BOARD OF ADJUSTMENT MINUTES

AUGUST 24, 2016

The Board of Adjustment of the City of Norman, Cleveland County, Oklahoma, met in Regular Session in the Multi-Purpose Room of the Norman Municipal Building, 201 West Gray, at 4:30 p.m., August 24, 2016. Notice and agenda of said meeting were posted in the Municipal Building at the above address and at www.normanok.gov/content/board-agendas at least 24 hours prior to the beginning of the meeting.

Item No. 1, being:
CALL TO ORDER
Chairman Andrew Seamans called the meeting to order at 4:36 p.m.

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Item No. 2, being:
ROLL CALL

MEMBERS PRESENT	Hank Ryan Curtis McCarty Nils Gransberg Andrew Seamans
MEMBERS ABSENT	

A quorum was present.

STAFF PRESENT	Susan Connors, Director, Planning & Community Development Wayne Stenis, Planner II Leah Messner, Asst. City Attorney Roné Tromble, Recording Secretary David Woods, Oil & Gas Inspector Shawn O'Leary, Director, Public Works Scott Sturtz, City Engineer Todd McLellan, Development Engineer

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Item No. 3, being:
APPROVAL OF MINUTES OF THE JULY 27, 2016 REGULAR MEETING
Hank Ryan moved to approve the minutes of the July 27, 2016 Regular Meeting as presented. Curtis McCarty seconded the motion.

There being no further discussion, a vote was taken with the following result:

YEAS	Hank Ryan, Curtis McCarty, Nils Gransberg, Andrew Seamans
NAYS	None
ABSENT	None

Ms. Tromble announced that the motion to approve the July 27, 2016 Minutes as presented passed by a vote of 4-0.

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Chairman Seamans announced that the Board has received a request to postpone Item No. 6.

Item No. 6, being:
BOA-1617-8 – VEENKER RESOURCES, INC. REQUESTS A VARIANCE FROM THE REQUIREMENT TO INSTALL FENCING AROUND THE TANK BATTERY.

ITEMS SUBMITTED FOR THE RECORD:
1. Staff Report
2. Location Map
3. Application with Attachments
4. Aerial Photo

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:
Curtis McCarty moved to postpone BOA-1617-8 to the September 28, 2016 meeting. Hank Ryan seconded the motion.

There being no further discussion, a vote was taken with the following result:

YEAS	Hank Ryan, Curtis McCarty, Nils Gransberg, Andrew Seamans
NAYS	None
ABSENT	None

Ms. Tromble announced that the motion, to postpone BOA-1617-8 to the September 28, 2016 Board of Adjustment meeting, passed by a vote of 4-0.

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Curtis McCarty moved to move BOA-1617-9 to the next item of business. Hank Ryan seconded the motion.

There being no further discussion, a vote was taken with the following result:

YEAS	Hank Ryan, Curtis McCarty, Nils Gransberg, Andrew Seamans
NAYS	None
ABSENT	None

Ms. Tromble announced that the motion, to move BOA-1617-9 to the next item of business, passed by a vote of 4-0.

Item No. 7, being:
BOA-1617-9 – STEPHEN ELLIS APPEALS THE ISSUANCE OF A FLOODPLAIN PERMIT ISSUED TO PLAINS ALL-AMERICAN PIPELINE, L.P. (FLOODPLAIN PERMIT APPLICATION NO. 573) ON JULY 5, 2016.

ITEMS SUBMITTED FOR THE RECORD:
1. Staff Report
2. Location Map
3. Appeal Application
4. City Attorney Memo 7/26/16
5. Floodplain Permit Committee Draft Minutes 7/5/16
6. Floodplain Permit Committee Minutes 6/20/16
7. Floodplain Permit Committee Staff Report 6/28/16
8. Approved Permit 573

Hank Ryan moved to find that Dr. Stephen Ellis is an aggrieved party, with presentation limited to Dr. Ellis or his attorney and to Plains All-American Pipelines or their attorney.

There was a request by a member of the audience that the meeting be moved to a larger room that can accommodate people that were not able to get into the room.

Curtis McCarty moved to suspend the meeting until Council Chambers have been prepared and the meeting can continue.

There being no further discussion, a vote was taken with the following result:

YEAS	Hank Ryan, Curtis McCarty, Nils Gransberg, Andrew Seamans
NAYS	None
ABSENT	None

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The meeting recessed from 4:41 to 4:57 to relocate the meeting to Council Chambers.

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Hank Ryan moved to find that Dr. Stephen Ellis is an aggrieved party, with discussion limited to Dr. Ellis or his attorney and to Plains All-American Pipelines or their attorney. Curtis McCarty seconded the motion.

PRESENTATION BY THE APPELLANT:

Stephen Ellis, the appellant – I am operating on the assumption that members of the Board have read the written materials that have already been submitted. So what I'm interested in doing right now is addressing the standing issue, taking into account those sorts of materials.

I want to start by reviewing the standards that a Board of Adjustment member should use in judging this threshold issue of standing. I think it's important to realize that Boards of Adjustment are required by State statute, so Oklahoma Statute Title 11, Section 44-101, following, says that a member of a Board of Adjustment is required by the State, and the Attorney General's Opinion 65, from 1986, says that a member of a Board of Adjustment holds office under the laws of the State. I think that's important, because it establishes that Boards of Adjustment aren't subject to the authority of the City Attorney in this particular matter. I know the City Attorney's office has offered opinions about this matter, but I want to just emphasize that you guys have an independent role to play in the process and, for that reason, there shouldn't be any sort of presumption in favor of the City's position, much less a sort of rubber stamp for what the City Attorney has to say. Under the State statute which authorizes your office, the call is yours. So it sounds as though the City Attorney's office won't actually have a presentation, but I do notice that a member of the City Attorney's office is actually sitting up there with you. And what I'd like to emphasize is that she's not your attorney in this particular situation. The Board of Adjustment is a State board and you should consider yourself as someone who's making a judgment about the City of Norman, and not an independent – or a body that listens to the advice of the City Attorney's office. So, given the source of your authority, you should make your decision on the arguments that are actually made here, and not merely on some sense that a person with the title of attorney must be right about these kinds of issues.

What we're discussing is a body of statutes from the State and ordinances from the City that are supposed to be clear enough to guide the behavior of regular citizens, which means that all of us should be competent to say something about it. I mean, clearly, the Board of Adjustment is supposed to be competent about that, regardless of whether or not their attorneys – that's because you have some expertise in the relevant body of law. It turns out I do, too, for reasons that I will explain in just a moment. Not all of us here are lawyers, but all of us have sufficient capacity to understand the arguments that are being made here. So you should feel confident in making a decision, regardless of whether or not someone with the title of the attorney is telling you that it's the correct decision or not. You can't make an irreversible legal error because this can be appealed to a State court. But it's also important to realize that it's possible for you to abrogate your responsibilities if you just decide to go with the flow of the City Attorney's office. So I hope that you will all live up to your responsibilities to exercise independent judgment.

I would say a little bit about why I feel comfortable in addressing these issues here. I've been interested in the issue of city accountability to citizens for a long time, and among the activities that I've taken on that – I actually have a Law Review article with a couple of co-authors that addresses this very issue, where we advance a notion of standing. I actually sent a copy of this, as soon as it got published in December of 2014, to Jeff Bryant, so I was a little surprised that he didn't mention that whenever I sent in my appeal. So I've got a theory of standing that I think will stand up very well. But I think what's actually important here, though, is, you know, I'm not a lawyer. I will probably mess up some of the legal jargon. I hope we can all get past that in some sense, as long as we can make the relevant issues clear.

So I've got two arguments. Now, having laid out those sorts of standards, I have two lines of argument that I think are important and establish that you should hear this appeal, the first of which is that notwithstanding the representations of either the City Attorney or Mr. Hall, it turns out that I don't have to be an aggrieved party to do an appeal here. So that's argument

number one, which I'll get to in just a second. So the first argument is that grievement is actually irrelevant.

The second argument, which goes back to the Arizona Law Review article that we did, is that, actually, I do qualify as an aggrieved party, even under the standard legal definition. So I'm going to make a two-pronged argument here.

So let me start with the first prong. Your power in this case, again, stems from the Oklahoma Statutes, Title 11, Section 104, which reads in relevant part: The Board of Adjustment shall have the power to hear and decide appeals if it is alleged that there is an error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance. So your authority – there's more to it. It talks about variances and stuff – stuff that you guys probably do a little bit more of – but the very first thing that gets listed in sources of authority for Boards of Adjustment is your authority to hear all kinds of appeals. And it's important to see that there's really nothing about being aggrieved here; there's just your authority to look into things. Both the City Attorney's office and Mr. Hall from All-American Plains Pipeline cite City ordinances involving the notion of an aggrievement and then argue that, as someone not aggrieved, I cannot gain a hearing tonight. Now, again, I'm going to argue that I am aggrieved a little bit later, but right now I want to say it doesn't really matter. It's important to recognize, however, that while City ordinances can influence the procedures that you follow, they cannot limit the scope of your authority. Boards of Adjustment are State creatures. And, actually, Mr. Hall provides the argument that I need there, so he cites *In re De-Annexation of Certain Real Property from the City of Seminole* – I love the way legal cases are cited – in his little brief, and it's relevant here. As he tells us, municipalities are political subdivisions of the State. Their government activities – executive, legislative, and judicial – must conform to both the mandates of the State's constitution and to the general laws upon matters of statewide interest. And what it is that Board of Adjustments do is a matter of statewide interest. That's actually in the Oklahoma State statute. So your authority is not determined by City ordinance here. So to make sense of your statutory authority, you need to see that whatever the City's prescribed procedures, you are at least permitted to hear and decide appeals that come to you. That may be merely permissive, but you are permitted to do that. And I'd like to point out that, you know, the City already has my $150 and the Norman Transcript already has my $35 for the legal announcement that we're required to do here. You've read the materials. Everybody here wants to talk about the substance of this kind of issue. And I want to suggest that there's nothing that prevents you from proceeding to discuss the substance of this issue, regardless of what the City ordinances have to say, because that's not where your authority derives from. There's a sense in which the horse is already out of the barn here, right? I mean, we're discussing these kinds of issues in public anyway. There's no use in trying to close the door now. We're already talking about this stuff. You guys should have your say.

Now, the City Attorney's office argued in their brief that the Floodplain Ordinance requires an appellant to be aggrieved in order to have standing. But it's really important to notice here that the language that they cite doesn't say that. It doesn't say you have to be aggrieved in order to have standing. What it says is that there's a procedure through which an aggrieved person can come before the Board of Adjustment, and that's right. The City can provide procedures to get people in front of the Board of Adjustment. But the City procedures don't limit what your authority is, so you've got permission to hear this. And, honestly, it would be really sort of richly ironic – almost a reductio of the City's own substantive position and, likewise, from Mr. Hall's position – if they were to argue that failure to employ one very specific City procedure would limit access to this State body, because the substance of their position is really that, hey, you know, close counts, right? Well, I've at least got an argument to that effect; I don't think they do. But if you're inclined at all to think that their reasoning holds some water,

that's reason to listen to this appeal. So you have the authority to hear this appeal under State statute. Whether or not the City Attorney's office likes it, whether or not Mr. Hall likes it, that's your call at this point. Point one. So I don't need to be aggrieved.

Point two. I am aggrieved. Usually – there's an old maxim, actually – I don't know if I've said I'm a philosophy professor, that's what I do for my job. And usually it's a mistake to keep going on once you've sort of given what you take to be a knock-down argument for a certain kind of conclusion that you want to establish but, actually, I find this really interesting. One of the reasons why I've written on this was that issues of how citizens can have some accountability for decisions that get made in their community I think is a sort of fascinating kind of issue, and for that reason I'm going to throw caution to the wind and talk about standing and aggrievement and such things. So let me start by noting that both the City Attorney's office and Mr. Hall from Plains All-American discussed my aggrievement issues in their briefs, but I think they misunderstood my standing claim. The injury that I claim here is not some speculative damage that would come from a possible pipeline spill. So, I mean, they are treating the issue of aggrievement as someone who has suffered an injury, and they said look, there's no injury, right? There's just this pipeline that's going through. No big deal, right? But actually, I'm claiming that the injury is the actual ongoing failure of the City to live up to its clear commitments concerning – and this is something that I put in my original appeal – concerning the benefits of home rule, including efficient and business-like methods in the transaction of municipal affairs, civic advancement and general welfare, as well as the protection of human rights and personal dignity of all persons. And that's language that comes from the Charter of the City of Norman. Actually, I quoted that in section 2 of my original appeal, and that was for a purpose. I argue that failure of the City to follow its own clear rules directly undermines the civic goods which are discussed in that Preamble and imposes an undue burden of hyper-vigilance on those of us who it has promised those goods, and that is the argument for why I am aggrieved. So onto the details about that.

Both the City Attorney's office and Mr. Hall misconstrue the intent of the *Cleary* v. *Petroleum Corporation* v. *Harrison* case that they cite in their documents. They cite that case to argue that one has to have a pecuniary interest in some subject in order to have the kind of injury that it takes to be an aggrieved party. And I don't want to deny that that's good law, but I want to make the argument that that's an instance of someone who has standing and not a definition of standing. And I think you can find that by looking at the rest of what's quoted from the *Cleary* case there, as well as other Oklahoma cases. Pecuniary interest and property rights are not necessary conditions for standing. *Cleary* itself contemplates standing in cases that operate to impose a burden or obligation and have binding affects upon any right, interest, person, or property of the appealing party. The fact that, as Mr. Hall puts it, I don't have any personal pecuniary or property interests in any real property affected by the floodplain permit is not dispositive. That would preclude anybody from having standing, because there hasn't been a pipeline leak or anything like that; it's not in the ground yet. Instead, I'm claiming that I have standing in virtue of the City's decision itself being an injury.

So the City Attorney's office does better when it appeals to the *Federal Practice and Procedure* document that it does, and it's pretty clear when you read the case law that Oklahoma follows federal standards quite closely. So there's a three-fold test of standing. The first branch of that test says that a plaintiff must show a distinct and palpable injury to himself. The second part of that test is that an injury is caused by the challenged activity. And the third branch of that test says that this injury is apt to be addressed by a remedy that the court is willing to give – and court here would be you guys, right? This sort of test has been explicitly adopted by the Oklahoma Supreme Court in a way that recognizes the possibility of non-pecuniary injury. So I was looking around to try to find a case that establishes this, so I'm talking about

Independent School District No. 9 of Tulsa County v. *Glass*, which was a 1982 Oklahoma State Supreme Court case. So let me quote to you some relevant language from that. A violation of a state statute is an injury to the state and its citizens – and, of course, I'm going to argue analogously that a violation of a municipal ordinance is an injury as well. A continuing violation is an irreparable injury for which injunctive relief is available. However, standing does not depend upon the merits of the plaintiff's contention that a particular conduct is illegal. Before a litigant possesses standing it is as a proper party to seek injunctive relief it must be alleged that the challenged action has caused him or her injury in fact – so the first strand of the test. Second strand of the test – it must be alleged that – wait a minute, where am I? Sorry I got lost. The relief sought would remedy the injury – so that's the second branch. And the third branch is the interest sought to be protected is within the zone of interest to be protected or regulated by the statute in question. So, in other words, it's the same three prongs. And there's some instructions here for courts. The purposes of ruling on a motion to dismiss for lack of standing, a trial court and a reviewing court must construe the petition in favor of the complaining party. If it is not – it is not necessarily to decide whether a litigant will ultimately be entitled to any relief in order to hold that a party has standing to seek judicial redress for his or her grievance. The proper inquiry concerning standing is whether the plaintiff has in fact suffered injury to a legally protected interest as contemplated by statutory or constitutional provisions – and I'm obviously going to argue the Charter provisions fall under the same idea. If he has not, standing does not exist and the case must be dismissed. If standing exists, the case must proceed on the merits. So that's just a little thumbnail sketch, but it's a thumbnail sketch of going through the process that shows that injury needn't be pecuniary or involve property rights.

So here we go. I want to argue that I can meet that legal criteria of an aggrieved party and have standing to appeal the decision of the Floodplain Committee because of the kind of injury that I was talking about before. As the *Federal Practice and Procedure* document cited by the City Attorney's office notes, the central focus is on fixing – is fixed on the injury requirement. The very notion of injury implies the second branch, that the causal connection to the challenged activity, and causation in turn turns on remedial benefit, since a remedy addressed to actions that have not caused the injury won't alleviate the injury. So, basically, if you can establish that there's an injury and it's removable, you're good.

So I want to start by arguing that my theory of injury has to do with a relationship between a citizen of a municipality and the municipality itself. So let me start with a distinction. I'm not talking about the theory of taxpayer standing. Some courts do accept that and other courts don't. I want to make a distinction. I'm applying something actually a lot more direct than that. So here's the line that I've actually argued in this law journal article. Where am I here? Sorry. The relationship between a municipal corporation – which is basically what corporations are – they're creatures of the state – they're corporate bodies – and its citizens is in relevant respects analogous to the relationship between a business corporation and their shareholders. In both cases, corporate managers, be they public or private, act as agents for a set of principals, which are their shareholders and/or citizens. And it's that agency relation that I think is important here, because in corporate law that agency relation results in a duty of care in corporate decision making.

So I want to focus on an analogous duty of care and an analogous notion of principal agent arguments. Duty of care in the corporate world has largely been shaped by this Delaware Supreme Court decision known as *Smith* v. *Van Gorkom* and the gist of the *Van Gorkom* decision is that corporate managers discharge their duty of care to shareholders by adopting and following appropriate procedures for considering shareholder interests. So this *Van Gorkom* corporation made a business decision – it actually turned out to be one that made everybody a bunch of money, but they did it for completely half-assed reasons, was basically

the argument. And several of their shareholders sued. Everybody thought the shareholders would lose, but the court found that the corporation has an obligation as an agent of the shareholders to – that they have to at least look at the relevant stuff before they made that kind of decision. So it's a procedural requirement and there's an argument, I think, that there's a similar procedural requirement for cities. That procedural requirement is limited by what's known as a business judgment rule. Here I'm talking about the business judgment rule and how that limits the scope of appeals. I think it's actually kind of important but we're getting long here.

So here's what I want to say. Municipalities, I think, are importantly distinct in this regard for the purposes of this analogy. It turns out that I have to live in some country or other. I'm going to be governed by some nationality. If I'm gonna live in the United States, I've got to be governed by some state or other. There's no place that you can go that isn't covered by some state. Municipalities are special. They're creatures of the state where a group of people who wouldn't have to do it otherwise come together to form a community for certain kinds of purposes, and the purposes of the City of Norman as a community are laid out in our Charter in the language that I described. Given that municipal sense of relationships are sort of like a distinct kind of relationship, I think that really supports this analogy with private corporations and their shareholders. You don't have to own anything; you can always get out of the market. Likewise, you can get out of the municipality market; you can live just in the state if you want to. But coming together, there's a kind of agreement that we all are going to live by certain kinds of rules, and violation of that agreement turns out to be injury.

So the case that there's a duty of care implicit in municipal governance is even stronger than the case for a duty of care in the corporate world. Basic democratic theory of representation establishes that municipal corporations are more clearly the agents of their citizens than is the case in the private atmosphere. After all, political powers inherent in the people, if you look at the Oklahoma State Constitution, we're supposed to be the ones who get to run the show. The purposes spelled out in Norman's municipal Charter are essentially promises of good stewardship of citizen resources. That's what that whole business-like atmosphere is supposed to be. The reason why you want to live in Norman is because they do a good job of stewarding various resources. That's what the benefits of home rule amount to. That's what efficient and business-like methods in the transaction of municipal affairs amount to. And that sets up a kind of principal/agent relationship, and once you're in that principal/agent relationship the agent, which is the City government, has obligations to the principals. And I want to argue that they – when a city fails to follow its own rules, as I'm alleging, they have violated that principal/agent relationship, which is a direct and palpable injury to any of the citizens who depend upon the representations of the state government – or the city government, rather, for their living in the city – for their being part of that corporation. If I don't like the rules of Norman, it turns out I can just leave. But if I want to avail myself of the rules of Norman and the principles that they're going to have – the extra protections for things like pipelines going through – then I've got to trust that the City government is going to do its job when it comes time to granting permits for things like this. And to the extent that a city government fails to follow its own rules, it's violating that duty of care, that principal/agent relationship, which is a direct and palpable harm. That's harm in the breach of contract sense. I think that's actually a relevant analogy. And it's also harm in the sense of imposing heightened monitoring costs on citizens who don't have any immediate options to get out of town. If a corporation in which I am a shareholder makes some bone-headed move, or makes a move that I don't like, I can sell tomorrow. But my assets in the City of Norman are not nearly that liquid. So if I am unhappy with the way Norman does stuff, it's certainly true that I can get out, but if I get blind-sided by the City of Norman – they're not going to follow their rules or anything like that, then I am aggrieved because I can't get out that quickly and what I have to do is be

hyper-vigilant in monitoring.

So that goes beyond just sort of like standard participation, right? You would think that if you elect a city government and they adopt public rules, then I can go back to my own business, right? The whole point of having an agent take care of these kinds of things is that you trust that they will do what they say and you don't have to do it yourself. But if I'm uncertain that my city government will follow their own rules, if I want to protect my interests in what that government does, I've got clearly tangible resources that I have to put into that, which is why I come every night to – or every Tuesday to the City Council meeting, right? So that's basically the gist. If the City doesn't follow its own articulated procedures, a citizen has their breach of duty violated. There's like a breach of contract kind of argument analogously. Or a citizen has to bear direct monitoring costs when she gets involved in political life. So, in a nutshell, I claim that I'm aggrieved by the failure of the Floodplain Committee to follow its own rules in issuing a permit. In failing to follow its own ordinances, the City has injured me by breaching a duty of care and failing to act as an honest agent. That harm is as palpable as any breach of contract harm would be, and I think the attorneys here will agree that if you get a breach of contract claim, you've got standing.

Further, I think it undermines this agency relationship on which I depend, which is the thing that I'm really interested – I do think that that actually constitutes an injury. Now, this injury is not limited to myself alone, but I want to distinguish this from discredited notions of taxpayer harm, right? It is visited on a distinct limited class of municipal citizens who stand in this important principal/agent relationship. So the injury here is not diffuse – that's one of the things that they tell you it can't be if you're going to have standing. But it's not diffuse at all; it's focused on citizens of Norman that rely on their agency relationship with the City. Not all taxpayers within the City or anybody who shops in Norman or anything like that have this sort of claim. This is the claim – this is an injury claim that you can only make if you're someone with voting rights – that's at least a necessary condition. But I would argue you have to be politically involved as well, because otherwise you're not so worried about the cost of agency. But as a politically active sort of super-voter, right? You can go check my voter registration; I vote in all the stuff. I participate a lot. My reliance on the City as an agent is clear, and so is the harm when I – so is the harm I receive when the City fails to do as it commits to doing in its own City code.

So the harm I have suffered is clearly caused by that behavior being challenged. It's a breach of contract. That's a harm. If the City follows its own ordinances, that duty of care is met, so they can solve my harm, right? I mean, the problem is they don't follow their ordinances. If you send this back and make them follow their ordinances, then I get resolution, we're perfectly happy. That's part of what's required to be aggrieved, as well. And then, finally, the injury is apt to be corrected, not because it places any burden on someone like Plains All-American. The remedy is to kick this problem back to the Floodplain Committee. They've got to follow their rules. They've got to get Plains All-American to hand in the right stuff. They've got to make conditions on Plains All-American's pipeline so that it follows the rules. All you need to do is void the current permit, which is within your ambit, and once you void that current permit, we're all good. So you can – you have the authority to handle this injury. Given that you have the authority to handle this injury, and it's a handle-able injury, I think it's clear, first, that I'm an aggrieved party – I mean, I think that's sufficient to establish that – but also it's sufficient to establish that, when we go to the substance, you've got something to do, right? It's not as though you're just going to listen to people complain. You have it within your ambit to do something about it. So, given all those reasons, I'm an aggrieved party. It wouldn't matter if I were, you could still hear this thing. But given all those facts, I hope you'll let us go on to the substance.

[Applause and interruption by members of the audience]

Mr. Ryan – Under your claim that you are an aggrieved party, is your grievance against Plains All-American Pipeline?

Dr. Ellis – My grievance is against the Floodplain Committee.

Mr. Ryan – And not against the pipeline?

Dr. Ellis – No. I mean, I think that the Floodplain Committee erred in not sending the Plains All-American Pipeline sort of back to the drawing board with what they came up with. But if they send Plains All-American – I've got no problem with that.

Mr. Ryan – Mr. Chairman, I believe I erred when I suggested that we limit discussion to the applicant and Plains All-American Pipeline's representative. At this time I believe it's appropriate that if the City Attorney's office wants to respond that they be allowed to respond also.

Dr. Ellis – I would agree with that, by the way, just for what it's worth.

PRESENTATION BY PLAINS ALL-AMERICAN PIPELINE:
Adam Hall, attorney with the firm of Crowe & Dunlevy – I'm here representing Plains All-American Pipeline, and its subsidiary Plains Pipeline. Thank you for permitting us the opportunity to be here today. Our argument is very brief. It will take a mere fraction of the time that Dr. Ellis offered as a justification for why he is an aggrieved party and is able to bring this appeal.

Dr. Ellis isn't an aggrieved party and I believe there's a reason why he spent nearly 90 percent of his entire argument trying to explain why he was. Section 429.1, subsection 5(e) of the City's ordinance, is the only ordinance dealing with standing that has any relevance to this case. And that clearly states, and I'm quoting, appeals from any decision of the Floodplain Permit Committee – not any other ordinance dealing with any other zoning variance – but appeals from any decision of the Floodplain Permit Committee may be taken by any person or persons, jointly or severally, aggrieved by any decision of the Committee, to the Board of Adjustment, which is why we're here today. So Dr. Ellis' argument that he doesn't have to be an aggrieved party is contrary to the clear reading of the Zoning Ordinance.

But the question then becomes what is an aggrieved party, and that's a difficult thing to answer if you're limiting your reading purely to the Zoning Ordinances, or even to the Oklahoma Statutes themselves. Because an aggrieved party is neither defined in the City of Norman's Zoning Ordinances, nor is it defined in Title 11 of the Oklahoma Statutes, which Dr. Ellis made numerous references to.

So in such a case, as we cited in our response, what you do is you look to relevant case law in Oklahoma. And we cited the decision of *Cleary Petroleum Corp. v. Harrison*, which is an Oklahoma Supreme Court case. And in that case, the Supreme Court clearly announced that, and I'm quoting again, an aggrieved party is one whose pecuniary interest in the subject matter is directly and injuriously affected or one whose right in property is either established or divested by the decision from which the appeal is prosecuted. Now that sounds pretty clear to me. You have to have a pecuniary interest at stake that's a part of the alleged grievance, or you have to have real property that is affected by the granting of this variance. In this case, that variance is the grant of the floodplain permit.

Again, another important quote from that case is generally if a judgment sought to be reviewed does not, by its own force, operate to impose a burden or obligation, and it has no

binding effect upon any right, interest, person or property of the appealing party, that appellant is not deemed aggrieved. There's a reason why we've limited the citation in our response to less than a page in our response. Because the law is clear. This is a legal argument, and so the only question is standing, and standing is merely the principle for does this individual own the legal right to seek the relief that he is claiming? That's purely what standing means.

So Dr. Ellis is totally incorrect when he says he doesn't have to be an aggrieved party. But he is utterly incorrect when he's trying to verbosely explain why he is an aggrieved party, because he's not. And, by his own admissions in his written appeal document, he clearly shows that he's not an aggrieved party under Oklahoma law, especially an Oklahoma Supreme Court decision. But I have a little bit more to that point.

It appears that Dr. Ellis has even had some concerns prior to submitting this appeal about his ability to actually bring it. So I think he has some questions about his standing, and perhaps that's why he offered a very, very lengthy response to why he has standing to bring this appeal. In a social media post that Dr. Ellis submitted to an opposition group known as Stop the Plains All-American Red River Pipeline, he clearly states, and I quote, I might need someone who lives out that direction to actually make that appeal. I have a screen shot of that if anybody would like to look at that ...

[Interruption by members of the audience]

Mr. Hall – Dr. Ellis' own concerns are consistent with what the law is, and the law is you have to have a property interest at stake by the issuance of this floodplain permit, or you have to have some pecuniary interest. In all of that 25 minutes of presentation from Dr. Ellis, I heard neither anything that described a pecuniary interest, nor did I even hear a statement from him that he's a property owner in the City of Norman. Specifically not one in the area immediately affected by the granting of the floodplain permit. And that's important. A perfect analogy is what are the other zoning ordinances that are important in issuing zoning variances? The City's own notice requirement states that all citizens and landowners within the immediately affected area of a grant of a zoning variance need to be notified. It doesn't say anybody that lives in the City of Norman has to be notified. It doesn't say anybody who claims that they don't like this pipeline has to be notified. So the notification ordinance is in perfect symmetry with the standing requirement. But, again, I'll just raise the issue again that Dr. Ellis' own admissions caused him concern, since he's not a property owner in the area, that he didn't even know if he had standing to bring this appeal. So I'm happy to entertain any other questions, but that's our legal argument.

Mr. Ryan – Was the Floodplain Permit Committee required to publish notice?

Mr. Hall – I don't believe that there's any publication requirements that I've seen, but I'm simply not ...

Mr. Ryan – So you don't know.

Mr. Hall – I don't know for sure, but I have not seen that. They're required to issue notice to those affected in the area, and that's my understanding has been done, because I've seen that document.

PRESENTATION BY STAFF:

Leah Messner, Assistant City Attorney – Members of the Board, I provided you all a memo in your packets that kind of details my argument on standing, then addresses the merits as well, in case you all do want to move on to the merits.

Dr. Ellis raises a couple of things that I would like to comment on. He, first, separates my office from the Board of Adjustment and seems to argue that, as you all are created by State law, that you're not bound by my advice. Certainly Boards of Adjustment are a creature of Oklahoma State statutes. However, as with many areas of Oklahoma law, there's a little bit of friction between the State law and the City Charter and City ordinances. Norman is a Charter city, created by a Charter. Therefore, we enjoy the benefits of home rule. That gives us the option to create boards and commissions similar to those in State law, but that may have different requirements, more stringent requirements, than those boards or commissions created by State law. You all, as the City of Norman Board of Adjustment, are created by City ordinance. And, therefore, I would request that you all consider yourselves to be a creature of the City of Norman. And I would ask, while you certainly don't have to, but I would ask that you consider my advice as your representative – your legal representative at this meeting today.

Moving on, standing is, like Dr. Ellis mentioned, and Mr. Hall from Crowe Dunlevy, an initial matter. It's something that courts look at when they're trying to determine if the plaintiff in a case has an injury that they can adjudicate. Is this a case that I can come to a conclusion on that will resolve the issue between the parties? And so that initial matter, the courts look at whether there's a distinct and palpable injury, that the injury is caused by the challenged activity, and that the injury is apt to be redressed by a remedy that the court is prepared to give. I think that was quoted earlier here tonight, and that's correct. In addition, Oklahoma case law has defined standing for an aggrieved party, which is the standard that you all are looking at today under the City of Norman ordinance, as one whose pecuniary interest in the subject-matter is directly and injuriously affected or one whose right in property is either established or divested by the decision from which the appeal is prosecuted. In the 30 minutes that Dr. Ellis spoke, I did not hear either a pecuniary interest or a property right at stake in his appeal. And, again, for that reason, as my memo states, I advise you all that Mr. Ellis does not have standing to bring this appeal to you all today.

In addition, he makes an argument – an interesting agency relationship argument, something that I feel fairly certain would be a matter of first impression here in Oklahoma, something that our Oklahoma courts have not decided on. And, as such, I would advise that you stay closer to what Oklahoma courts have decided, which is a pecuniary interest or a property right, and I did not hear that today, and that has not been submitted to us in Dr. Ellis' appeal.

I think those are all the comments I have. Do you have any questions for me?

Mr. Ryan – Is publishing notice a requirement for the Floodplain Permit Committee meetings?

Ms. Messner – I believe it is. I was just checking my Zoning Code when you asked me to answer a question.

Ms. Connors – The Public Works Director is indicating from the audience that we do publish for the Floodplain Permit applications, and we're still looking in the ordinance exactly where it says that.

Shawn O'Leary, Director of Public Works and, in that capacity, the City's Floodplain Administrator, and the Chair of the Norman Floodplain Permit Committee – To answer the

question, yes, we do publish notice of the meetings, like any board and commission here in the City. We are also bound by the same zoning regulations, so we notify all property owners within 350 feet of the permit location, as we did in this case.

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:
Dr. Ellis – Would it be possible for me to just comment sort of rebuttal? I mean, this is the first I've heard ...

Chairman Seamans – No, thanks. You've had plenty of time to speak.

Dr. Ellis – I realize I had plenty of time, but I was asking – there were comments that were made that I think misrepresented what I said.

[Interruption by members of the audience]

Chairman Seamans – We're not going to let you speak.

[Interruption by members of the audience]

Chairman Seamans – We have discussion amongst the Board.

Mr. Ryan – My motion is that this Board ...

Chairman Seamans – We're going to put this meeting on hold while we get a police officer. And if anybody else wants to speak up, you'll be escorted out of here. We are following the rules and guidelines and we'll get your democracy.

[Interruption by members of the audience]

Chairman Seamans – We're not going to allow Mr. Ellis to speak at this time. We're talking amongst the Board.

[Interruption by members of the audience]

Chairman Seamans – We're going to restate the motion.

Hank Ryan moved to find that Mr. Ellis is an aggrieved party. Nils Gransberg seconded the motion.

[Interruption by members of the audience]

There being no further discussion, a vote was taken with the following result:

YEAS	Hank Ryan, Nils Gransberg
NAYS	Curtis McCarty, Andrew Seamans
ABSENT	None

Ms. Tromble announced that the motion, to find that Mr. Ellis is an aggrieved party, failed by a vote of 2-2.

Chairman Seamans – Alright. There is a 10-day appeal process for this. You may get that appeal information from the City.

[Interruption by members of the audience]

Chairman Seamans – The Board of Adjustment needs 3 votes to pass.

[Interruption by members of the audience]

Ms. Messner – Members of the Board, the motion to grant Dr. Ellis standing failed on a vote of 2 to 2. The City ordinance for the Board of Adjustment requires a vote of 3 members of the Board to take action. Because no action was taken, the motion fails. And if that's the only motion you all are interested in making, then the matter is decided and you're welcome to move on to the next item on the agenda.

[Interruption by members of the audience]

The meeting recessed from 5:48 to 6:19 p.m. to allow members of the public to leave the room.

* * *

Item No. 4, being:
BOA-1617-2 – JOHNSON & ASSOCIATES, INC., ON BEHALF OF KENDRA & RUSSELL STREETER, REQUEST A VARIANCE TO THE 7,000 SQUARE FOOT MINIMUM LOT SIZE REQUIREMENT FOR TWO DWELLING UNITS (HOUSE AND GARAGE APARTMENT) ON PROPERTY CURRENTLY ZONED R-2, TWO-FAMILY DWELLING DISTRICT, AND LOCATED AT 808 ELM AVENUE.

ITEMS SUBMITTED FOR THE RECORD:
1. Staff Report
2. Location Map
3. Application with Attachments
4. Protest Maps and Letters

PRESENTATION BY STAFF:
Mr. Stenis – This item was postponed from last month. It's a variance at 808 Elm Avenue for a property where they want to put a garage apartment on a property where there's an existing house. The code requires 7,000 square foot lot; this one lacks that by 285 square feet. The ordinance that changed that requirement to 7,000 square feet was actually adopted in 1984; it was my error – I put '78, but it's actually 1984 and we have provided you a copy of the annotated ordinance that was adopted at that time.

Mr. Stenis reviewed the staff report, a copy of which is filed with the minutes. Staff does not support the variance because it does not meet the criteria. Protests were filed for this application.

PRESENTATION BY THE APPLICANT:
Tim Johnson, representing the applicant – Mr. Streeter is here with us today, and also Mark Zitzow of my office is here. Thank you for allowing us to come back. This presentation really is for Mr. Gransberg, who wasn't present last time, but as well as to clear up a couple things that I think maybe were unclear or maybe misstated last time. Because I believe that, respectfully, we disagree with the staff on their findings. And so, as we go through this presentation, I'm going to try and point out some of the reasons that we believe that we do meet all four of the statutory requirements. As mentioned by the staff, the plats were done in the 20s. It was originally zoned multi-family to allow for garage uses back in 1924. So, clearly, it was the intent of the developer and the City of that time to allow multi-family or garage apartments -- secondary tenants – to be developed in this area. So the area has always been planned to be used for houses with the possibility of having a garage apartment, not unlike older neighborhoods like Heritage Hills, Nichols Hills, and some of the older founded city neighborhoods that have that same ability. As staff mentioned, not 1978 but 1984, the zoning changed citywide, and I doubt that the City planners at that time went through and looked at every single lot in the City to see what is the impact on current R-2 zoning. And that's why we're here. Unlike the previous applicant, I'm not going to tell you how to do your job or what your job is. But we are here because you have the Board of Adjustment to allow for variances to be heard, and our variance today is simply talking about 285 square feet of property, which is about 16-1/2 by 16-1/2 square – not a very big piece of land.

This is our proposed site plan, and under the proposed site plan we're proposing to do a non-connected independent garage building in the rear that would allow for additional parking, which parking is an issue you'll probably hear about today. We've got complaints of cars parking in the front yard and things like that that, by removing the garage and allowing more of the driveway to be used, will remedy that situation.

So the problem with our site is that it's fully developed on all three sides so there's no way for us to combine additional land, as the staff has mentioned that other property owners have

been able to do. We're locked in.

And so in talking about the items as staff has mentioned, there are special conditions or circumstances peculiar to the land or structure involved, and as mentioned the land is 6,715 square feet. We're asking for a 4% variation. As I already mentioned, in 1984 the City changed the zoning ordinance and it applied to all R-2 zoning, of which this was zoned in the 50s to R-2 from U-2. Same concept; same zoning concept – it was just a change in the way the ordinances were written. So we believe that this is a special condition. We have an odd-shaped lot that is slightly less than what the 1984 ordinance citywide calls for.

The second item, the literal interpretation of the provisions of the ordinance would deprive the applicant of the rights enjoyed by others in the same district. As mentioned, there are other land owners in the area that have the right to have a garage apartment. What we show is in the green surrounding us – our tract is the red. Yellow is church. Fraternities and sororities – we're surrounded by them. So this is an area that is meant to be intensely developed. The green areas are two-family or greater properties. So it's not unusual; we're not creating an unusual situation by asking for this variance that the Board can grant. And so by not granting this we are being deprived of the ability to add a garage apartment, which is by right through the zoning code permitted.

Special conditions or circumstances do not result from the actions of the applicant. As mentioned by the staff, yes, we bought the property recently. It was zoned R-2 when purchased. We knew that it's 285 feet short, but that's why we're here. The process allows for us to come before this Board and ask for a variance.

The granting of the variance would not confer special privileges on the applicant that are denied to other lands or structures in the same district. As you can see, there's a mixture of the two-family uses around us, and I think that there may only be a couple of more lots that, if they wanted to add a garage apartment, they have the same right that we have here, coming before this Board asking for that variance of 285 square feet.

The other thing I want to point out is that this house is right across the street from University property. This parking lot is as big as a Walmart neighborhood store; there's 325 spaces. It is intended to be a property that can be used to its maximum potential. By its proximity to the University and by its location to the parking lot area and walkability to the college, the R-2 zoning is appropriate. On the previous presentation and meeting with the neighbors it was discussed about parking and so we concur there are parking issues. The church to our north occupies a lot of the driveway – we share a driveway with the church to the north. And by removing the garage and allowing us to add that garage in the rear, it will pull all of our traffic in the back.

You've already seen our site plan, but I want to mention the advantages of the accessory dwelling units. Obviously, that creates flexibility because of the zoning. It allows for affordable housing for college students and it just allows a better living area so close to the campus.

Although I don't believe that flooding is an issue that should be brought before as part of this case, I know that we won't have the chance to rebut it, so I want to discuss drainage with you a little bit. We all know that this area suffers from drainage problems during heavy rains. Our house in the subject property has never flooded. All the houses along Elm Street are several feet above the curb. But just to the south of this, there's quite a bit of flooding that occurs and down the street and the surrounding streets. I think we show it on the next slide. So this is not uncommon during heavy rain. It takes several hours for the water to recede. But us increasing our square footage still leaves us way below what the City permits by right. We can develop on this property up to 65% coverage. This plan with this garage in the back is only 51%. At the end of the presentation I'm going to show you an alternative plan that is a few more percentage

points, but it's something else that's permitted by right. In comparison, and I won't spend a lot of time on this, but this is a real quick map that we put together based on the City's database and you can see that there are a lot of properties that have much higher coverage than even the 65%. So the addition of our few square footage to this area is not going to create a difference here, unfortunately. The passing of the bond issue would have possibly allowed that.

Going on to discuss the property specifically, the Streeters bought the home; they're renovating the home. Their intent is to move into that home possibly at retirement when their kids are grown up. It was a poorly maintained house full of rodents and insects. They've spent months and months and lots of money cleaning it up. Their intent is to add sight-proof screening around the property which is permitted under building permit process. They're cleaning up the overgrowth and really trying to clean the property up. The garage is not historic; doesn't match the house, and it's really, really poor shape. I think I have a couple slides here that show -- the garage is in the right slide. That's a one-car garage. The foundation appears like it was just wood on the ground, so there's not much benefit of saving the garage. So they want to take the garage down to allow for the access to the rear of the property, which is more suitable not only for the area they're in, but it makes a safer exit for the tenants that would live there.

So, in closing, we've looked at this really hard. We think this is a good application. We think that asking for 285 square foot variance is not going to adversely affect anybody around this property.

Let me show you briefly – we came up with an alternate plan for the Streeters. The alternate plan creates a little bit higher percentage; I think it puts us at 58%. But we would be permitted by right – they're going to tear down the porch that's there now at the back of the house, and they would add a connected garage, turn it sideways, allow for more parking. This could be permitted today through the building permit process. So our variance request is actually less intensive than this. So this isn't a threat; this is just a plan that, if they wanted to connect this to the house that does have historic value. It's an architectural unique house. It's not on the Historic Register. There are a couple of houses in the area that were designed by this particular architect. But what you do on an historic structure is you don't attach something new to it, typically, but they can. What they'd like to do is build a separate garage and structure. And so, with that, I'd be happy to answer any questions.

Mr. Ryan – How many bedrooms in the existing house?

Mr. Johnson – I believe three.

Mr. Ryan – And what's the proposed bedroom situation for the detached garage?

Mr. Johnson – It would be two – more than likely two bedrooms.

Mr. Gransberg – And what was the amount of coverage this is going to be?

Mr. Johnson – Under the plan before you is 51%. That's below the 65 that's permitted.

Ms. Connors – I just want to clarify that. The 65% is total impervious coverage. The actual building coverage is 40%. I wanted to make that distinction, since I don't think it was clear in the discussion.

Mr. Johnson – We would be below the 40% on both cases. But thank you for clarifying that.

AUDIENCE PARTICIPATION:

Blaine Nice, 100 North Broadway, Oklahoma City, representing some of the neighbors – First, I thought representing Walmart was tough, but after being here tonight that's not anything. I feel for you guys tonight. I'll try to be brief.

I represent approximately five of the neighbors, but I think what's in your packet will show that there's an 87% protest for owner-occupied houses. There's a couple houses that residents – and I think Mr. Johnson mentioned that there's a church there; they didn't protest. There's two other properties which he alluded to that I think that they may be in front of you at some point for a variance if this passed. And then, of course, the Delta Gamma House – they did not protest. So I just want to make a point. Most of the neighbors are here that are owner-occupied and there's 87% of those that protest. And, while we respect the applicant's application – in fact, I know Mr. Johnson well, worked with him. I know the applicant and his father, who – actually, his father was a neighbor of mine, didn't realize it before, but he was maybe the best neighbor you could ever have. So this certainly isn't a personal objection, but I just think that the neighbors feel, for various reasons, that this variance does not meet the requirements. I've got a few practical things I wanted to go through, and I'm going to try to be brief, not like Dr. Ellis, but try to go through this – some of the practical things, and then I want to hit on the four basis for a variance and why I don't think it meets all those criteria. But, first of all, we're here because the lot size doesn't meet the criteria of a neighborhood – or the guidelines to have a second structure. You've got a letter from J.W. Dansby in your packet where he's done some calculations and we believe that it will increase the flooding in the area. While Mr. Johnson is correct, the flooding is significant already and adding this may not bother that. This is the back yard of the structure. This is the house that's directly behind this structure and, as you can see, the flow – and Phyllis Murray is here today. She was at the last meeting and spoke up that the flow from the Streeters' property is to the south and to the west, and you can see that build-up on Mr. Rayl's property, and that is exactly where this is going to flow. And when they build this it's going to be more run-off that way. So there is – it is going to impact the surrounding property significantly, I believe.

Now, while under the law if you grant a variance, that doesn't set precedents for other variances. As I indicated, I do believe there's a couple other property owners in the area that have expressed interest in doing some additional paving – in fact, putting in maybe an additional garage apartment, and I think that once you do that for one of these houses, it's difficult for you to turn down another one. There's no need for additional housing. I don't think that – my clients have gone out and looked. You can see here there's like 25 houses for rent within a five-block area. I'll put this here so you can see that. There are plenty of houses for rent, so I don't think there's a need for additional rental properties in that neighborhood. It has been indicated, while this is not an historic house, it's a Gimeno – or however you say that – house and it's definitely unique. I do think that'll impact that. While this isn't within your – they haven't said how much greenery or trees – there's a very large tree in the back yard. I realize that doesn't enter into your decision, but there's quite a bit of growth back there and if they remove that they'll remove greenspace.

This is a two-story garage, it should be pointed out. The other garage in this immediate area – garage apartment – is one story. The other is a duplex. This is going to be two-story garage. Mr. Johnson indicated at the last meeting they may be willing to do some things with the windows or whatever and not point into, maybe, the yard directly behind it. But, certainly, they're going to have windows somewhere and they're going overlook either the Best household, Mr. Rayl's house, or Ms. Murray's house, or even look to DG house. It's obviously going to be – they're going to have some windows somewhere.

As I said, there's 87% protest of owner-occupied houses. The others haven't protested.

There are no other garage apartments in the 600 block, 700 block, or 800 block of College, Elm or Chautauqua in this core area. Mr. Stenis, in the first meeting, indicated that – and he didn't go through this tonight, but in this particular platted area, there are no other two-story garage apartments. I mean, when you get into this very limited – this particular plat.

Now, those are some practical reasons, but I think, as Mr. Johnson points out, he thinks that they have met the four conditions. The first one, it's special conditions – this property peculiar. I don't think there's any question about that. It is. These other lots were combined and there were 7,000 square feet and I agree with that. But when he says a literal interpretation would deprive the applicant of rights enjoyed by others in the same district, I believe he misconstrues that. They have the same rights as a single-family dwelling as anybody else in that district. The only other multi-family uses are the duplex and the garage apartment, which were both constructed prior to the change in the ordinance. So other people can't have – they are not being deprived of their use that anybody else in that district would have. Now one of the things – it's kind of a sticky wicket because there's case law that goes both ways, but the current conditions are not the result of the applicant's actions. Well, as they said, they purchased this property knowing the limitations, and there's authority that says that that is such that that does not justify a variance. There's some authority that says it doesn't matter, but I do know there's some legal authority that says it does. I do believe that, by granting this variance, you are conferring on them a special privilege that the other people in the neighborhood would not have.

Now one of the things Mr. Johnson talked about in the first meeting, and he hit again tonight, is the intent. When you go back – and City staff just got this today – when you go back to the Planning Commission and when the City Council approved this change from 6,500 feet to 7,000 square feet, the City had a consultant that reviewed some of the zoning ordinances to try to make them consistent and bring them up-to-date, and when it came to this particular portion of it, they talked about that the main thrust of the plan is the conservation of the residential areas that are designated as residential areas, and specifically they said those should reflect those residential parts of the area that, in the opinion of the committee, should, with all the powers available to the City, be retained in more or less historical nature. And I would argue that single families without garage apartments – that's the historical nature of this particular area – this small core area. The Board may well be aware – I think there's been some down-zoning not far from here, and there's some current applications pending for some down-zoning. I think that the goal is to keep this core area single-family. I mean, there's plenty of multi-family housing there and I think it's important to keep the historic value there. I would say that, while they indicate there's no negative impact, I can't sit here and say the sky is falling, we believe it will have a negative impact on the surrounding area. They made the comment in the first meeting that they want to maximize, and I believe that's in their presentation – they want to maximize the use of the property, and I certainly understand that. But there is a case – a Supreme Court case that specifically says that added advantage and monetary benefit are not sufficient grounds alone to warrant the granting of a variance. And I submit that that's what you would be doing. That's what they're asking is to have additional rental for additional income, and that's not a sufficient basis for granting of a variance. I indicated at the other meeting, and Mr. Gransberg wasn't here – and I don't want to quote Dr. Ellis or whatever and talk about your functions as Mr. Johnson said – but the Board may not under the guise of the variance nullify the zoning ordinance and deregate the fundamental character, intent, and true purpose of the zoning law. And I think that that's what the – when the Planning Commission recommended approval and the Council voted back in 1984 to change this, that that's their intent to keep these – they put that limit. They upped it to 7,000 square feet for a reason. And I just feel like, while this is not a thousand feet, it seems an insignificant amount, it's kind of getting the nose

under the camel's tent. And if you allow this variance, then the dominoes fall in that neighborhood and it just – you lose the character of single-family. And, like I said, there's plenty of multi-family in there. I would have given you copies of the Planning Commission minutes – we just got those late today. But Mr. Dansby is here to answer any questions about the drainage issue if you have, and I'd be happy to answer any questions. But we would ask you to follow the City staff's recommendation and deny this variance.

I do want to point out one picture I had. The issue is that they could put a garage back here, but this is a shed in the back yard of one of the adjacent property owner, and when you superimpose the same size building, that's what it looks like and it's going to go right there in the back yard. I mean, that's nine feet tall, so it just – I don't think it's just a small structure back there. Now, we realize that, under the code, they could put a garage back there, but I don't think you'd have the same amount of paving for a garage as you would for this garage apartment when you're going to park additional tenants back there. But, as I said, we would respectfully request you follow the City's recommendation – or the City staff's recommendation and deny the variance.

Terry Best, 809 College – My back yard adjoins the back yard at 808 Elm. Just one thing I want to say is, yes, our street floods. This isn't probably going to make any difference to the flooding in the street in front of my house, but my back yard floods during a heavy rain, too. My back yard – well, I don't know – is on the other side of that fence. When we get a heavy downpour, we get flooding. And I'm talking a foot or more. We have a storage shed in the back yard that floods so we can't – you know, the first time we had stuff sitting on the floor and, of course, it got mildewed and ruined. Now we don't keep it on the floor anymore. But I just want to assure you that flooding is, indeed, an issue. It's not just in the streets; it's in my back yard and affects my stuff, and I'm worried that more impervious surface so close to my yard will just increase that runoff.

And another thing I just wanted to say is the other garage apartment in the neighborhood is ours – it's mine. It's not – it's a single story and it was built, of course, before 1984 – I think it was built in 1927 when my house was built. So it's not something that somebody got to do that this other – the applicant might not get to do. You know, it was something that was done almost 100 years ago. So I just wanted to clarify that. I guess that's it. And I'm the one – I sent you a letter; I hope you got it. It's the one with the picture of the guy in the canoe rowing down the street. I won't re-read my letter to you, 'cause I'm sure that you read it.

J.W. Dansby – I'm an engineer here in Norman. Mr. Rayl asked me to look a little bit about the drainage situation. I think the letter I wrote was pretty short and, basically, there will be impacts because there is more impervious area. So it will – and the reason that their house doesn't flood is that it's at the top of the hill and everything runs downhill. There will be an impact because of this additional impervious area that's proposed in the plan. Any questions?

Mr. Ryan – The impact that is going to happen on any increase in the permeable area isn't related to the use of the property. It is related to the amount of impermeable area. The permeable area question is not what is before us. The use of the property is what's before us – the size of the buildings, all of that, aren't what we decide on. It's whether or not the proposed use of whatever is built is allowed.

Mr. Dansby – I understand. I just thought everyone should know that the additional impervious area will affect the problems that are already in the neighborhood.

Mr. Gransberg – What's the general drop from that house?

Mr. Dansby – You have the letter I submitted, and if you look at the second page – this one says Dansby Engineering at the very top. The second page of my letter shows the – 808 Elm is about the middle of the page, kind of the top part, and if you look at the contour right there, it's 1162 and everything is downhill from there, going to the southwest – something like that. So it's about – to the adjacent property, it's about a foot drop. And then it goes on down a couple of feet when you get down about a half a block or a block or so.

Jane Crumpley, 423 Elm – I'm here to speak in support of the neighbors who are very concerned about what this variance could cause or the potential impact on their home. Recently – we're R-3 on Elm and right next door to me they just built a two-story tri-plex, covered 65% of the property, which they're allowed to do. It has changed the entire tenor of the neighborhood. I mean, I'm concerned about our core area being changed by all of the infill that doesn't meet or match or fit in to our homes. This property next to me that was put in blocks the entire north side of our house. And I have to make a comment, too, about the drainage. When I asked about what happens when it floods our property and the properties on back on Park, which it flows that way, because it was not a replat when our properties flood we will have to sue civilly to get it corrected, which will be at our expense. Flooding is a concern. It's not something, if it's not a replat, that gets reviewed by the City to see is it flowing properly? Did the building go on there? And so I think it's a legitimate concern on their part. Thank you.

Brent Swift, 900 South Berry Road – I just want to comment about the historical nature of the home. The house is a Gimeno house. It's a limited number of them still available – or still here in Norman. Has a tremendous amount of architectural value and could be on the National Register pretty easily. I restored one over the last couple of years on Hoover. We took off the room addition. This one has an existing room addition on it that, in our case, we ended up taking off. We did add a detached garage. We did not go for an additional apartment. I think the argument here is going to be volume, so I understand your variance is based on square footage and footprint. But I think if they go back and revise their architecture, their footprint would get greater if they pulled it down to single story. I'm not really here in support or saying it's bad or doesn't work. I'm just saying, from an architectural standpoint, this house is very significant to the history of Norman. Thanks.

Phyllis Murray, 801 College – I am fortunate enough to have lived in this house since I was born, and my grandparents built it in 1918 before this area was platted and it has not changed in all the years. I don't have a problem with the neighbors; I wish them well. I am concerned about the space that that garage apartment is going to contain and the grounds around it. Yes, we flood terribly on College Street and I am above because I'm on the corner of Parsons and College, and so we have it on our corner – it floods clear up there and that area does get in my back yard some. It seeps under our wall and it sits in the yard. And I am concerned about the water. I do understand – I've really looked at this hard and it's been a love of my life to be in this neighborhood and watch it not change very much at all, especially the structures. And I would hope that you all would take staff's recommendation on this. And if it were a one-story, it's not nearly as bad as a two-story. Two-story just overwhelms that whole area, and we've seen that in the core area, that it's not very pleasant, and it's really hard to live with a house that is so overbearing in the neighborhood that it wasn't when it was built and it was built with lots of constraint and lots of thought. So I would appreciate the fact that you would use staff's recommendation. Thank you for listening.

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:
Mr. Ryan – The question isn't the size of the structure, it's the use. The question isn't the size of the structure; they're entitled to certain coverage, certain setbacks, and everything. The question before us is whether to grant a variance that would allow a different use than just single family. And, in effect, it would allow a second living area that could be rented and probably would increase the number of people on that lot by two, maybe three – but probably two people. So I think we have to look at and say is that more than this lot and this neighborhood can deal with. I know everybody's concerned about the flooding, but that's not what is before us. And I know people are concerned about the parking, but they're not requesting the ability to park on the lawn and, in fact, the proposal could alleviate the parking issue.

Curtis McCarty moved to approve the Variance. Hank Ryan seconded the motion.

There being no further discussion, a vote was taken with the following result:

YEAS	None
NAYS	Hank Ryan, Curtis McCarty, Nils Gransberg, Andrew Seamans
ABSENT	None

Ms. Tromble announced that the motion, to approve the variance, failed by a vote of 0-4.

Mr. Seamans noted there is a ten-day appeal period.

* * *

Item No. 5, being:
BOA-1617-7 – GULF EXPLORATION, L.L.C. REQUESTS A VARIANCE FROM THE REQUIREMENT TO INSTALL FENCING AROUND THE WELL AND TANK BATTERY.

ITEMS SUBMITTED FOR THE RECORD:
1. Staff Report
2. Location Map
3. Application with Attachments

PRESENTATION BY STAFF:
Ms. Connors reviewed the staff report, a copy of which is filed with the minutes. This was postponed from the July 27 meeting; there were insufficient votes to approve this, but there were sufficient votes to postpone this to this meeting. No protests were filed for this application.

PRESENTATION BY THE APPLICANT:
Pat McGraw, Gulf Exploration, 9701 North Broadway Extension, Oklahoma City – Thank you for hearing the case. As stated by staff, the only reason our well comes under this City ordinance is due to the fact that of the proximity to the public road. Now, there are wells in this section that are outside of the I believe it's 660 feet and so they don't come under this ordinance. The staff report talks about waivers of the property owners. I was wondering if I could get a clarification of that, because we do have agreements with the property owner of the site in regards to our fencing and what we've done. And I'm wondering if that statement about waivers would take any – it talks about to not require fencing. That's what I need clarification. Or just because we're close – does that have anything to do with it for a waiver? I just would like clarification on that statement.

Ms. Connors – The requirement is that if it's outside the Current Urban Service Area and it's within 600 feet of a structure or building or the centerlines of a public roadway, they must get waivers from the property owners. So this is not within 600 feet of a building or structure, but is within 600 feet of the centerline of our roadway and, therefore, we, as property owners, need to grant that waiver.

Mr. McGraw – So do I understand that the property owner that we are on is not the property owner as stated? So if I had an agreement with the property – that's what I'm asking.

Ms. Connors – This does not refer to the property owner where the well is located, necessarily.

Mr. McGraw – Thank you. I think last meeting we talked about this is a marginal well and we're just asking relief due to the fact that there's – if this well was in the urban area, I wouldn't be here. We haven't had any problems. I'd like to answer any questions you have.

Mr. McCarty – How is your well currently fenced off?

Mr. McGraw – With barbed wire.

Mr. McCarty – One wire? How tall?

Mr. McGraw – It's approximately five foot tall. The roadway gate is kept locked unless somebody is in there all the time, per agreements.

AUDIENCE PARTICIPATION:
None

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:
Mr. Ryan – If you've been out to this site, there's virtually nothing around it. But there is some concern, I think, in the future as the City grows that we'll get to a point where things will get closer.

Hank Ryan moved that the Variance be granted on a temporary basis, to expire December 31, 2020, then they will have to reapply and we can see if the City has grown closer to the well site. Curtis McCarty seconded the motion.

Mr. Seamans – If a building was to be placed, say a residence, nearby, would they have to comply?

Ms. Connors – If a structure is built and they got a waiver from that property owner, they would not have to build the fence.

Ms. Messner – However, if the designation on the property changes to Current Urban Service Area ...

Ms. Connors – Well, not just because a structure is built. If the Current Urban Service Area, or whatever we call it in our new Comp Plan, is expanded to this area, then the fence would be required no matter what.

Mr. McGraw – Well, if the ordinance changes again, we're under the ordinance.

There being no further discussion, a vote was taken with the following result:

YEAS	Hank Ryan, Curtis McCarty, Nils Gransberg, Andrew Seamans
NAYS	None
ABSENT	None

Ms. Tromble announced that the motion, to grant the Variance to expire on December 31, 2020, passed by a vote of 4-0.

* * *

Item No. 8, being:
BOA-1617-10 – SHERWOOD CONSTRUCTION COMPANY, INC. APPEALS THE DENIAL OF A FLOODPLAIN PERMIT (FLOODPLAIN PERMIT APPLICATION NO. 574) ON JUNE 20, 2016.

ITEMS SUBMITTED FOR THE RECORD:
1. Staff Report
2. Location Map
3. Application with Attachments
4. Deficiency Letter
5. Floodplain Permit Committee Minutes 6/20/16

PRESENTATION BY STAFF:
Susan Connors reviewed the staff report, a copy of which is filed with the minutes. No protests were filed for this application.

Shawn O'Leary, Director of Public Works and Floodplain Administrator, Chair of the Floodplain Permit Committee – I would just add a few comments to Susan's remarks. First, I would just offer that in the ten years I've served as the Floodplain Administrator, we've never had an appeal of any of our actions and it's ironic that we're having two in one night. So what's interesting, too, is that the previous case was a situation where the Floodplain Permit Committee issued the permit for the pipeline and the appeal was deny it, I guess, or remove that permit. This is the opposite. The Floodplain Permit Committee recently denied this permit and they're asking you to, I guess, reinstate it, or perhaps send it back to the Floodplain Permit Committee. As Susan mentioned, this is first located in the South Canadian River watershed floodplain, southeast of the intersection of I-35 and Highway 9 East. The applicant, Sherwood Construction Company, has been the contractor on two or three different ODOT projects in the area, which brought them to us in October of 2013 with an application for a floodplain permit to create a borrow pit – a very large borrow pit to use that dirt on one of their projects. The problem – that was authorized, I think by unanimous vote of the Floodplain Permit Committee and it was very clear in that application and in the action taken by the Floodplain Permit Committee that it was only for a borrow pit. There was no reference in that application, no discussion at the Floodplain Permit Committee meeting, that they would ever fill it back up. So that's important to understand. Earlier this year, our office was notified that there was some activity filling the floodplain in this area. Our staff investigated and found that it was Sherwood Construction, or their subcontrators, who had been hauling for some time and filling this borrow pit back up with concrete materials and other materials – they can speak to that in more detail. We notified them immediately, indicated that they did not have a permit to do that. They were confused. I think you'll hear about that tonight. Not a confusion on our end, frankly. We were very clear on what we had issued for a permit. We indicated to them that they were violating that permit and they should cease that operation immediately, and they basically had two options. One, remove the fill that was not authorized by the original floodplain permit, or apply for a floodplain permit – a second floodplain permit to fill the borrow pit. So that kind of gets you up to the recent meeting with the Floodplain Permit Committee. They then did that; they applied for new permit to then bring fill in to that borrow pit, and the Floodplain Permit Committee voted 5-1 to reject that application, and that's why they're here tonight.

Our Floodplain Permit Committee is made up of seven members, and it requires 5 members for a positive issuance of a permit. So they got a vote of 5-1. In your packet – and I'm going to read from this, and then I'll take any questions you have and then sit down. To try to clarify this for you all and for the applicant, we wrote a letter to them on August 1st of this year

indicating that on June 20th the Floodplain Permit Committee denied application #574 and, in our view, reviewing that meeting and the minutes of that meeting, we believe these are the reasons that it was rejected. The Floodplain Permit Committee members suggested the application was deficient in the following three areas. Due to the types of materials placed in the pit – mainly concrete or small amounts of asphalt and steel – the Floodplain Permit Committee was concerned that a groundwater monitoring program should be implemented down gradient to monitor for possible contamination due to the fill. Number two, the Floodplain Permit Committee was not provided proof that the surface elevation of the top of the fill matched the original surface contours prior to the pit excavation in 2012. And, number three, the ground surface of the fill is mostly barren and has not been revegetated. Revegetation is a basic requirement of the State Stormwater Permit OKR10. So that was a very quick summary. I encourage you – I'm sure you have read the minutes of that meeting, and there are many more comments and concerns expressed by other members of the committee. I am the chairman, but I am just one member. I did vote with the five to deny the application. I don't do that very often.

So that's kind of a summary of what happened and why we're here, and really what we think were the concerns of the applicant. The last thing I'll mention is that, in our action of denial, again, same premise was offered to the applicant. They had two options. One, to appeal to the Board of Adjustment or, two, remove the fill. And you'll hear, I think, from them and it's in their application that that is a million dollar endeavor – to take out all the material that they mistakenly placed in the borrow pit. So this is a very expensive problem for Sherwood Construction, and we're sensitive to that, but we're also sensitive to our floodplain regulations and we regret that the misunderstanding took place, but it wasn't a misunderstanding on our part – it was a misunderstanding on their part. I hope they can present to you something tonight that maybe can rectify this. But that sort of gives you the background on how we got here tonight. Be happy to answer any questions.

Mr. Gransberg – You said that there's asphalt and rebar?

Mr. O'Leary – Yes, sir. That was one of the concerns. We were getting sort of a mixed review going into that meeting – the Floodplain Permit Committee meeting, but the applicant went on to say, oh, yeah, we've got concrete. Some of the steel might be exposed – the reinforcing steel in the concrete might be exposed, which is a violation of our floodplain regulations. They indicated they would remove the exposed areas of steel – don't know if they've done that or not, or how hard that's going to be to do. Imagine – it's a pollution issue, certainly the exposed steel. But, frankly, the Corps of Engineers regulations are much more sensitive to the notion that someday that slab of concrete with that exposed steel could impale a person who might fall into that pit. So it's a very dangerous condition to have in a floodplain area. Also indicated to us that, certainly, they are removing concrete with asphalt overlay material and, while they try to remove the large chunks of asphalt, naturally some of that was adhered to the concrete and was not removed, so we think there might also be asphalt materials in the pit. And, again, I would let the applicant speak to that. But that's what they told us at the Floodplain Permit Committee.

Mr. Gransberg – Was there any discussion about remediating any of that or monitoring that floodplain for potential pollution?

Mr. O'Leary – Yes, sir. Great question. And there was a great deal of discussion. Again, I can't speak for others of the committee members, but they were very concerned about the notion of

exposed steel and asphalt. And that, I think, was the origin of this – the mention that we made a moment ago that if it were to be authorized, the Floodplain Permit Committee was concerned that a groundwater monitoring program had not been offered by the applicant. So perhaps they're going to offer that to you tonight. We think that if that were the direction of this committee, certainly we would want to monitor that groundwater for some period of time in some organized fashion to know that we're not seeing pollution. And we certainly want to make sure that all of that exposed steel is removed for just safety reasons, if nothing else.

Mr. McCarty – Shawn, is it normal for these borrow pits to be filled with debris like that?

Mr. O'Leary – It really is, and I think that's what the applicant is going to tell you – that it's not uncommon at all to create a borrow pit and fill it back up. That's good business for contractors. They're saving lots of money on their projects and hopefully saving us money, if they're bidding our projects. So we all like that. The difference here is that I think they misunderstood Norman's floodplain regulations and made an assumption that was incorrect. We don't allow that in our floodplain regulations, unless there had been a provision. Now, had they come to us in October with an application that said we want to create a borrow pit in 2013 and 2014, and in 2015 we want to fill it back up, I think our committee would have reviewed that accordingly and perhaps would have approved it under certain conditions. Unfortunately, that didn't happen and we're sort of catching up now on something that was a misunderstanding on the applicant's part.

PRESENTATION BY THE APPLICANT:
John Curtis, Sherwood Construction Company – Well, I don't have much of a presentation. He summarized it pretty well. We do this quite a bit. Simultaneously with when we are doing this one, we're doing one in Del City in a floodplain, and that permit happened to be worded differently – it said excavation and backfill. And I think – we're not denying it slipped through the cracks. We did not catch it and we started that, and we stopped immediately as soon as we were notified. So we've been trying to get a permit to backfill it ever since. A couple of things that weren't quite stated correctly is it's mostly earthen materials going back in there. If you go over there right now, you can see where they had put it in there. It's all leveled off. When we got this letter dated August 1st that told us what the deficiencies were and why we were denied, it kind of changed everything because we're perfectly willing to do all of these things. We will submit a closure plan that shows exactly what the elevations are going to be with dirt and what sort of revegetation we're going to do to the approval of whoever we give it to. So a ground monitoring – water monitoring program, up-gradient, down-gradient – get some background water information. We're confident that there isn't anything in there that's going to have any impact on the groundwater. You're talking about earthen materials, concrete. The steel is imbedded in the concrete for the most part. There is trace amounts of asphalt that gets intimate with the concrete and you can't get it off, but it's not enough to do anything, in our opinion, and we would like to get a third party groundwater consultant, work with the City – someone they like, and we'll set up a monitoring program. But the fact of the matter is, we'll put it back just like it was before or better. And what we have there right now is a hole in the ground that's not good for anyone. There won't be any rebar sticking up. Everything will be back as it was if we're allowed to finish it.

I guess we're offering to come up with a closure plan that's acceptable to the staff, and a groundwater monitoring program acceptable to the staff, and finish the pit out.

Mr. McCarty – Do you have that prepared for us tonight to be able to see?

Unidentified – We do have a ground monitoring plan. Like he said, when we submitted this appeal, we did not have this letter in hand. So we're kind of catching up now.

Mr. Curtis – The whole timing of the thing – we're newbies a little bit, so we – the staff recommended – the Floodplain Permit Committee staff recommended approval. So we were set back when they didn't approve it. And then we get the letter – I mean, we had to file the appeal before we got the letter. The normal course of business is we would take the deficiencies, we would correct the deficiencies, go back to them and say, okay, now we've done everything, can we go now? But it didn't work that way. It had to go to this appeal process before.

Mr. McCarty – Has City staff reviewed this?

Mr. Curtis – No.

Mr. McCarty – So how can you assure us there's no exposed rebar?

Mr. Curtis – It'll be covered up. It will be leveled off.

Mr. McCarty – And you're going to monitor that with the monitoring plan that you're proposing?

Mr. Curtis – The groundwater monitoring will pick up any volatiles – like if there's asphalt in there, it will pick up. I don't know if rebar would even show up on groundwater monitoring. But anyway, the rebar is going to be buried.

Mr. Gransberg – Rebar is not a concern with your groundwater; it's the asphalt.

Mr. Curtis – Right. So the asphalt would be the only thing that might trigger some readings.

Mr. Gransberg – That and any other trash or oil or any kind of leakage or anything that might have gotten mixed in. That's the sort of thing to be concerned with.

Mr. Curtis – The thing is – you can see it from the bridge as you drive by. It's essentially earthen materials is what's going in there.

Mr. Gransberg – I don't have an issue with this right here as far as your ground monitoring. But I do think that – how long will it take you guys to prepare this plan is my question?

Mr. Curtis – Thirty days. My question would be who do we give the plan to?

Mr. McCarty – Well, that's kind of my question. If you're coming up with a plan that would be satisfactory to the Floodplain Permit Committee, I'm wondering why we're hearing this at this time, and this might just need to be sent back to be redone and resubmitted to the Floodplain Committee with all the proper documents and plan in place.

Mr. Curtis – With your permission, we will get with them, come up with an acceptable third party groundwater monitoring system – geotechnical firm. We'll set that system up. We will, ourselves, design a CAD model closure plan to exactly what it will look like, and get their approval on it.

Mr. Seamans – Staff had a comment?

Ms. Messner – I would say that, with the concurrence of the applicant, you all could certainly make a motion to send this back to the Floodplain Permit Committee with the recommendation that the committee review any additional information that you all might require them to review, and to look at the application another time and make a decision with that additional information.

Mr. Seamans – Does that sound fair to you?

Mr. Curtis – Perfect.

Mr. Gransberg – And, if I might add, maybe what we should also do – or maybe he can sit down and we can discuss here as well, if we have no other questions.

AUDIENCE PARTICIPATION:
None

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:
Mr. Gransberg – I think maybe what we should think about, as well as in the interim, because the construction operations are going to continue, that we require a continuous observation or a daily reporting. Because that's something ...

Mr. McCarty – Monitoring? It sounds like it's already filled back in.

Mr. Curtis – It's about three-fourths filled back in.

Mr. McCarty – So maybe we should stop any more fill until a new plan.

Mr. Curtis – It has been stopped. We stopped as soon as we were informed that we didn't have the correct permit.

Nils Gransberg moved that Sherwood Construction Company's request for a waiver be returned to the Floodplain Permit Committee, and that they be directed to prepare a groundwater monitoring program, a pit closure plan, and any other documentation or plans as required by the Floodplain Permit Committee to be reviewed by that committee. Curtis McCarty seconded the motion.

There being no further discussion, a vote was taken with the following result:

YEAS	Hank Ryan, Curtis McCarty, Nils Gransberg, Andrew Seamans
NAYS	None
ABSENT	None

Ms. Tromble announced that the motion, to return this item to the Floodplain Permit Committee with certain documentation prepared by the appellant, passed by a vote of 4-0.

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Item No. 9, being:
MISCELLANEOUS COMMENTS

None

* * *

Item No. 10, being:
ADJOURNMENT
There being no further business and no objection, the meeting adjourned at 7:31 p.m.

PASSED and ADOPTED this 28th day of September, 2016.

Secretary, Board of Adjustment