front of the Attorney General and lets get the right ruling.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Pittman stated not a one sided ruling, and that is all I am asking you all, to allow us to have input, and submit our authority, and our position along with yours, and I am happy to share everything we have got with the City of Daphne. We have got nothing to hide.

The Chairman stated I am just speaking personally for myself. I do not think you will have a problem with that because I think we would present the facts as you have presented them. You say that no it does not and we say yes it does fall under the per view of the City of Daphne Land Use Ordinance and we would like an Attorney General's Opinion on that.

Mr. Moss stated I think we would be crazy not to present both sides that is what it is all about.

Mr. Pittman stated absolutely. I just want to be the one to present that gets to present our side just like I am sure Mr. Hoffman can do a better job of articulating Daphne's side or its position.

Mr. Hoffman stated Mr. Chairman.

The Chairman stated Mr. Hoffman.

Mr. Hoffman stated as I understand the request for an AG's Opinion is that we submit the questions that we want the AG to answer. There is no submittal of authority as to who is right or wrong or case law or anything like that. You are simply asking the AG here is the question being presented, what is the answer and they do all the research and all the fine tuning. So it is simply a matter of what questions are presented not necessarily presenting a side one way or another because the BZA and our governmental authority simply wants the right answer or the one that the AG sets out that they will follow at that point. If that is clear enough. In other words I usually do not see an AG's Opinion that says here is the question and here is what we think the answer is and we do not tell you what the other side thinks. We just say here is the question, please tell us what you think the answer is Mr. Attorney General.

Mr. Pittman stated I would respectfully disagree to some extent. One of the gentleman said that we just want to do what is in the best interest of Daphne and its residents. I do not see what harm can come from everybody getting an opportunity to tell their side of the story. Mr. Pittman stated that is what due process fundamentals of our Constitution are all about. I think that the Attorney General in the interest of expediting everything would love us to help them where they can. I know you guys have got one statue municipal ordinance that supports your position. We have got a lot of authority that supports our position. So if Daphne does not allow us to include our materials with the package, to the AG's office, I am going to write Troy King myself, and say City of Daphne would not allow us to tell our side of the story, here it is, please consider our position as well.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Swaney	Aye
Ms. Hargiss	Aye
Mr. Robison	Aye
Mr. Moss	Aye

The Chairman stated alright. We will be asking for the Attorney General's Opinion, and I would like to thank you all tonight for coming out and presenting your case in this matter. Thank you very much.

Mr. Swaney stated I would like to make one additional request if I could of Ms. Jones. Could you sort of keep us up to date as to the progress of this?

Mr. Moss stated I would like to make a comment to Ms. Jones. I really appreciate and approve your statement about what you said when you said that you are just looking for an answer. You are not looking for confrontation. You just want an answer.

Mr. Hoffman stated for point of clarification Mr. Chairman and the Board. I understand that I am to request an Attorney General's Opinion. I will be phrasing a question and so forth, but at some point the Board will have to make a decision as to whether the question I am submitting is the question that they want answered. So at some point whether it is the next meeting or before that there will have to be a decision making by your body that this is the exact question that you want submitted.

The Chairman stated if it is before the next meeting.

Ms. Jones stated we do not have a meeting next month. It would have to be a special called meeting.

The Chairman stated we do not have one next month so then we will need to have a meeting just for that. Let us adjourn before I say this.

Mr. Swaney stated just amplification. We would have a special meeting. Is that what you are saying?

The Chairman stated yes, in October.

There being no other business the meeting was adjourned.

Adjournment:

A Motion was made by Mr. Moss and Seconded by Mr. Swaney to adjourn.

The Motion carried unanimously.

There being no further business the meeting was adjourned at 7:46 p.m.

**CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL**

Mr. Pittman stated and knowing Mr. King I think he would allow that, if what we are trying to do is get the right answer. I do not see how any harm can come from TimberCreek being able to put their two cents in. You all have certainly been kind enough to listen to us at nauseam tonight in getting to put our two cents in. We need to do it again with Mr. King's office. Thank you.

The Chairman stated thank you.

Ms. Jones stated I am not looking for a battle or a fight. I am looking for an answer that is all. I want to know what is the right answer.

Mr. Swaney stated the right answer. Exactly.

The Chairman stated that is all we are looking for is the right answer. Whether the Attorney General says that what you have said tonight is correct or whether he says what the City has said is correct. All we are looking for is an answer.

Mr. Pittman stated what I am going to do is put together a package and I am going to have it to Mr. Hoffman office with copy to Mr. Ross and ask that it be submitted to the Attorney General's office and will simply ask them to verify for me that it has been in fact submitted with their submission. What I ask you all and I know you want to ask the advice of Counsel to share with us what your position is because we certainly have nothing to hide and we are will to copy any of you or anybody you want with our written position and our authority.

The Chairman stated so at this time you are saying that you all are withdrawing this appeal.

Mr. Pittman stated without prejudice.

The Chairman stated without prejudice, which allows you to come back.

Mr. Swaney stated and again then I will make the motion.

A Motion was made by Mr. Swaney and Seconded by Mr. Moss to pursue an Attorney General's Opinion.

The Chairman stated any discussion?

Ms. Hargiss stated I would like to say one thing. I do not think it is just TimberCreek and this Board. I happen to know that other properties in Daphne, you know, are aware of this situation and they are concerned too. So it is the community.

Mr. Pittman stated yes, madam. Thank you.

Upon roll call vote, **the Motion carried unanimously.**

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Mr. Swaney Aye
Ms. Hargiss Aye
Mr. Robison Aye
Mr. Moss Aye

The Chairman stated alright. We will be asking for the Attorney General's Opinion, and I would like to thank you all tonight for coming out and presenting your case in this matter. Thank you very much.

Mr. Swaney stated I would like to make one additional request if I could of Ms. Jones. Could you sort of keep us up to date as to the progress of this?

Mr. Moss stated I would like to make a comment to Ms. Jones. I really appreciate and approve your statement about what you said when you said that you are just looking for an answer. You are not looking for confrontation. You just want an answer.

Mr. Hoffman stated for point of clarification Mr. Chairman and the Board. I understand that I am to request an Attorney General's Opinion. I will be phrasing a question and so forth, but at some point the Board will have to make a decision as to whether the question I am submitting is the question that they want answered. So at some point whether it is the next meeting or before that there will have to be a decision making by your body that this is the exact question that you want submitted.

The Chairman stated if it is before the next meeting.

Ms. Jones stated we do not have a meeting next month. It would have to be a special called meeting.

The Chairman stated we do not have one next month so then we will need to have a meeting just for that. Let us adjourn before I say this.

Mr. Swaney stated just amplification. We would have a special meeting. Is that what you are saying?

The Chairman stated yes, in October.

There being no other business the meeting was adjourned.

Adjournment:

A **Motion** was made by **Mr. Moss** and **Seconded** by **Mr. Swaney** to adjourn.

The Motion carried unanimously.

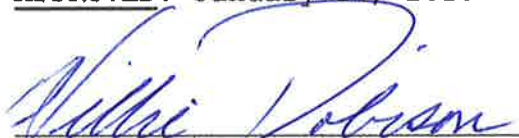
There being no further business the meeting was adjourned at 7:46 p.m.

CITY OF DAPHNE
BOARD OF ZONING ADJUSTMENT MINUTES
REGULAR MEETING OF SEPTEMBER 3, 2009 - 6:00 P.M.
COUNCIL CHAMBERS, CITY HALL

Respectfully submitted by:


Pat Houston, Recording Secretary

APPROVED: January 14, 2010


Willie Robison, Chairman

/ph