

**City of Lawrence
Board of Zoning Appeals
April 5, 2012**

MEMBERS PRESENT: Kimzey, Mahoney, Lowe, Edie, Holley
MEMBERS ABSENT: Christie, Perez
STAFF PRESENT: Guntert, Parker, Miller, McCullough, Larkin
PUBLIC PRESENT: Hill, Nichols, Werner, Donohoe, Reardon, Ammann, Finkeldei, Rainey, Killough, Tubbs, Stauffer, Mitchell, Henderson, Martin, Repinsky, Eldridge, Mansur, Heckler, Klingenberg, Soden, Gardner, Winter, Almon, Davis, Harris

**BOARD OF ZONING APPEALS
Meeting Minutes of April 5, 2012 –6:30 p.m.**

Members present: Kimzey, Mahoney, Lowe, Holley, Edie
Members excused: Christie, Perez
Staff present: Guntert, Miller, McCullough, Larkin, Parker

ITEM NO. 1 COMMUNICATIONS

Lowe stated communications were added to the packet on April 5th, 2012, and abstentions would be announced for each agenda item.

No items deferred.

ITEM NO. 2 MINUTES

Motioned by Holley, seconded by Edie, to approve the February 2, 2012 Board of Zoning Appeals minutes.

Motion carried, 3-0-2 Mahoney and Kimzey abstained

BEGIN PUBLIC HEARING:

ITEM NO. 3 BOWERSOCK MILLS & POWER COMPANY [AM]

B-3-7-12: A request for a variance as provided in Section 20-1309 of the Land Development Code in the Code of the City of Lawrence, Kansas, 2011 edition. The request is from the provisions in Article 12, Section 20-1204(b) of the City Code as it pertains to development in the Regulatory Floodway. The variance request is related to electrical improvements that are necessary to the new North Powerhouse. The property is generally described as being east of the Massachusetts Street Bridge on the south side of the Kansas River just east of the Bowersock Dam. Submitted by The Bowersock Mills & Power Company, plant owner and operator. **The legal description for the property in the appeal and the case file for the public hearing item are available in the Planning Office for review during regular office hours, 8-5 Monday - Friday.**

STAFF PRESENTATION

Ms. Amy Miller presented the item.

Lowe asked Ms. Miller if the location was the only feasible area for the structure.

Ms. Miller stated the area was the only feasible place for the structure and the structure would be required to come into compliance with the non-residential construction standards of the flood plain regulations.

APPLICANT PRESENTATION

Steven Hill, Bowersock Mills Power Company, said Ms. Miller's presentation summed up the reason for the variance. He said the transmission lines and the outputs would be delivered to the Westar Energy grid.

PUBLIC COMMENT

There was no public comment.

PUBLIC HEARING CLOSED

Motioned by Holley, seconded by Mahoney, to close the public hearing.

Motion carried unanimously, 5-0

BOARD DISCUSSION

Mahoney said Staff did a great job of summing up why project should be approved.

Lowe said the project met all of the requirements.

ACTION TAKEN

Motioned by Mahoney, seconded by Holley, to approve the variance request for the Bowersock Mills and Power Company based on the recommendation and findings of fact in the staff report, subject to the following condition:

1. Approval of a local Floodplain Development Permit.

Motion carried unanimously, 5-0

ITEM NO. 4 103 PROVIDENCE ROAD [DRG]

B-3-6-12: A request for a variance as provided in Section 20-1309 of the Land Development Code of the City of Lawrence, Kansas, 2011 edition. The request is for a variance to allow a wood screen fence to be constructed in a code restricted area on a corner lot having its rear yard abutting the side yard of the adjoining property. Section 20-602(e)(6)(ix)(b) in the Development Code is the governing provision in this case. It does not allow a fence, wall or hedge to be located in an area on the property measured 25 feet from the common property line, and from the exterior side lot line a distance equal to ½ the front setback for the adjoining property. The subject property is located at 103 Providence Road. Submitted by Patrick R. and Kathie S. Nichols, the property owners of record. **The legal description for the property in the appeal and the case file for the public hearing item are available in the Planning Office for review during regular office hours, 8-5 Monday - Friday.**

STAFF PRESENTATION

Mr. Guntert presented the item.

Mahoney asked Staff if there had been any opposition to the project.

Mr. Guntert stated the neighbors were not opposed to the project and had submitted a statement in support.

APPLICANT PRESENTATION

Patrick Nichols displayed photos of the property at 103 Providence Road. He and his wife recently purchased the property and the house had been renovated. The problem was the back of the lot was long and narrow. The sidewalk on Princeton Boulevard was close to the back yard and he was seeking personal security.

Ms. Nichols said she spoke to the neighbors in the area and they were all excited about seeing a fence on the property.

Holley asked if permanent structures would be built within the fenced area.

Ms. Nichols said structures would not be added to the enclosed fenced area.

PUBLIC COMMENT

There was no public comment.

PUBLIC HEARING CLOSED

Motioned by Edie, seconded by Holley, to close the public hearing.

Motion carried unanimously, 5-0

BOARD DISCUSSION

Lowé said the variance was for 7.5 feet and the neighbors did not have a problem with the project.

Mahoney said he drove by the property and spent some time looking at the line of site along Princeton Boulevard. He did not believe the location of the fence would be an issue affecting the sight distance at the intersection of Providence Road and Princeton Boulevard.

ACTION TAKEN

Motioned by Mahoney, seconded by Holley, to approve the variance request at 103 Providence Road, based on the recommendation and findings of fact in the staff report.

Motion carried unanimously, 5-0

ITEM NO. 5 1012 BRANCHWOOD DRIVE [DRG]

B-3-4-12: A request for a variance as provided in Section 20-1309 of the Land Development Code of the City of Lawrence, Kansas, 2011 edition. The request is for a variance to reduce the 5 feet interior side yard building setback from an interior lot line required in Section 20-601(b) of the City Code to a minimum of 2.84 feet from the interior lot line measured at the front of the new garage addition. The variance is requested to correct the building's encroachment into the side setback. The subject property is located at 1012 Branchwood Drive. Submitted by Joy Rhea with Paul Werner Architects for Terry R. and Rebecca S. Spriggs, the property owners of record. **The legal description for the property in the appeal and the case file for the public hearing item are available in the Planning Office for review during regular office hours, 8-5 Monday - Friday.**

STAFF PRESENTATION

Mr. Guntert presented the item.

APPLICANT PRESENTATION

Paul Werner, Paul Werner Architects, stated he had spoken with staff and there was no other alternative for the garage addition. Mr. Werner said the neighbors supported the variance.

Lowe asked if the back corner of the new addition was in compliance with the setback requirement.

Mr. Werner stated the home was built on a lot located along the curve of the street. The rear portion of the new addition met the setback requirement. Only a small area of the addition encroached into the setback and it was less than 2" into the setback.

PUBLIC COMMENT

There was no public comment.

PUBLIC HEARING CLOSED

Motioned by Mahoney, seconded by Holley, to close the public hearing.

Motion carried unanimously, 5-0

BOARD DISCUSSION

There was no Board discussion.

ACTION TAKEN

Motioned by Edie, seconded by Mahoney, to approve the variance request at 1012 Branchwood Drive, based on the recommendation and findings of fact in the staff report.

Motion carried unanimously, 5-0

ITEM NO. 6 1645 KENTUCKY STREET [DRG]

B-3-3-12: A request for variances as provided in Section 20-1309 of the Land Development Code of the City of Lawrence, Kansas, 2011 edition. The request involves variances from off-street parking requirements for a neighborhood religious institution seeking to locate in a developed residential property several blocks east of the University of Kansas Campus. The applicant is seeking relief from the standards set forth in Article 9 of the Development Code that address the required amount of parking spaces and parking area setback from a street right-of-way. The requested property is located at 1645 Kentucky Street. Submitted by Chad Donohoe with Grace Evangelical Presbyterian Church, contract purchaser from David D. Wagner, the property owner of record. **The legal description for the property in the appeal and the case file for the public hearing item are available in the Planning Office for review during regular office hours, 8-5 Monday - Friday.**

STAFF PRESENTATION

Mr. Guntert presented the item.

APPLICANT PRESENTATION

Chad Donohoe said most of the students who were part of the ministry live within the Oread Neighborhood. They expected a lot of the students would walk or bike to the center rather than drive. Sunday nights would draw the largest group, approximately 30 people; and on Tuesday night it would be a much smaller group. They had been running around four people on Tuesdays.

Mr. Donohoe said the students would be asked to park in designated areas. They were talking with the First Regular Missionary Baptist Church, located one block east on Vermont Street, about possibly using their parking lot on the nights they would hold meetings. They were favorable to allow them to use their parking. He said they also had talked with the school district about parking at Cordley School on those nights.

Mahoney said the only other option for parking would be on Kentucky Street if there was no agreement made.

PUBLIC COMMENT

Terry Reardon, 1613 Tennessee Street, said he was not against the church and said the kids were probably good kids. Mr. Reardon said parking in Oread Neighborhood was a premier problem. He said the church would create an adverse affect to all of the neighbors in the area if they did not have to provide off-street parking. He thought the situation was dangerous and a significant inconvenience on Sunday and Tuesday nights. He said the students would not want to walk from the designated parking spots and asked if there was a guarantee for the neighbors there would not be a parking problem. Mr. Reardon reiterated he was not opposed to the church opening a student center at this location but wanted the Board to find some way to mitigate the parking problem in the area. He said everyone had good intentions but the variance should be delayed for a month to come up with a solution.

PUBLIC HEARING CLOSED

Motioned by Edie, seconded by Mahoney, to close the public hearing.

Motion carried unanimously, 5-0

BOARD DISCUSSION

Mahoney said he drives on W. 17th Street every weekday and he could see where the neighborhood residents would think the parking for the church would be a problem. He asked if there was an alternative if the students would not park in a designated area. There was no way to regulate public parking on the street. He said it would be hard to determine if students were attending the services and hard to enforce. He said the alternative for the applicant would be to purchase a different property in the area.

Holley asked Mahoney if he believed the project met the hardship condition for the Board to be able to grant a variance.

Mahoney said there was no unnecessary hardship to the applicant.

Edie thought the church down the street offering to let the student center use their parking lot alleviated the issue and a variance wasn't necessary.

Lowe said he did not see a uniqueness factor with the property. He said the parking issue could be alleviated but there was no way to enforce it.

Holley asked if there could be a time limited variance which could be renewed every two years.

Lowe said there could be a condition added to an approval that if the variance was granted it would stick with the ownership of the property. He said he was familiar with the area and knew how congested the area was. Lowe said 13 parking spots would be needed for the property assuming a 50 occupant meeting room.

ACTION TAKEN

Motioned by Mahoney, seconded by Holley, to deny the variance request at 1645 Kentucky Street, based on the Boards discussion that the request did not meet the five conditions needed to support the granting of a variance. Specifically, there are no uniqueness conditions associated with the property and no unnecessary hardship to the property owner by denial of the request.

Motion carried unanimously, 5-0

ITEM NO. 7 1602 HIGH DRIVE [DRG]

B-3-5-12: A request for a variance as provided in Section 20-1309 of the Land Development Code of the City of Lawrence, Kansas, 2011 edition. The request seeks relief from the requirement that off-street parking areas be set back a minimum of 25 feet from a street right-of-way in any residential zoning district per Section 20-908 of the Development Code. The variance is prompted by proposed parking lot improvements for the Kappa Delta Sorority located at 1602 High Drive. Submitted by Darron Ammann with Bartlett & West, Inc. for Zeta Epsilon House Corporation, the property owner of record. **The legal description for the property in the appeal and the case file for the public hearing item are available in the Planning Office for review during regular office hours, 8-5 Monday - Friday.**

Lowe said he was contacted by Bartlett & West staff about this item.

Mahoney said he was also contacted by Bartlett & West staff about the item.

Kimzey said he was also contacted by Bartlett & West staff.

STAFF PRESENTATION

Mr. Guntert presented the item.

Lowe said currently there were 84 members with only 41 parking spaces. He said the applicant proposed to add 40 additional parking spaces bringing the total number of parking spaces to 81, which was 18 more spaces than the minimum required by the Development Code.

APPLICANT PRESENTATION

Darron Ammann, Bartlett & West, thanked Staff and stated the project was very important to help Kappa Delta Sorority house get their parking under control. He said the property had been platted and portions of the property were dedicated to the City of Lawrence for street right-of-way. Mr. Ammann said there was communication with the neighbors and they had been provided with a site plan.

He said the property was egg shaped and it has over 30 feet of grade change. There was also a deed restricted area on the property known as the rock garden that cannot be touched. Mr. Ammann said there were 41 parking stalls and 84 residents and the situation for the residents was not safe for those who return late at night and have to walk three to four blocks to their residence. He said the large trees would stay and additional trees and shrubs would be added for screening. Mr. Ammann stated approximately fifty percent of the site would be open space.

Mahoney asked Mr. Ammann how much green space was on the property now and after the parking improvements were completed.

Mr. Ammann said currently there was 55-60% of the site in green space; after the project there would be 48% green space.

Mahoney asked if railing would be added around the parking lot.

Mr. Ammann stated any place the wall was over 30 inches in height there would be a rail added. He said the highest point of wall was twelve feet.

Mahoney asked if the height of the wall would take care of headlights in the area.

Mr. Ammann stated there were large trees in the area that would hide headlights.

Lowe asked if there was any way to work around the restriction in the deed filed in 1958 and access part of the rock garden.

Mr. Ammann stated the deed restriction allowed only sidewalks in the rock garden area.

Kimzey asked if the retaining wall would encroach into the restricted area.

Mr. Ammann stated the contractors would not encroach into the restricted area.

Holley said there would be a significant amount of trees added and asked what the process was for interacting with the neighbors.

Mr. Ammann said there were multiple concepts for the project and the neighbors had presented the rock garden stipulation.

Holley asked the applicant if there was an option of a two level parking garage.

Mr. Ammann stated a two level parking garage was not considered because of the cost to build such a structure.

PUBLIC COMMENT

There was no public comment to this item.

PUBLIC HEARING CLOSED

Motioned by Mahoney, seconded by Holley, to close the public hearing.

Motion carried unanimously, 5-0

BOARD DISCUSSION

Lowe stated the property shape, deed restriction, and presence of public street right-of-way on so much of the property boundary were all unique conditions to this property and these conditions created an unnecessary hardship for the applicant to be able to comply with the Development Code parking setback requirement.

ACTION TAKEN

Motioned by Mahoney, seconded by Holley, to approve the variance request at 1602 High Drive, based on the recommendation and findings of fact in the staff report.

Motion carried unanimously, 5-0

ITEM NO. 8 12TH & HASKELL RECYCLING CENTER; 1146 HASKELL AVENUE [SM]

B-1-2-12: Consider an appeal filed by Bradley R. Finkeldei with Stevens & Brand, L.L.P., on behalf of his client Robert B. Killough, owner of 12th & Haskell Recycling Center, 1146 Haskell Avenue. The appeal challenges an administrative determination made by the City of Lawrence Director of Planning and Development Services outlined in a letter dated January 13, 2012, that the lawful nonconforming use of the land has expanded and that the use of the property is an Open Use of Land not permitted pursuant to Section 20-1502(b) and Section 20-1502(d) of the City Code. The reasons cited by the appellants for filing this appeal are contained in a letter from Mr. Finkeldei, dated January 30, 2012. **The legal description for the property in the appeal and the case file for the public hearing item are available in the Planning Office for review during regular office hours, 8-5 Monday - Friday.**

STAFF PRESENTATION

Randy Larkin, City Attorney, explained the appeal procedure for a Notice of Violation and stated there were two violations at 1146 Haskell Avenue. Mr. Larkin stated the violations were an expansion of non-conforming use and open use of land, such that the use should be discontinued.

Scott McCullough, Planning Director, presented photos of 1146 Haskell Avenue and stated the property was approximately six and half acres with industrial zoning and uses to the north and west, open space zoning and uses to the east, and residential zoning to the south and at 1146 Haskell Avenue. He said the property contained an industrial use only allowed in the IG and IL districts, in terms of the open use of land requirement. He said the property was located near two water ways and virtually all of the property was within the floodplain or floodway. Mr. McCullough stated the property was annexed in 1966 and was used as auto salvage use and repair. He stated in 2003 the Planning office made a determination of legal non conformity for a request for a clean salvage and sales operation with limited palletized outdoor storage of materials with most of the assembly work being conducted within the structure on site. He said in July 2006 a new Development Code was adopted which required a non conforming industrial open use of land be discontinued by November 1st, 2008 and at the time the property was converted from RS1 to RS10. He said the property had been zoned single family residential for all of the property's existence. Mr. McCullough said a complaint was filed in the Planning Office in February 2010 alleging nuisances such as noise, litter, odor and fires and the land use was questioned. He said the Planning and Development Services Office sited the land owner in May 2010 and after several meetings with the land owner an agreement was made with the land owner for a reduction of the intensity of use on the property. Mr. McCullough stated Staff submitted a status report to the City Commission in September 2011, informing the Commission Staff was prepared to declare the property in compliance with the Development Code. He said Staff asked the Commission for direction on the intent of interpretation of the code standard related to open use of land and the Commission held a meeting on December 13th, 2011 and provided direction on the open use of land. He said the Commission determined the plan presented by the owner on the scope of open use of land still met the definition of open use of land. Mr. McCullough said in January 2012 the City filed a new notice of violation to the property owner and on January 30th, 2012 the owner filed an appeal to the notice of violation. Mr. McCullough stated the definition of open use of land involved a use that included improvements and the Development Code provided guidance on uses that typically qualify for land use definitions and they include auction yard, auto wrecking, and junk salvage. He said Staff and the City Commission's interpretation was the facility at the property was categorized as an open use of land. Mr. McCullough stated the property owner had been using the entire site as an open use of land to collect and separate materials and the similarities of the outdoor activity to the junk and salvage use was evident. He said the property owner had reduced the activity on the property in August of 2011. Mr. McCullough said Staff and the property owner were headed down the path toward compliance and an enforcement exhibit was prepared and presented to the City Commission. Mr. McCullough said the City Commission determined the plan as presented met the definition of open use of land and the property owner appealed Staffs determination that the use had expanded and the property had remained as an open use of land. He said the Board of Zoning Appeals charge was to determine if

Staff erred in reaching the conclusion in the notice of violation. Mr. McCullough said Article 15 of the Land Development Code controlled much of the issue and in section 20-1502(d) non-conforming use was defined as a land use that was legally established but no longer allowed by the use regulations and RS zoning did not allow open use of land and the zoning required it to be discontinued. He said expansion was permitted in very limited instance and was allowed when it reduced or eliminated the non-conforming aspects of the situation, when the expansions was part of a building or other structure lawfully and manifestly designed for the use, and only if it is approved via Special Use Permit. Mr. McCullough stated the Planning Office had not received a request for a Special Use Permit to expand the facility. He said in conclusion the base line for what was non-conforming was spelled out in the letter from the Planning Office dated 2003 that declared the owners proposal for clean salvage, retail sales, and limited palletized material as a non-conforming use. He said the non-conforming use was established in the 2003 letter and the use expanded without review or approval, and section 20-1702 in the Development Code referred to how Staff viewed principal uses. He said the owner raised an argument that Staff did not consider the buildings and accessory structures on the property but the Development Code defined the issue and Staff determined there were three principal uses; retail use, recycling processing center within the building, and the open use of land. He said section 20-1502(d) in the Development Code states that non-conforming commercial or industrial open use of land shall be discontinued by November 1st, 2008 and if the Board found that Staff had classified the open use of land correctly then the use must cease. Mr. McCullough said a complaint was received and Staff did a full investigation of the complaint and determined the non-conforming use expanded without approval and contained an open use of land in a RS zoning district. He said Staff took an extra step to receive direction from the City Commission on the intent of what open use of land was and asked the Board to find there was not an error in the notice of violation dated January 13th, 2012, the use had expanded from a non conforming status and an open use of land existed at the property.

Lowe asked Staff why the issue had not been resolved when there was discussion with the City issuing a Special Use Permit.

Mr. McCullough said the goal was to bring the property into compliance with the Development Code. He said Staff had worked with the property owner for a few months to submit a site plan to bring the property down to a level to declare it code compliant. He said City Commissioners took an interest in the property and part of the issue was that it was zoned RS. He said the property owner could have submitted an application to have the property rezoned.

Mahoney said the issue was if there was an error in the notice of violation.

Lowe said the 2003 letter did not include the issue of open use of land.

Mr. McCullough said the 2003 letter did not include the issue of open use of land. He said the issue was if Staff erred in the conclusion of the notice of violations.

APPLICANT PRESENTATION

Brad Finkeldei, Attorney with Stephens and Brand, stated he disagreed with the Boards charge and disagreed factually with the events of 2003 and the meaning of the letter. He said there were two issues on appeal. Mr. Finkeldei stated one issue was the determination of a non-conforming use, and if the applicants use of the property constituted an open use of land. He said the Board of Zoning Appeals is authorized to hear and decide appeals where it is alleged there was an error by an administrative official. Mr. Finkeldei stated the Board has all of the power of the official for who the appeal is taken. He said the Board could reverse, affirm, or modify, the administrative decision, or could request additional information. Mr. Finkeldei said the Planning Directors decision should be reversed due to a non conforming use is a use that was legally established but is no longer allowed by the use regulations of the zoning district in which it was located. He said the non conforming use runs

with the land and it was created in 1966 and zoned residential. Mr. Finkeldei said April 12th, 1966 the business became a legal use as a recycle business and salvage and that is was annexed into the city. Mr. Finkeldei said his client purchased the property from Mr. Ray, and in addition to the uses that were already in place, his client wanted to add appliance recycling and had requested written confirmation acknowledgment that the property had been used and occupied as a legal and non conforming activity. Mr. Finkeldei said the Planning Director at that time responded and stated the property had been used continuously for various industrial and commercial uses including wholesale and retail sale and the property was a legal non conforming use as defined in the City Development Code, and the use was allowed to be continued. Mr. Finkeldei said the nonconforming use was created in 1966. He said the Planning Director claimed the use of the property has been expanded but the use had not expanded. Mr. Finkeldei read a Supreme Court ruling to the Board. He said the natural growth of a business did not change the non conforming use due to the non conforming use related to area, not volume or intensity. He said in 1966 the entire property was used but in 2012 the entire property was not being used. Mr. Finkeldei said the non conforming use has not expanded and the question was if the property was used as a primary operation or an accessory operation. He said most of the activity occurs inside the building and there was a pile of recycling items outside and when the pile is large enough it is taken to be recycled. Mr. Finkeldei stated the question was if the property owner uses his buildings as a primary part of his operation or if they are only an accessory and the amount of material outside was not a factor. He said the property owner uses his buildings and it is not an open use of land. Mr. Finkeldei stated in September 2011, the Planning Director made the determination in a memo that the property owner had reduced the open use of land to levels found acceptable to staff. Mr. Finkeldei stated the City Commission heard evidence of trash, noise, and traffic that happened in 2007 and 2008 and determined it was an open use of land. He said the Boards charge was to decide if trash, noise, and traffic constitute an open use of land. Mr. Finkeldei stated there was material stored outside but that did not constitute the property as an open use of land and asked the Board to overturn the Planning Directors decision.

Lowe asked Mr. Finkeldei to explain the interpretation of the law when the zoning or the Development Code changed.

Mr. Finkeldei said legal non conforming use that continues should be grandfathered in even if the law changed. He said there was an exception and if the use was phased out the legal non conforming use can be phased out, and the City chose to do that in 2006. He said if the property was determined to be an open use of land the City has the right to phase it out.

PUBLIC COMMENT

Caray Rainey stated she worked for Mr. Killough for over seven years and has seen recycling grow in Lawrence. She said the center was a family friendly environment and people of all ages and stature use the center. She said the average amount a customer receives is \$40.00 and the money goes straight to other businesses in Lawrence. She said metals are separated and held until they are taken to Kansas City for processing. Ms. Rainey said aluminum cans and radiators were bailed inside and then stored inside. She said vehicles are weighed on the 1951 scale. Ms. Rainey stated the recycle center works closely with different companies in Lawrence and work to help nonprofit organizations.

Robert Killough, owner of 1146 Haskell Avenue, stated he was proud to be in Lawrence helping recycle. He said he rented the property when he began and he then purchased the property. He said he wanted to add the appliance business to the recycle business. Mr. Killough stated he had nine employees and has a business in Ottawa and Baldwin. He said he has invested a lot of money in the business and he would like to continue it.

Linda Klinker, Cans for Community, Inc., Chair, stated her business recycles aluminum cans and then gives 100% of the profit back to the community. She said Cans for Community has recycled 6.5 million

cans and Mr. Killough helped and supported Cans for Community for the past seven years. She said 1146 Haskell Avenue has improved and it looks great. Ms. Klinker said Cans for Community goal this year was to raise \$100,000.00 and hoped Mr. Killough stays in business.

Huey Tubbs said he lived in the area of the recycle business and said the business was greatly needed. He said the business has saved the community 33% on sanitation costs.

Dave Stauffer said he had bought car parts from Mr. Ray in the early 60's and there was salvage at the business for years.

Julie Mitchell, 1231 Brook Street, presented a video of a fire on the property, cars being crushed, and large trucks dumping outside the building. She said the crusher caused homes nearby to shake and there was too much truck traffic thru residential streets. She said it would be great if the City would help Mr. Killough relocate.

Melinda Henderson said she lived within 200 feet of the recycle center and Mr. Ray previously owned the property which operated as auto salvage. She said Mr. Ray leased the property to different businesses for numerous years and in 2005 the property became a heavy industrial site.

Theresa Martin said she did not reside in the neighborhood but spent time there and the biggest impact was the noise. She said crashing and forklifts and track hoes cause noise. She said there were toxic fumes due to fires and City drainage pipes had been crushed by the trucks. Ms. Martin said there was a lot of litter in the neighborhood and the screening fence did not block the view to the site.

Andrea Repinsky stated it was useful to look back to the Land Development Code and the section of open use of land. She said the definition of open use of land was salvage yard and the City permitted clean salvage and sales of house wares and furniture. She said industrial uses were incompatible with residential neighborhoods.

Jane Eldridge, Attorney representing neighbors, said there was an open May 4th, 2010 notice of violation and there was no appeal of the violation. She said there was an effort by Staff and the property owner to work the violation out and the notice was still open and viable. Ms. Eldridge said zoning was adopted in the City of Lawrence in 1966, and the nonconforming use was adopted in 1979. She said in the 1966 photos of the property the cars were all lined up in nice straight lines because that was where customers bought parts and was not a typical salvage yard. Ms. Eldridge said the legal definition of storage yard and auto wrecking were for properties that came into a place and formed into different types of objects and not repaired or salvaged and put back into the same kind of use. She said prior to 2003 the use of the property was for repairing and reuse of items and the property owner did not propose auto wrecking or junk yard. Ms. Eldridge said the property owner had stated all uses had ceased by March 1, 2003 and was not until September 2003 or later that the property owner formed his entity. Ms. Eldridge stated section 20-1502(b) of the Development Code talks about two types of expansions, one is if a property owner was doing more of one thing, or changing the use, and that was what the previous planning director did was give permission for change of use to the property owner. She said the open use of land is a special kind of non conforming use. Ms. Eldridge stated non conforming use statues came into being because the City wanted to codify nuisances so that nuisances are not perpetuated. She stated the open use of land should be discontinued within a two year period.

Beth Ann Mansur, 1217 Prospect Avenue, stated she lived three blocks east of the recycle center. She stated she hears noise from equipment, glass breaking, and smelled toxic fumes. Ms. Mansur stated the area was the main route for children walking and she worried about kids on their bikes due to glass on the ground. She stated when she moved to the area in 1989 the property was Bill and Waynes auto repair shop.

Richard Heckler, 1217 Prospect Avenue, said he hears noise and also smells the toxic fumes from the property. He said the property owner had been sited with code violations and there was no way to know if the activity would continue to occur and there was no logic in letting it to continue. Mr. Heckler stated the property owner had put forth some changes he claims he is willing to make that would be more accepting to the neighborhood but there was more than enough time to clean up the operation. He said the new plan still violates the code. Mr. Heckler stated he had not seen a lot of auto salvage and previously the property had been kept quite nice but at the present time the property was different.

Gwen Klingenberg, 4900 Colonial Way, President of the Lawrence Association of Neighborhoods, presented signatures from a meeting of the Lawrence Association of Neighborhoods. She said the property was a concern for the community.

Leslie Soden, President East Lawrence Neighborhood Association, stated the neighbors often hear noise from 1146 Haskell Avenue over to Pennsylvania street. She said the neighborhood closed the metal recycling account at the business to show solidarity for the Brook Creek neighborhood.

Don Gardner, 3209 Yellowstone, said Mr. Killough has helped the Dog Days for years and the business was very friendly. He stated it should be mentioned how much taxes Mr. Killough pays and it should be mentioned. Mr. Gardner stated the neighbors were blasting away at Mr. Killough, yet the neighborhood needed to be cleaned and yards mowed and trees trimmed. He stated right across the street from 1146 Haskell Avenue was a pile of concrete and it needed to be moved. He said the neighbors should take care of their own properties. He said the recycle center was handy and nice and Mr. Killough does a great job.

Wint Winter, Attorney, stated he knew Mr. Killough personally and he was a compromiser and worked with people. He said Mr. McCullough had stated essentially the parties were on the road to a resolution and the resolution was interrupted. Mr. Winter stated the Boards authority was to stand in the shoes of the director to direct him and not to just say yes or no. He said the situation was a matter of extremes. Mr. Winter stated the video displayed the dates of 2006 and 2010. He said the question was when the video was taken. He said the question was if there was some middle ground. Mr. Winter stated the Board should ask what the possible resolution was between the City and Mr. Killough. Mr. Winter asked the Board to not deprive itself of what the resolution would have been. He asked the Board if the issue would be a case of winners and losers of political extremism or will the Board promote compromise and resolution. He asked the Board to direct Staff to find a resolution.

Michael Almon, 1311 Prairie, stated the judicial hearing was not a popularity contest about recycling. He said the neighbors had asked Mr. Killough to continue his service in a legal way but he declined. Mr. Almon stated Mr. Killough claimed an unbroken right of lineage from the 1966 Ray's Salvage Yard. He said to engage industrial land use was not in conformance with the property as single family zoning and Mr. Killough stated the business choices derived from his supposed non conforming use right, his August 5th, 2003 non conforming use permit, his 2005 expansion of his land use category, his non conforming open use of land, his processing, sorting, crushing, and loading junk vehicles and scrap metal materials. Mr. Almon stated the claims are not supported and typically when there is a discontinuance of a non conforming use activity the non conforming use right will cease. He stated after six months of discontinuance the Development Code requires the land use revert to the underlying land use classification. Mr. Almon stated the Rays salvage yard and industrial land use under the 1979 Development Code, ceased operation in 1993 then followed a ten year break, and in 2003 five auto towing and service businesses operated as commercial uses not industrial use. Mr. Almon said Mr. Killough stated in 2003 that he proposed to be purchasing returned or rejected house wares and outdoor furniture to reassemble and sell. He said the Director of Planning Development

Services issued the non conforming use permit stating the same and there was no mention of large collection recycling, auto wrecking yard, or salvage yard. Mr. Almon stated in 2005 Mr. Killough illegally expanded his business to the industrial uses which was non conforming use of land and failed to file a site plan or apply for the required use permit. Mr. Almon stated Mr. Killough changed the name of the business from Bargain Center to Recycle Center. He said the nonstop industrial activity was not temporary outdoor storage and it can be disputed that the open use of land constitutes the majority of the land use activity. He said the owners' current industrial activity was created under false pretense and defiant against the City Development Code. He asked the Board to issue a cease and desist order.

Candace Davis stated she was concerned that a neighborhood would have to work so hard to secure a stable place for their families to live in and to preserve their own investment. She said she would love to see the City follow rules and codes. Ms. Davis stated she had visited the recycle center a few years earlier and it was muddy and dirty and she stopped going there. She said if Mr. Killough was a business man he should be able to afford an appropriate location. She said this would not be tolerated in West Lawrence for one second.

Lisa Harris, acting President of the Barker Neighborhood Association, said her neighborhood supported the east Lawrence neighborhoods position on the project. She said it was unfortunate to ask a business that does good within the community to stop what they are doing. She said the business does not meet the Development Code and it also affected the neighbors.

STAFF REBUTTAL:

Mr. McCullough said if a property enjoys non conforming property rights, it does not enjoy any and every property right. He said it enjoys one or a set of uses, even if it is industrial in nature there are a whole list in the code that fall under the industrial category. He said the previous Planning Directors letter did not mention any other salvage use and the owner had asked if a certain use was allowed. Mr. McCullough stated the Planning Office had not been presented with the operation depicted in the photo and other testimony tonight. He said if his office had been presented with the information he did not know what the answer would have been from the Planning and Development Services office. Mr. McCullough said the operation was different than the tow lot use and the intensification of it was not taking the tow lot use from 10 customers to 1000 costumers. He said even if the business was a salvage operation that enjoyed non conforming rights, by definition it was open use of land and it needed to discontinue under the current code. Mr. McCullough said it was not the uses in the building that was presenting the legal code issue; it was the open use of land and the owner was not cited for the retail component within the building. Mr. McCullough stated his office was not presented with the operation as it was today with all of the outdoor activity and had it been, he did not know what the decision would have been. Mr. McCullough stated that was not relevant to the discussion and if it was relevant, it was an open use of land, and it must be discontinued. He said as far as he could tell there was no exercise to seek all the open uses of land and his office did not know the use existed until presented with the complaint in 2010. He said property owners do not get to claim a new use for their property.

Lowe asked Mr. McCullough what happened between December when there appeared to be negotiations and January when the City Commission gave direction to issue the notice.

Mr. McCullough said negotiations were about how to comply with the code.

Mr. Finkeldei said he had been on the Planning Commission for six years and Mr. McCullough had a tough job. He said what happened in December was relevant because Staff interpreted the code and the City Commission had heard exactly what was presented tonight by Mr. McCullough. He presented photos of the property that was presented to the City Commission. He said the City Commission had

stated there was a lot of noise and trash and decided a certain amount of open use of land and scope was too much. Mr. Finkeldei said the issue was how much is too much and what existed now was smaller than what the City Commission was presented with. He said the Board of Zoning Appeals was not determining if there is too much trash, noise or traffic. He said the Board was to determine if the use of the property expanded and if it is an open use of land. Mr. Finkeldei stated if other issues were considered it would be improper. He said if the Board found the property to be industrial use, it could not be considered open use of land. Mr. Finkeldei stated Mr. Killoughs use as it existed was a use of improvements.

Lowe said the negotiation going on in December and prior to December appeared to encourage the property owner to clean up the area and the clean up caused the additional noise. He asked if Mr. Killough was willing to keep the property the way it was now.

Mr. Finkeldei stated absolutely Mr. Killough would keep the property clean as it was today.

Kimzey asked to see the current picture of the property. He asked if the current photo was the photo the City Commission ruled on.

Mr. Finkeldei said the City Commission ruled on a different photo. He said the operation was smaller now than it was in December.

Lowe asked if a concrete pad would be installed to help decrease dust, and if other improvements were still on the table.

Mr. Finkeldei stated improvements would be made to the property.

Mahoney said Ms. Eldridge presented a case in Topeka that was challenged.

Mr. Finkeldei stated Spurgeon was a case that the City of Topeka had tried to phase out a land use. He said the case was fought and lost.

Kimzey asked Mr. Finkeldei if the use that was going on was consistent with the use prior to the purchase of the ground.

Mr. Finkeldei stated there were factual disputes. He said the evidence from Mr. Killough was that he knew the property was a salvage yard and recycled metals. He said Mr. Killough had rented the property and he wanted to recycle metal, car parts and appliances. Mr. Finkeldei said the City now looking back has made a factual determination and the previous Planning Director stated the property was a continuing legal non conforming use. He said the non conforming use was not created in 2003, it was a continuing use.

Mahoney said the property owner was asking to run a salvage yard.

Mr. Finkeldei stated the property owner asked to run a salvage, auto recycling, metal recycling and house wares similar in nature.

Mahoney read portions of the Development Code 20-1501 and 20-1502. He said open use included salvage yard and the code stated they would be removed as of November 1st, 2008. He said the property was a salvage yard which qualified as an open use of land.

Mr. Finkeldei stated in 2003 one of the uses was a salvage yard which could be considered an open use of land. He said the question for the Board was what was the property owner doing today and if the

property was considered a salvage yard.

Holley said the first violation was May 4th, 2010.

Mr. Finkeldei stated the original violation notification was May 4th, 2010 and the property owner had worked with Planning and Development Services and four or five letters had been exchanged during that time. He said there was a letter from the city stating the property owner was in compliance. Mr. Finkeldei stated a new violation notification was issued January 12th, 2012 and that was the issue to discuss at the current meeting.

Holley asked if the property was not a salvage yard but there were salvage like operations then what were the exterior activities.

Mr. Finkeldei stated the use was a recycling center and recycling process. He said a salvage yard was a place you go and buy salvage and no one is buying parts at the location.

PUBLIC HEARING CLOSED

Motioned by Holley, seconded by Edie, to close the public hearing.

Motion carried unanimously, 5-0

BOARD DISCUSSION

Lowe said the issue was if 1146 Haskell Avenue was an open use of land or if the city erred in issuing the citation. He said if the Board determined the property was an open use of land it should have been phased out in November, 2008. Lowe said the property owner had worked to clean the property and to comply with the current code and the clean up phase caused noise and it appeared the property was clean at the present time.

Mahoney said the issue was if the property was an open use of land.

Edie said the term clean salvage versus storage yard should be thought of.

Mahoney said there had been a change of use. He said the property was a salvage yard, storage yard, or junk yard and at the date of the violation the property was an open use of land.

Lowe said the letter dated December 5th, 2011 from the Planning and Development Services director to the City Manager indicated the Development Code was not clear on what amount of outdoor use was necessary to constitute an open use of land.

Holley asked if the Board was to define open use of land.

Lowe said the city should be more specific on the definition of open use of land. He said it appeared the property owner and the city was becoming close to agreeing on what would be acceptable on the property. He said the city and the property owner should make an agreement.

Mr. Larkin said the Boards charge was to determine if the property was an expansion of a non conforming use and if the property was an open use of land. He said if the evidence established either of those two items the Board would affirm the Planning Directors decision and if not the Board would reverse the Planning Directors decision.

ACTION TAKEN

Motioned by Mahoney, seconded by Edie, to uphold the Planning and Development Services decision for a notice of violation, based on the facts presented and Section 20-1701 of the Development Code that defines open use of land.

Motion failed, 2-3

Lowe said the use of the land had changed over time. He said the property was a salvage yard and an open use of land, the use had increased but presently the use was reduced significantly. He said the property owner and the city should come to an agreement and stick to it.

Mahoney said it was confirmed the property was a salvage operation and the Board should determine if the property was an open use of land.

Kimzey said the city and the property owner were working toward an agreement and the process was stopped.

Mahoney said if the Board upheld the Planning Directors decision the property owner and the city could continue to work together to find a solution.

Lowe said if the violation notice was in error the property owner and the city would renegotiate.

Mr. McCullough said there was nothing that prevented the owner and the city to renegotiate. He said the Boards charge was to determine if the property was in violation of the Development Code at the time of the violation notice regardless of how the property appeared today.

Mr. Larkin said it was not the Boards charge to direct the property owner and the city to negotiate.

Lowe said the property appeared to be an open use of land over time and the property owner was trying to clean the property up.

Mahoney said at the time the property was an open use of land.

Holley said the definition of open use of land was too vague.

ACTION TAKEN

Motioned by Mahoney, seconded by Holley, to uphold the Planning and Development Services decision for a notice of violation, based on the facts presented, public discussion and Section 20-1701 of the Development Code that defines open use of land.

Motion carried unanimously, 5-0

ITEM NO. 9 MISCELLANEOUS

- a) Lowe asked Mr. Guntert when a training session would be held.

Mr. Guntert stated a training session would be held in May 2012 following the Board of Zoning Appeals meeting.

Mr. Larkin stated he would prepare Findings of Fact for Item 8 above.

ACTION TAKEN

Motioned by Mahoney, seconded by Holley, to adjourn the Board of Zoning Appeals meeting.

Motion carried unanimously, 5-0

ADJOURN- 10:40 p.m.

Official minutes are on file in the Planning Department office.