BOARD OF ADJUSTMENT MINUTES

DECEMBER 4, 2019

The Board of Adjustment of the City of Norman, Cleveland County, Oklahoma, met in Regular Session in Conference Rooms C and D of Building A of the Norman Municipal Complex, 201 West Gray, at 4:30 p.m., on Wednesday, December 4, 2019. Notice and agenda of said meeting were posted in the Municipal Building at the above address and at www.normanok.gov/content/board-agendas in excess of 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 4:34 p.m.

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Item No. 2, being:
ROLL CALL

MEMBERS PRESENT	Brad Worster Mike Thompson Curtis McCarty James Howard Andrew Seamans
MEMBERS ABSENT	None

A quorum was present.

STAFF PRESENT	Jane Hudson, Principal Planner Lora Hoggatt, Planner II Kelvin Winter, Code Compliance Supervisor Anais Starr, Planner II Roné Tromble, Recording Secretary Elisabeth Muckala, Asst. City Attorney Rick Knighton, Asst. City Attorney Jeanne Snider, Asst. City Attorney

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Item No. 3, being:
APPROVAL OF MINUTES OF THE OCTOBER 23, 2019 REGULAR MEETING
Brad Worster moved to approve the minutes of the October 23, 2019 Regular Meeting as presented. Curtis McCarty seconded the motion.

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

YEAS	Brad Worster, Curtis McCarty, Mike Thompson, James Howard, Andrew Seamans
NAYS	None
ABSENT	None

Ms. Tromble announced that the motion to approve the October 23, 2019 Board of Adjustment Regular Meeting Minutes as presented passed by a vote of 5-0.

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Item No. 4, being:
BOA-1920-6 – ALFRED AND PAMELA BRADFORD REQUEST A VARIANCE OF EIGHT FEET (8') TO THE TWENTY-FIVE FOOT (25') SIDE YARD SETBACK (EAST) TO ALLOW A STORM SHELTER THAT WAS BUILT SEVENTEEN FEET (17') FROM THE PROPERTY LINE FOR PROPERTY LOCATED AT 11010 ALAMEDA DRIVE.

ITEMS SUBMITTED FOR THE RECORD:
1. Staff Report
2. Location Map
3. Application with Attachments
4. Survey of Subject Property

PRESENTATION BY STAFF:
1. Ms. Hoggatt reviewed the staff report, a copy of which is filed with the minutes. Staff supports this variance request and recommends approval.

PRESENTATION BY THE APPLICANT:
1. Alfred Bradford, 11010 Alameda Drive – I'm a professor at OU, and my wife, Pam, is a fine artist at present doing mosaics. I've given you packets of just a short presentation. We own a parcel of land of about 13 acres. On page 1, it's an old survey done in 2004, but it shows our house, a not yet constructed library/garage, which is there now, my wife's smaller art workshop at C, and the studio that burned down and is more than 25' from the property line. Page 2 is a photograph of my wife's studio. It burned down two years ago on the day after Thanksgiving. It was completely destroyed. Some time has passed since then; we've been having some discussions with the insurance company to get the money they owe us. Page 3 shows what our plan was to replace the studio and to put the OZ Room storm shelter next to the studio so we could just step from the studio right into the storm shelter. Then pages 4 to 9 are a copy of the permit application that was submitted by the OZ Company to the City. The application required to be included a sketch of the proposed structure. The sketch on page 9 shows that the OZ Company proposed to construct the storm shelter 20' from the eastern property line. On page 10 is the enlargement showing that portion of the sketch. The inspectors appended a copy of an aerial photo, which I think is probably a Google map, with a number written on the roof of the burned studio. The number is 25, but at a glance it could be read as 20, and I think this is what led to all of the misunderstandings. The next page shows an enlargement of the approval stamp. And the next page, page 13, shows an enlargement of the number on the studio. The inspector didn't clarify what he meant by sending this map and he didn't get in touch with the OZ Company or with us, and the OZ Company didn't get in touch with us. I think if he had just denied the permit, then there would never have been a problem. We would have just figured out a different place to put the storm shelter.

But, since we applied for the original variance of 20', we had a survey done to make sure that we would be representing the distance correctly to you, and that's page 14. To our consternation, we discovered that the OZ Company had put the storm shelter within 17' of the property line. Page 15 is a photo of the OZ Room in place, installed facing east. As you can see, it's not a mobile structure. It is completely concealed from

the neighbors by the brush and trees, and we intend to leave the cover as it is. Once the OZ Room had been completed, we applied for a permit to replace the studio with a steel building on the exact footprint of the old studio, which had been destroyed by the fire. We were denied a permit on the basis of the OZ Room needed to be 25' from the property line. We were told we had to ask for a variance, so here we are. We're asking you for a variance. I do want to emphasize that the people in the City office whom we've dealt with personally have been friendly, sympathetic, and helpful. Thank you.

AUDIENCE PARTICIPATION:
None

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:

1. Mr. Worster – This new permit for the studio would be at the 25' setback line?
   Mr. Bradford – Absolutely.
   Mr. Worster – And that will still reach the door as you intended?
   Mr. Bradford – Yes.

Curtis McCarty moved to approve BOA-1920-6 as presented. Brad Worster seconded the motion.

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

YEAS	Brad Worster, Curtis McCarty, Mike Thompson, James Howard, Andrew Seamans
NAYS	None
ABSENT	None

Ms. Tromble announced that the motion, to approve the variance as presented, passed by a vote of 5-0.

Mr. Seamans noted the ten-day appeal period before the decision is final.

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Item No. 5, being:
BOA-1920-9 – KELLY THOMPSON REQUESTS A VARIANCE OF FIVE FEET (5') TO THE FIVE FOOT (5') SIDE YARD SETBACK TO ALLOW CONSTRUCTION OF A CARPORT FOR PROPERTY LOCATED AT 714 TIFFIN AVENUE.

ITEMS SUBMITTED FOR THE RECORD:

1. Staff Report
2. Location Map
3. Application with Attachments

PRESENTATION BY STAFF:

1. Ms. Hoggatt reviewed the staff report, a copy of which is filed with the minutes. Staff supports this variance request and recommends approval.

PRESENTATION BY THE APPLICANT:

1. Kelly Thompson, 714 Tiffin Avenue – I would like to build a carport. I recently bought a new car and would like to protect it from hail. My parents are getting tired of me parking it in the garage whenever it hails. It will be 26'4" back, so it will start at the edge of the house and go all the way back. It will sit right on the property line. It will be 8'3" wide. I found out there was a carport there until I bought the house. I bought it from a flipper and they tore down the carport because it was degrading. There are several of my neighbors with carports right on the property line. So I just ask for a variance.

2. Mr. Worster – Is it a steel carport, or is it wood?
Ms. Thompson – It will be steel. And it won't be attached to the house; it will sit right next to it.

3. Mr. McCarty – Do we have the distance from the carport to the next house?
Ms. Thompson – It's about 6'.
Mr. McCarty – And it is made of steel, so there's nothing combustible.
Ms. Thompson – Right. And it will be guttered so that the runoff will come back to my property. My neighbor to the north, Steven Taylor, has no problem with the structure. He used to live in the house when the carport was there.

4. Mr. Howard – Is the edge of your driveway on the property line, or do you have some measurable distance?
Ms. Thompson – There's about 6".
Mr. Howard – Okay. So you can get the column in there and the gutter and not disturb the drive. Okay. That's one thing I was concerned about, is the placement of the columns with the addition of gutter – would it actually extend over the property line? Be aware of that.
Ms. Thompson – I'll make sure – be extra aware.

5. Mr. Thompson – In these older neighborhoods, it's hard to get anything in without a variance.

AUDIENCE PARTICIPATION:
None

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:
Mike Thompson moved to approve BOA-1920-9 as submitted. Curtis McCarty seconded the motion.

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

YEAS	Brad Worster, Curtis McCarty, Mike Thompson, James Howard, Andrew Seamans
NAYS	None
ABSENT	None

Ms. Tromble announced that the motion, to approve the variance as submitted, passed by a vote of 5-0.

Mr. Seamans noted the ten-day appeal period before the decision is final.

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Item No. 6, being:
BOA-1920-10 – LIFTED SMOKE & VAPE REQUESTS A VARIANCE OF THIRTEEN INCHES (13") TO ALLOW A PORTION OF THEIR WALL-MOUNTED SIGN TO EXTEND ABOVE THE ROOFLINE FOR PROPERTY LOCATED AT 317 WHITE STREET.

ITEMS SUBMITTED FOR THE RECORD:
1. Staff Report
2. Location Map
3. Application with Attachments
4. Photos of the Sign
5. Approved Sign Permit

PRESENTATION BY STAFF:
1. Mr. Winter reviewed the staff report, a copy of which is filed with the minutes. Staff does not support the variance request.

PRESENTATION BY THE APPLICANT:
1. William Barker, 317 White Street, the applicant – We're with Lifted Smoke & Vape. First off, I want to thank you for letting me speak at today's meeting and allowing me to present our formal statement toward the matter of the request for a variance for the sign advertising the business of our shop. The staff has responded to our request with a variance is not approve recommendation. I respect the staff and their decision and I'd like to present some of my evidence that I have collected of other locations around the Campus Corner where their signs have been approved for a variance for the restriction that are above their lines. We're just a local company, just as the others are on Campus Corner, and we want to be there for the community and fit their needs. So we just want to request that this be granted so we can be treated equally, as others are. I actually submitted photos, I'd like to pass around, if you all would like to look at them, of other locations. First off, we have I Sushi here; some of the light fixtures a little bit above. There's an antenna that sticks way up above that roofline. The next one, I understand, is not a part of the building, but it is a strip club – Sugars. They have a sign that extends above the lines of the roofing. However, it is on a pole, but they are still advertising above rooflines. I just wanted to submit that as a photo. The next one is an old historical building; I understand it's part of the structure, but it's still some of their signs for advertising – sticks up above those rooflines. The next one is significant, also on Campus Corner – Diamond Dawgs. They have yellow fencelines – it's supposed to significantly describe like foul baseball lines as their advertisement for their business downtown as well. Here's some more photos of different angles of those yellow posts. The next one we have here – O'Connell's Bar and Grill – one of their entrances. Their sign is actually sticking above that roofline as well in their name. And here we have Volare, right next to our building, and it's a 5-story bar, but as you can tell from this picture, our sign does not throw anything off and it doesn't look like it's – it's not bothering anything. It's just simple design right there next to that. And here is an up-close photo of our sign showing that it's just barely 13" above the roofline there. So we just respectfully ask that this be approved. Anything that we need to mandate to get it on a vertical platform, keep it sturdy, we will

rectify those solutions and we respect your decisions.

2. Mr. McCarty – Do you not have 13" just to lower your sign down?
Mr. Barker – It would cover up the mural that we actually have sitting right there as well, if we lowered it down 13".

3. Mr. McCarty – I have a question for staff. So was this sign permitted originally?
Mr. Winter – It was. It was caught upon inspection and rejected because of the placement.
Mr. McCarty – I'm sure Fast Signs does a lot of signs. They should be familiar with the sign ordinance.
Mr. Winter – I would think so.

4. Mr. Howard – Looking at the O'Connell's sign, what's the difference between this sign and the one that's being presented in terms of ...
Mr. Thompson – That, I think, is the alley.
Mr. McCarty – I think it's the angle that it's taken.
Ms. Hudson – I'm not sure. I would say that we could look at it. It may be that it's installed incorrectly or that it is the angle that it's taken.

AUDIENCE PARTICIPATION:
None

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:
Brad Worster moved to approve BOA-1920-10 as presented. Curtis McCarty seconded the motion.

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

YEAS	James Howard, Andrew Seamans
NAYS	Brad Worster, Curtis McCarty, Mike Thompson
ABSENT	None

Ms. Tromble announced that the motion, to approve the variance as requested, failed by a vote of 2-3.

Mr. Worster – I might now add that it looks like you can move it down, and if you move it down, then there's no need for a variance. If I were you, I would call the sign company.

Mr. Seamans noted the ten-day appeal period before the decision is final.

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Item No. 7, being:
BOA-1920-13 – TBC HOLDINGS, L.L.C. REQUESTS A VARIANCE OF SIX FEET (6') TO THE THIRTY-FIVE FOOT (35') HEIGHT LIMIT (ALLOWING THREE (3) STORIES RATHER THAN TWO AND ONE-HALF (2-1/2) STORIES) FOR PROPERTY LOCATED NORTH OF DOVE CROSSING DRIVE BETWEEN STONEY BROOK DRIVE AND NORTH INTERSTATE DRIVE.

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

STAFF REPORT:
1. Ms. Hoggatt reviewed the staff report, a copy of which is filed with the minutes. Staff supports this variance request and recommends approval.

PRESENTATION BY THE APPLICANT:
1. Rick McKinney, 3600 West Main Street, representing the applicant – Good evening, and thank you for your time tonight. We have an important variance we're requesting, and it's important, I think, for our community and it's also important for our client, which is Nextep. I also have the Rieger Law Firm with me if there's any questions they might be able to answer as well.

My client is Nextep; they occupy the building on I-35 that's just off the access road on the west side. I'm sure you all know where that is. They have a contract to purchase the first two lots north of that that have been vacant for a long time, and there's a reason for that, and it has to do with – this is the tract. Nextep is the small building on the left. Legacy Park is across the street for reference, and then the subject tract – Tracts 1 and 2 – are within that red area. This is the zoning plan; the purple is a PUD that was granted to the current Nextep building. The pink area is all C-1, as well as the property on to the right. As you can see those dashed lines – the bottom dashed line along the red line is a natural gas main line. The pair of dashed lines right down the middle, going left to right, is a low-pressure crude oil line – a 12" line. It has been there for a long time, and there have been many attempts and efforts to develop this property. There have been PUD requests. I've worked on several of those, as Sean has as well. It's just a complicated site. They're conditions that were existing; they've been there since 1983 when the development around the top of the picture here was done. They just left that as not platted, but it is zoned C-1. What we're requesting this for is for office use, which is in full compliance with the 2025 Plan.

I have a few images here just so you can get your bearings. There's the height of the Nextep building. This is from the northeast. This is more from the north. The mowed area is the actual route of the low-pressure crude oil line. The natural gas line goes right just off of the telephone pole line that you see on the left side of the image. This is from the other direction. But I think what you'll see, and what I want you to take from this, is the complexity of this site – of trying to do a project on this site, which is a commercial site for office use as we're requesting.

What we're proposing is to allow our client to construct the office buildings to the

north from their current building. Their vision is to create their national corporate headquarters here in Norman. They were originally based in Norman. Now they've booked business in every state of the country, as well as Canada and the Caribbean, and they want to stay right here in Norman – a logical, obvious place for them to build their office campus. But, in order to do that, we're requesting to construct the buildings – the 3 lighter colored buildings are proposed – 2, maybe 3 is what he is considering. That whole pink and green shape there indicates Tract 1 as labeled above on the left and above on the right. But all of those buildings – these two easements kind of converge as they head to the north and it narrows. So the restrictions we have and the complexities of the site are compounded. We have parking. We have drainage. We're sensitive to all of that. But the building area is really pinched and we're respectful of the neighborhood to the west. So our request is to allow the three – that strip between the two easements – instead of being a two and one-half story, 35' height as allowed by ordinance for C-1, all we're requesting is to allow to raise those three building heights 6' to 41', and that matches what was built on the original Nextep building. We're not requesting any increase in the parking areas to the west toward the residences. This would be restricted only to that furthest east zone that is buildable. This is the current building. The top of the building right there is right at 40+ feet, and our building would match that. We're not going any higher. The mechanical screen above that, as you can barely see it, conceals all the mechanical units from as far as you can go on I-35. We would take that same basic profile, but do a different veneer that's compatible with that building design.

This is the interstate view – you see the houses in the background. This is just a ghosted image that would show those three buildings if that's what he did at approximately the same height. Those actually, I think, are drawn a little bit taller than what Nextep is right now, but they would be no higher than what is built today.

As you're aware, there are four criteria that are needed to be met for any variances brought before you. I could read through these, but the basic criteria is are there special conditions or circumstances; I think I've demonstrated that by those existing easements that have been there for 30 years or probably 50 years. The interpretation of the ordinance would deprive the applicant of rights enjoyed by others in the same district – the literal interpretation. So what was allowed for the Nextep building, that was the Dillard Building – now, they applied for a PUD and their site is on a much more constrained site, so they went in for a PUD because they asked for several modifications, including the height. You can see the area that's available to the current Nextep building is tighter, more constrained. If we did our buildings, they would be as little as about 240' from the residences up to 320' on the far north side. That would be the nearest elevation of the buildings to those homes. But our request is not to change the zoning. We don't feel we need to do that. We're just asking for a variance in the current height restriction. All other C-1 zoning criteria would be maintained. We also felt that if we came in for a PUD, that allows for flexibility and a lot of variances within that designation, and I just don't think the neighborhood needed to concern themselves with what's this developer going to do now? C-1 is what it has been; C-1 is what it will stay. We're just asking for 6 more feet to match the building that's there today.

In conclusion, special conditions or circumstances did not result from the actions

of the applicant. We didn't cause this; this was there. It's been there for a long time. And the granting of the variance will not confer special privileges on us that are denied to other land structures in the same district. We're just asking for the same height that was granted for the precedent that was set with the Nextep building. With that, I'll entertain any questions you may have.

2. Mr. McCarty – What would be their idea of screening the residential neighborhood? The Nextep building has a wood fence across the back. What would they plan to do?

Mr. McKinney – Thank you for bringing that up. I meant to say we would do a minimum 6' – 8' possibly – along that north line as close as we could put it toward their homes, and that would be a sound and a sight break for them. But we would separate residential from the commercial use.

Mr. McCarty – Would it be wood or masonry?

Mr. McKinney – It would probably be a combination of both, just to aesthetically break it up, instead of a continuous masonry wall all the way down.

Mr. McCarty – What is the rough distance from the back building to the closest residential house?

Mr. McKinney – About 255', I think. 240. Like I said, on the north end it's 315-325 – something like that. 300.

3. Mr. McKinney – We've also talked about driveways and the spacing that's required. We meet that. Also, the parking is one concern. General office parking is one per 300 gross square feet. We exceed that. We would like to get as much parking as is really needed, not what is required by code, which would be in excess of what is required by code. We have room on the site to get additional parking.

Detention – I am fully aware of Brookhaven Creek and the drainage issues along that creek as it goes through my back yard, so I feel the pain. All of our detention would be on-site, either on grade or under the parking lot – sub-grade detention, and it would be released into Brookhaven Creek at a timed release to not increase the runoff they have today.

4. Mr. Worster – I think I just found it. I was looking for the legal description. Is this already platted – final platted – all public improvements in place?

Mr. McKinney – Part of it is. There's a section. This tract is not. Tract 2 and Tract 3 are. That is platted. In fact, if I go to that – this is platted, but it's expired. Originally, they brought in some utility lines here and some fire lines there. But that plat is – that was done back in like the late 90s.

Mr. Worster – So you're going to have to engineer it all, go through Pre-Development, Planning Commission, City Council – the whole routine to get it platted.

Mr. McKinney – Jane, wasn't there some discussion about the platting – what we would be required to do?

Ms. Hudson – I'm going to let Mr. Rieger – where did we leave that with Ken? Do you know?

Sean Rieger – I can kind of answer your questions. So, yes, we will have to go

back through the preliminary platting process as Mr. Danner has informed us. In case your question -- are they the same, I guess you could say the process is the same, but the determination at City Council is much different when it comes to zoning versus platting. I don't know if Beth would want to comment on it or not. But platting is more of a ministerial function, in that the uses aren't changed. So it's a lesser standard for the Council to pass it as opposed to a zoning, which is a higher standard because you're changing the uses. We're not proposing any changes of uses at all.

Mr. Worster – I'll just cut to it. That's kind of my question. If we allow a higher building, it could still have a rooftop restaurant on it if it stays C-1 – on the third floor.

Mr. Rieger – That's an interesting question I've not really thought about. The current C-1 says a height limitation is 2 and ½ stories or 35 feet. So one clarification there – you can do 3 stories, it's just the height doesn't really work at 35' anymore for modern architecture and what they want to do to match. I don't know if the legal standard would say you could have a use on top of that.

Mr. Worster – Even if it was the 3rd floor that was a restaurant and a retail 2nd floor. We're not talking use change. We're talking a building permit.

Mr. Rieger – Well, now, keep in mind, too, though – let's just contemplate – first, there is no plans to do a rooftop restaurant. Let's just play that out. If you were to do that, one, you'd be under the commercial lighting ordinance of the City of Norman. You could not spill over the lighting, no glare – none of that. Two, also you would be under noise ordinances, which I don't think you can have outside entertainment or anything like that, as we went through with some other unique zoning applications previously. So I don't think you could have noise issues, because you can't, and I don't think you would have a lighting issue, either. One of the things – Rick did a great job. One of the things that came up was, when you have that linear line of buildings, we actually think there's a pretty good positive from noise blockage into that neighborhood behind. If you've ever looked at highway traffic noises – when you study the acoustics, I remember from architecture school, the closer and the taller of a wall you have to the noise source, the better of a noise block you have. So actually one of the great advantages here, I think, that you wouldn't have under the normal zoning ordinances would be a significant noise break from I-35 back into the neighborhood.

5. Mr. Worster – At this point, I think a three story office building, where we are in this discussion, is appropriate. It looks nice and it would fit with what is there. I just don't know about the use piece, because we're not addressing use at all. I did note that, in the Dillard Group PUD, it states used as professional office. So we're talking – and I guess once the building is built it probably doesn't have an easy conversion to some other use, specifically for a restaurant. I'm trying to think of other uses that might change the dynamic of a three-story building compared to what is proposed.

Mr. Rieger – A couple points on that: one, this is C-1, not C-2, and, in fact, there was an applicant that attempted to make C-2 zoning there and it failed, so there's, I don't think, any effort or any desire to go to the more intensive use. I would just remind the Board that C-1 actually says that it is compatible for adjacent residential – let me just read that to you. This commercial district is intended for the conduct of retail trade and personal services, etc., but it says for the convenience of the people of adjacent

residential areas, so it's intended to be next to and it says these shops and stores may be an integral part of the neighborhood closely associated with residential, and goes on to talk about all of these issues. So, if you were to suggest that there's going to be one of these uses at the very top, this category already contemplates that these uses are compatible with the residential adjacent. So I don't think it takes us to a higher intensity of use or any change of use that should be a problematic area for the neighborhood.

Mr. Worster – Is there any way that we can specify a use? Maybe this is a staff question. Because, again, I don't see any issue with an office building.

Ms. Muckala – No, what has been sought is a variance of just very specifically the height limitation. They are already zoned C-1 and nothing that can be done based on the request that's made today will change their zoning for a more intense or less intense use. If they were to seek a rezoning, that would be the place where uses could be changed, but that's not this variance application. It is a separate process that allows them to zero in on the one minimum necessary request they need to make. So that's really the standard you're looking at.

6. Mr. Worster – I have no problem with a three-story building that's an office. I think three-story mall probably doesn't fit there; maybe a two and one-half story mall would be better.

AUDIENCE PARTICIPATION:

1. Mitch Baroff, 421 Park Drive – My question is, we're allowing 42' in a zoning category that's 35', and that means that instead of a two-story building you can build a three-story building.

Mr. Rieger – Well, I want to clarify. The zoning ordinance does not limit it two-story and I'll read. It says two and one-half stories or 35' in height. There is no limitation on stories.

Mr. Baroff – What does two and one-half stories mean?

Mr. Rieger – That's a good question. I'm sure Jane has answered that before. Right? Have you ever answered that before? But specifically it says shall not exceed two and one-half stories or thirty-five feet in height. So there is not an absolute mandate on the number of stories.

Mr. Howard – I can answer that question. Usually alludes to a mechanical mezzanine, so you could have one floor, mechanical space, and another floor on top of that. That would make your two and one-half stories.

Mr. Baroff – So if you allow this height and you can do three full stories, does that intensity of use break the code for that particular piece of property? Or that doesn't really apply in this case? I know this is Board of Adjustment for height and you're not really into the intensity of use, but it sounds like to me you can go from two to three stories and that means you're going to have 50% more floor area to deal with, which I guess you'll figure out.

Mr. McKinney – Yes, it still has to meet the parking.

Mr. Baroff – I'm just curious.

Mr. Rieger – I guess I'm being repetitive, but again, you can do multiple stories. It does not limit it to two. So we're not getting a 50% approval in area. I would also make

sure you're aware that – if you just look at the zoning category itself, irrespective of all the easements, it contemplates that that entire area of site could be improved with structures, parking, etc. Such a severe reduction in site availability because of those easements, then I think you're well below what the category of C-1 even contemplates.

Mr. Howard – You brought up an excellent point there. I just want to make sure that we're all clear here. So, in this particular situation, you could potentially, if we're not going in the direction we're going here, build another building on the other side of that easement to that two and one-half stories, which you're not doing. You're proposing the buildings being built furthest away from the neighborhood, reducing the visual impact and any sun blocking issues, things like that, on that neighborhood.

Mr. Baroff – I think the siting of the buildings is great for the site, and it makes sense to put the parking over on the residential side. I was just thinking of intensity of use and it's 50% more from two to three stories. That's the only question I had.

Mr. Howard – That's a fair question. I can see where you're coming from.

Ms. Hudson – In my mind, it doesn't increase the intensity of use. They can still develop this area for C-1 uses. We're not changing any of the uses that are going to be allowed on this property.

Mr. Baroff – I understand that. It's square foot.

Ms. Hudson – So, as James said, they could do two and one-half stories or 35 feet all along the east side, but then they could also jump across and build on the west side there and actually probably get more square footage than they would if this was approved.

Mr. Baroff – Right. And it's a juggling act. Where does the parking end up being?

Mr. Howard – I understand where you're coming from. It looks like you could get more area that's more volume of people, but in this scenario it's being constrained.

Mr. McKinney – It's totally constrained by the – you've got to be able to park your vehicles. The intensity – you're going to have the same number of people whether you go up or whether you go out. If you go out, then you can't have as many cars. What's really important to our client is he really – he's been in Norman a long time. He wants to see a design of his buildings and have a corporate campus right on I-35. I think it would be an incredible front – a lot better than car dealerships or other things like that. It would be a great presence on the highway. I'll piggy-back on what James said, also, on the two and one-half stories – what we've done with the City before is – what we've been advised of is you go two and one-half stories and you have a pitched roof, they measure to the mid-point of the roof. So if I had a 12 and 12 roof on top of that building, I could go up like this and the top of the peak might be at 50 feet. The middle of the building is at 35, then I'm good. So this is actually maybe even bringing that maximum height down, if you can take that into consideration.

2. Mr. Worster – And you're only requesting the height variance for the strip in the middle, essentially, between the easements. Presumably you wouldn't be able to add any more buildings due to the parking requirements or anything else.

Mr. McKinney – If we build those buildings as shown on this plan, we're going to need every bit of space to park on the other side. The oil company has a lot of restrictions over their line. If you're going to drive on it, if you're going to park on it,

you've got to do some special things to protect that line. So it's not a cheap endeavor, but we can park on it. You can't plant a tree over it; they don't want roots going down into the line. So it does impact a lot of things. So that means our landscaping would have to shift into the areas where we can plant and meet that ordinance. Anything else I can help with?

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:

1. Mr. Howard – The only comment I have is I like the fact that you've placed most of that traffic toward Interstate Drive with the decell lanes, which would make that safer. Of course, we're not discussing that today – we're just discussing height.

Ms. Muckala – I just want to add a little technical note. There's been some discussion of the applicability of this request to parts of the tract to the east side only, I think. That's not in the actual motion language. If you want to determine that that's the minimum necessary and restrict it, you'll need to state it.

Mr. McKinney – Our application spelled that out clearly. But if you want to put it in your motion, we'd expect that. I think we said that the 41' allowance would only be allowed in the east half of both tracts.

Curtis McCarty moved to approve BOA-1920-13 as submitted. James Howard seconded the motion.

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

YEAS	Brad Worster, Curtis McCarty, Mike Thompson, James Howard, Andrew Seamans
NAYS	None
ABSENT	None

Ms. Tromble announced that the motion, to approve the variance as submitted, passed by a vote of 5-0.

Mr. Seamans noted the ten-day appeal period before the decision is final.

* * *

Item No. 8a, being:
BOA-1920-7 – KEVIN EASLEY REQUESTS A VARIANCE FROM SECTION 429.3(7), THE HD, HISTORIC DISTRICT, CERTIFICATES OF APPROPRIATENESS SECTION OF CHAPTER 22 (ZONING ORDINANCE) FOR PROPERTY LOCATED AT 549 S. LAHOMA AVENUE.

ITEMS SUBMITTED FOR THE RECORD:
1. Staff Report
2. City of Norman's Hearing Brief with Exhibits
3. Application for Variance with Attachments

and
Item No. 8b, being:
BOA-1920-8 – KEVIN EASLEY HAS FILED AN APPEAL OF THE DECISION OF AN ADMINISTRATIVE OFFICIAL ON THE GROUNDS THAT STAFF'S APPLICATION OF THE GUIDELINES WAS ARBITRARY AND CAPRICIOUS WITH REGARD TO PROPERTY LOCATED AT 549 S. LAHOMA AVENUE.

ITEMS SUBMITTED FOR THE RECORD:
1. Application for Appeal of Administrative Decision with Attachments

Mr. McCarty – I have property in the notification area. It will not affect how I vote today. I just wanted to let everybody know.

PRESENTATION BY THE APPLICANT:
1. Fred Buxton – I'm an attorney for Mr. Easley. The first thing I'd like to do is give you all the proof of publication, which was mailed to me. I'm not sure if you have that in your records.

Ms. Tromble – Yes, we got it as well.

Mr. Buxton – This is a saga that's now gone on since 2011. Someone said earlier Mr. Knighton and I, both, didn't have gray hair when we started, and we're still here fighting. My client, Mr. Easley, bought a house at 549 South Lahoma – beautiful corner of Boyd and Lahoma. You guys have all been by that house many times, I'm sure. He didn't know it was in an historic district and he replaced some windows. And then the Historic District Association showed up at the house and told him he needed to file for a CofA, and they wouldn't hold the fact he already replaced the windows against him. So we applied, and it was denied because we'd already replaced the windows. So that was the start of a road that we ended up in District Court. We had a full trial. The District Court found that the City staff had acted in an arbitrary and capricious fashion. They also found that the ordinance itself is unconstitutional. We went up to the Court of Appeals, with no thought anywhere along the line we would ever be in front of the Board of Adjustment, because the Historic District has an appeal path for us. But the Court of Appeals found that we needed to be – we should have come here along the way. So now we're here. And the Court of Appeals also found that the Board of Adjustment has the ability to decide whether or not City officials acted in an arbitrary and capricious fashion along the way, and so you all should decide that first, before the

District Court decided. So I brought two different matters here. I brought the appeal of what the City officials had done before, along with a pure application for a variance from the Historic District ordinance.

There's three windows at issue at this point after this long saga. Two of them are – the house faces onto Lahoma, but you have a whole Boyd side of the house. The north side of the house is completely invisible from the street. I have some pictures if you all want to look at them, but you can't see it from the street. There were two windows that were replaced on that side. The paperwork submitted to you by the City says those were wooden windows; they were not. They were both aluminum junk that had been installed along the way along the years. Those two windows were replaced. There is a lower standard to be applied at the Historic District ordinance on parts of the structure that are not visible from the street, or on back elevations. Windows 4 and 5 are not visible from the street. They were originally aluminum garbage, for want of a better term. They've now been replaced by better windows and have been trimmed in appropriately. We'd ask for at least a variance on those two windows.

There is a window on the Boyd side that was a double hung, over and under window that was replaced with a picture window. Now that window is behind a 6' fence. I've got a picture. You can see the top of it from the street – you can. I'm not going to sit here and deny that. It's hard for me, even though it's behind a fence, it is partially visible from the street. The new – Mr. Knighton's arguments here today in his paperwork he submitted – if it's not visible from the street, let's apply the lower standard, and to not apply the lower standard, and to apply the strict standard because the Historical Preservation District was mad at my client for not asking permission first, and he should have. He didn't know it was an historic district. He did what he did. Now we're here 8 years later. And we would ask at least the two windows on the north side, which are windows 4 and 5, that the reduced standards be applied to those two windows. Now the window on the front side, I'd ask the same thing here that my argument is really weak and I'm the first one to admit that.

Does anybody have any questions?

2. Mr. Howard – Just to make sure, the application is for all three to be approved?

Mr. Buxton – For all three to be approved, yes. I've got pictures that show you can't see -- the two on the north side are behind a 6' fence with a hedge. You can't see 'em. The one on the Boyd side, you can see the top of it. I've got a picture here that shows you can see the top of it. It was originally a one over one window that, per the ordinance, should have been replaced with a one over one window. The two on the back side were aluminum; they've been replaced over the years. There's no requirement in the Historic District Guidelines to replace aluminum windows. We all know what aluminum windows on normal houses look like – that those be replaced with historic windows.

3. Mr. McCarty – I have a question. Was that wooden fence along Boyd – is that original when he bought it?

Mr. Buxton – That fence was there when he bought it. Yes. The fence is not – I mean, he's done some maintenance on it. He bought the house in 11. He's got two

boys who've gone to law school at that house, and one of them is still living there now. One of them is still in law school.

Mr. McCarty – So all the fencing on that property is original when he bought it?

Mr. Buxton – Yes. And, quite frankly, the guy that sold him the house said if it's behind a fence, you can do what you want, so he did what he wanted.

Mr. McCarty – And your client had no idea when he bought the house that that was a historic district?

Mr. Buxton – Even though there's a sign in the front yard, he did not know. He did not know. But the Court of Appeals found ignorance of the law is no excuse, and I'm not here to say it's an excuse. I'm just stating a fact. If he had known that, we wouldn't be here today.

STAFF PRESENTATION:

1. Rick Knighton – I'm going to try to provide a little bit of clarity with regard to how we got here. This house is at 549 South Lahoma. If you will notice – and I know that you guys have a copy of the Preservation Guidelines. If you look at the Preservation Guidelines, to the extent that this house is a contributing entity with regard to that particular historic district – this is a picture of that house, right on the front of our Historic Preservation Guidelines. So it is a contributing structure with regard to that Chautauqua Historic District. The issue that we have here initially involved six windows, and you see they're numbered on there – 1, 2, 3, 4, 5 and 6. 2, 3 and 6 are actually on the rear of the house, and the rear of the house is an addition – it was not original. It's an addition. So windows 2, 3 and 6 were actually approved by administrative bypass because, again, they weren't historic – they were a later addition, so those were approved by administrative bypass.

Of particular significance is number 6. Number 6 is actually a window on the second floor of that structure. The issue with that window is it's too small. The way it was constructed, it's a matter of egress from the building should the second story catch on fire and there's no way to egress with the size of the window, the footprint of the window is too small. So that was also approved by administrative bypass with regard to the issue of safety. I know the issue of safety was talked about in the information presented by the applicant with regard to that particular issue, but the safety issue was that window. That was approved by administrative bypass to allow that footprint to be increased because of the safety issue.

So 2, 3 and 6 were approved by administrative bypass, so the only issue we have today are 1, 4 and 5.

Alright. Window number 1, which is the window that faces Boyd Street – the litigation in this case, and nobody disputed, that that was a pair of one over one wood windows originally. Window number 4, which is on the north side of the house – the northeast side – that was a pair of one over one wood windows. And then window number 5 was a single pane wood window. We've litigated this issue. Nobody disputed that those windows were originally wood and that designation. They've been replaced, but one of the issues that the plaintiff has had in this case, or that the applicant has had, is that when the Historic District Commission issued its findings, it articulated as one of the reasons to deny is that he did not first get a certificate of approval initially. The City's

argument with regard to this issue is, let's assume that these windows were never replaced, that he was coming initially because he talked about the issue of the windows having some rot, the windows having – some of them were inoperable. If he were coming in for a certificate of appropriateness with regard to these windows, the Preservation Guidelines require one of two things. One is to replace like with like. If those windows were replaced like with like, they could have been done by an administrative bypass and he would not have needed to go before the Historic District Commission. If he were going before the Historic District Commission to get CoA, one of the requirements is, if it's a wood window, you have to retain the wood; you have to retain the historic glass.

So the question for us here is, in terms of a variance, if we assume that the windows were never replaced, why would you need a variance? What is peculiar to that property that it would have created a hardship for those windows to either be replaced like with like, or in accordance with the CoA provisions in Section 3.5 of the Historic Preservation Guidelines? And the answer is, there isn't. The house isn't peculiar. There's nothing different about that structure with regard to windows than any of the other windows in the Historic District – in that Chautauqua Historic District. There's no hardship with regard to changing the windows or replacing the windows, either like with like or by a CoA in accordance with Section 3.5.

But the other thing that we talked about, and this is page number 5 of your presentation, is that there's this issue about visibility being an issue. And that issue was talked about at trial, and one of the things that our former Historic Preservation Officer talked about was visibility is a factor, but it's not dispositive. Just because something may or may not be visible doesn't necessarily mean that you would be entitled to some sort of a relaxed standard. We've talked about relaxed standards. There's absolutely no doubt whatsoever in the Historic District ordinance revision in 2009 the Council did say rear elevations can be regulated to a lower standard. But the windows that we're talking about here are not on a rear elevation; they're on a side elevation. If you look throughout the applicant's information, one of the things he talked about was side elevations are to be regulated at a lower standard, but there isn't anything, either in the Historic District ordinance or Preservation Guidelines, that talk about side elevations being regulated to a lower standard. The testimony at trial from Ms. Atkinson was side elevations and front elevations are pretty much treated the same. They tried to compare rear elevations to side elevations, but her testimony is that there's no difference between how you regulate those two. She also talked about the issue of rear elevations in terms of modern lifestyles. What she specifically talked about was decks, service doors, sliding glass doors, and service entrance. So the specifics, even if we're talking about a rear elevation – the provision that allows some discretion with regard to modern amenities really apply only to the rear and they apply to decks, things like sliding glass doors, things like service entrance that may not have necessarily been historical. But on the issue of visibility there's absolutely no doubt whatsoever. This is the window number 1, and this is a photograph taken on the other side of Boyd Street – it's clearly visible from the street. This is a photograph of windows number 4 and 5. The difficulty is you can see – 5 is right here; 4 is right here. One of them is an atrium window; one of them, again, is the other window. Those are visible from the street. Now the difficulty is – and I've seen

the pictures that plaintiff presented at trial. In the summertime when there is leaves on these trees, that's more difficult to see. In the wintertime, it's not – if you know what to look for, so to speak, those windows are clearly visible from the sidewalk. But, again, visibility is just one of the factors to be considered and it's not dispositive with regard to historic structures.

We submitted hearing brief that talks a little bit about our understanding of what the law is in the area with regard to variances, and of course the City's position is Mr. Easley is not entitled to a variance, and the issues that he raises with regard to his appeal do not require him – or do not entitle him to an exemption. And, of course, the variance defined in the ordinance – the specific things that we talked about a little bit earlier is one of the requirements is owing to the conditions peculiar to the property. Again, if we assume that nothing was ever replaced, there isn't anything peculiar about that structure that would justify a variance. There's also a requirement that it be not the result of the applicant. Again, if the windows had – if we're assuming that they had never been changed and that's the way Plaintiff – or that's the way Mr. Easley wants us to proceed, there isn't anything I know of that is result of the applicant that would preclude him from replacing those windows like with like or in accordance with the CoA provisions in Section 3.5 of the Historic handbook. Again, and if the issue is the money that it would take to redo the windows now that they've already been replaced, then that's an issue that was caused by the applicant, again. In that case, *Matter of Schrader*, which is a 1983 Oklahoma Supreme Court case – in that case, a lady built some sort of shed or garage or some sort of building and she built it over the setback line. She says I didn't know there was a setback line. Of course, the city came in and said you've got to take it out because it violates our provision for the setback. She litigated it. The Court said the only hardship is the money that you spent constructing the garage and the money that you would have to spend taking it down, and that's your fault; that is not a hardship that justifies a variance. And this case is similar to that, again. If the hardship is – and I haven't heard one. I know what Mr. Easley testified about at trial; he testified about uncertainty, he testified about the bubbles in the glass – and, again, that's a historic feature – it had to do with the point in time when that glass was manufactured that was one of the features of glass at that time was it would have bubbles in it because of the manufacturing process. But he has not talked about a hardship that justifies any kind of variance. Again, literal enforcement would result in unnecessary hardship as hereinafter defined, and, of course, our ordinance defines what a hardship is. And, again, the red portions are – those are Mr. Easley's testimony at trial with regard to what it is he believes is a hardship. Money spent replacing windows – again, that's his fault. Uncertainty – I guess the uncertainty had to do with how was this going to be resolved, but, again, the City didn't file the litigation, he did, so if there's any uncertainty with regard to that particular issue, at that point it was not a result – that was a result of something that he controlled. He talked about going to jail because Susan Atkinson sent him a letter saying I'm giving you 90 days to replace the windows, get a CoA. He thought that she was threatening him with jail time. If you look at our ordinance with regard to alleged violations of the Historic District ordinance, the maximum fine is $750. There is no jail time. He talked again about the bubbles in the glass, and of course that was part of the manufacturing process prior to the invention of float glass, and that's all information that

was in his testimony when we had the trial back of June of 2016. Again, one of the other requirements is variances are supposed to be the minimum necessary to, again, comply with the spirit of the ordinance and also give that particular property owner a little bit of relief. We have no idea whatsoever what the minimum in this case would be, because he's not asking – for example, we talked about with the Historic Preservation Officer what if somebody – what if it was historic glass and somebody threw a baseball through your window? Obviously, you're not going to be able to replace it with original glass. Could you go down and get a single pane of glass that we would say was appropriate for that particular repair? And the answer is yes, we would. You can get modern glass; you don't have to go back and get glass that was manufactured prior to 1950. But the issue here is we're not asking for some minimum necessary to come into compliance with the ordinance; what we're asking for is an exemption. I want to be wholly exempt from any provision in the Historic District ordinance and Preservation Guidelines with regard to these windows because I've already replaced them. They are vinyl-clad windows with double-pane gas-filled windows. They're modern. They don't have anything to do historically with regard to that particular location. So, under those circumstances, again, what's the minimum? There's no way to determine what the minimum is because it seems as if alls we're asking is I did it – I didn't know about it – or I claim I didn't know about it and I want it to be left the way it is, and that, in no way, complies with either the letter or the spirit of the Historic District ordinance.

One of the things that we talked about – I don't know if you read in your packet – both us, the City, and the applicant submitted a copy of the Court of Civil Appeals order with regard to notice. The Court of Appeals order, and one of the arguments that Mr. Easley made, both at the District Court and on appeal, was that he didn't have notice of the Historic District designation for that residence. Well, there was some significant, or important, testimony at trial with regard to that. The first is, Mr. Easley saw this house on Friday; he bought it on Saturday and he immediately began repairing it. His father-in-law is a contractor out of Tulsa – immediately began repairing it without, one, checking to see if there were any requirements with regard to those replacements. So he talked a little bit – and part of their argument was they were complaining about the fact that the City didn't file anything with the County Clerk putting people on notice that was a Historic District. Well, here's what the Court said with regard to notice: The City presented evidence that there is a sign post near Mr. Easley's home that reads Chautauqua Historic District. Evidence was also admitted that the seller of the home disclosed to Mr. Easley that it was located within a historic preservation district, and the testimony on that case from Mr. Suter was he showed him a copy of the Preservation Guidelines and left them in a drawer – showed Mr. Easley I'm going to leave these in the drawer so you'll know where they are in case you need to consult them. And the Court said: In addition to the compelling evidence of Mr. Easley's actual notice. So the Court of Civil Appeals found that, in this case, there is compelling evidence that he actually had actual notice. The other information presented on notice was the contract for the sale of that home which, in the wrong designation, but there was hand-written in in a historic district. So the seller not only told him verbally, he also noted it on the contract for sale, there's a sign in the yard, and the Court said that evidence was compelling of actual notice. But it went on to say every person is presumed to know the law and may

not unduly benefit by claiming ignorance of it. Evidence that was presented in this case on the constructive issue had to do with the fact that, when the Historic District ordinance was enacted, it was enacted at a public meeting with appropriate notice, like all the other City's ordinances, and under the law when ordinances enacted in that manner, a person is considered to have constructive notice of it. So you can't come in and say I didn't have actual notice. Well, in this case, the Court said we think there's compelling evidence that you did, but even if you didn't, there was constructive notice of those particular provisions in the ordinance, so Mr. Easley cannot now come in, after we've been up and down through the appellate process, and say I didn't know about it. The Court said he did, and we're stuck with that.

But the issue with regard to – we talked about the minimum. So the City's position is, one, not only did he have notice, but, number two, it goes back to what justifies a variance. There's nothing peculiar, there's no hardship, any hardship that could be talked about is a result of Mr. Easley's action, and not something that he apparently did not know about.

He also has filed an appeal, in addition to requesting a variance. He talks about the City's actions being arbitrary and capricious. We talked about that in our materials. Again, from a legal perspective, the remedy for an arbitrary and capricious governmental action is an appeal, which is what this is. And, again, if this body thought – this committee thought that there was some sort of arbitrary or capricious decision, you would have the ability to remedy that. But, again, the arbitrary and capricious issues that we talked about are things like, well, the Historic Preservation Officer and the Historic District Commission or Council didn't consider landscaping. Well, the testimony at trial with regard to landscaping is it's temporary, it's not permanent, and it comes and goes. If you allow someone a variance because they can say I want to do the windows the way I want to do them and I'll just put a tree in front of it, we might as well get rid of the Historic District ordinance altogether, because everybody can do that. Anybody that wants to make some change to their structure that's not consistent with the ordinance or the Guidelines can always cover it up with something. Again, it does not sound like that's the direction Council wanted to go when it enacted the ordinance and approved those Guidelines. So landscaping really is not an issue that resolves this problem.

Again, we talked about the issue about a lower standard. The Historic District ordinance talks about rear elevations; it does not talk about side elevations, and there's nothing in the Preservation Guidelines that talk about that, also.

Mr. Easley made a substantive due process argument. The legality of that is for substantive due process purposes under the federal Constitution, the action of the government must shock the conscience. There is absolutely nothing about this case that shocks the conscience.

Again, the Appellate Court said he had notice. He chose not to check into, consult with City staff with regard to those circumstances. He chose not to follow up on the information that Mr. Suter provided him. Nothing about the City saying this is an Historic District, your house is in the Historic District, and you must comply with the ordinance with regard to windows – nothing about that shocks the conscience.

Talked about an equal protection argument, but there's no evidence to show that Mr. Easley had been singled out for different treatment.

2. Mr. Howard – That was my question. So from the records kept by the Historic District, no one has been given any kind of leeway similar to this at all?

Mr. Knighton – The instances that I'm aware of, we have given people time. I'm aware of one house in the Historic District – or my understanding is it was somewhere in the neighborhood of 10 to 12 windows that were replaced without a CoA, and that resident came in and said, look, I'll go back to old wood windows, but I can't do them all at the same time. So there was a little bit of leeway giving that person I think – I think they had to replace three per year. So you had to go back and comply with the ordinance; it was just – that was done at the staff level, was to give them time to complete that without imposing that burden upon them that you have to do it all now or we're going to do something mean to you. So there have been some occasions when that will occur. I do not know of any occasions when someone has replaced wood windows with vinyl-clad windows in the manner that was done at 549 S. Chautauqua.

3. Mr. Thompson – For general purposes, if you're buying a house in a Historic District, who is supposed to tell that you're doing this and there are rules? Is that up to you to know? Should your real estate agent tell you? Closing agent?

Mr. Knighton – On the contracts for sale that I've seen – and I don't have the one in this case – but on the real estate contract for sale, in this particular case, there is a box that says Historic District that you can check. Now, Mr. Suter didn't check that box, he put it in another section, but he hand-wrote in this is a Historic District. So, on some level, it probably is somewhat on the seller. One of the things that we talked about in this case, and we talked about the issue of, well, why don't you just go down to the County Clerk's Office and file something with the County Clerk for all those structures in that Historic District to say this is in a Historic District? The problem with that is, when we litigated this case, we cited a case – it's an Oklahoma Supreme Court case from 1960 called *Board of County Commissioners of Choctaw v. Schuessler*, that says: Unless a statute authorizes you to file something with the County Clerk, it doesn't give you constructive notice. In this particular case, the County bought some land at a sheriff's sale and it went to sell that land to a third party. Then it sold the land to a third party, the County Commissioners enacted a resolution that said we are reserving 25% of the mineral interests from this property that we're selling, then they filed that with the County Clerk. And one of the arguments when this case was litigated was, well, the plaintiff had constructive notice of the fact that we reserved that mineral interest because we filed this resolution with the County Clerk. And the Court said you were not authorized – there's no statute that authorized you to file such a document with the County Clerk, and in absence of a statute your filing it with the County Clerk does not give you constructive notice. It does not give anyone constructive notice. And, of course, the difficulty here that we talked about was, one, even if we had submitted it – even if we had filed a resolution with the County Clerk, that wouldn't have been sufficient to confer constructive notice on Mr. Easley. But, again, if you remember, we talked about this and I questioned him about this issue at trial. You bought the house – you saw it on Friday and you bought it on Saturday; the County Clerk's office is not open on Saturday. So, even if you wanted to argue that you did your due diligence and you went down to the County Clerk's office

to look to see whether this was in a Historic District and didn't find anything, actually, that didn't happen in this case, because you really weren't that concerned about it.

Mr. Thompson – Right. I understand about this particular case. But, as a general rule.

Mr. Knighton – I think the issue is – and it goes back to what the Court of Civil Appeals said in its opinion in this case, which is because the Historic District ordinance was enacted in accordance with the state statutes that provide notice and being enacted in a public meeting, that was sufficient to confer constructive notice on everyone in that Historic District. It's the same with regard to any of our other ordinances, whether it's speeding or public intoxication. I can't speed on Robinson and then go, I didn't know. Well, constructively you knew because there's an ordinance enacted by City Council that establishes that speed limit, hopefully we posted it so you would know that, but, again, in this case the sign in the yard, Mr. Suter allegedly told him this is a Historic District, he wrote in on the contract for sale, and the Court found that that evidence was compelling that he did have actual notice. I can tell you that since – at this point in time, we've gotten the County Clerk – and if you go to the County Assessor's website and you look up an address and you click on it, and you click on the map, it has a layer that you can click and it will show you whether or not that structure is in a Historic District. So that does provide a little bit of help, but, again, for us here in terms of the notice issue, we're stuck with the Court of Civil Appeals decision that's final that says there was notice, both actual and constructive.

4. Mr. Howard – Do we have any record of what the former windows looked like – the ones that were replaced? Whether they were replaced before he bought them or after, I'm not debating that, but just what those original windows looked like.

Mr. Knighton – Other than the descriptors of, again, they were double one over one wood windows on one of them, and then a single pane wood window, and I believe that's number 4. Other than that, I don't believe there are actually any photographs of those actual windows. But, again, when we litigated this case, there was no dispute as to those descriptions. The Historic ordinance and the Preservation Guidelines direct people wanting to make alterations to the exterior of historic homes to consult with the Historic Preservation Officer. If Mr. Easley eventually runs out of litigation option and is forced to do that, that they probably can work out something that would be appropriate with regard to complying with the Preservation Guidelines and the ordinance.

5. Mr. McCarty – Do you know, was this house listed by a realtor for sale or by owner?

Mr. Buxton – It was for sale by owner.

Mr. McCarty – So there was no disclosure signed?

Mr. Buxton – There was a disclosure statement and, as Mr. Knighton said, the box for Historic District was not checked, but he hand-wrote at the back it's in a historic district. And my client asked Mr. Suter what does that mean. And it took the testimony at trial from Mr. Suter and my client that Mr. Suter told him it doesn't matter if you're behind a fence and can't see it from the street.

Mr. Knighton – I would not agree with that assessment of the testimony. I do not have that particular ...

Mr. McCarty – And I believe there are pictures of most of these homes, all sides, in the historic – you can go back to the original maps and see most of all these homes. I think it's available.

Ms. Starr – There may be a picture on County, as well.

6. Mr. Knighton – Alright, if there aren't any other questions, obviously the City's position is that Mr. Easley's -- both his request for a variance and his appeal should be denied.

AUDIENCE PARTICIPATION:

1. Mitch Baroff, 421 Park Drive – I'm actually on the Historic Commission and I, just for clarification for you all, haven't been on that long, but we've dealt with windows on side yards and front yards and rear yards – windows and doors. And, basically, it's almost 100% you just replace like with like on the front façade. In the rear, we definitely have more flexibility. So that's about all I can say as a Commissioner. I can change hats and just be a citizen now. I'm kind of confused. I guess, since the applicant – or post applicant, I should say, can appeal to the City and the – this is kind of – I'm trying to clarify something in my mind on how we deal with this. You're allowed to go to District Court?

Mr. Buxton – What we did, per the ordinance said our appeal was to the City Council from the Historic District. We appealed to the City Council, then we went to the District Court. Nobody along the way really thought about the Board of Adjustment until the Court of Appeals said well you're challenging actions to the City official and the Board of Adjustment has the ability to look at what City officials have done, so we should be here.

Mr. Baroff – So, basically, the Court – since it does go to District Court and it is processed in Court, you appealed the District Court's ruling and went to the Appeals Court.

Mr. Buxton – Right.

Mr. Baroff – And the Appeals Court said, oh, well you should send it to ...

Mr. Buxton – Board of – well, they said it was our option to file a Board of Adjustment, but we should do that, and we did so.

Mr. Baroff – So that means that's really the legal process – it went through the legal process.

Mr. Buxton – This has been fully through a legal process, with more to go. As Mr. Knighton says, if my client gets tired of paying me.

Mr. Baroff – Like I said, we would never approve of non-wood windows on the front and sides, unless there was a really good cause. I wasn't around nine years ago on that situation.

Mr. Buxton – Our point has always been with this location – this home is there's two rears because it's on a corner lot. Or there's two sides because it's on a corner lot. And the side that's really not visible at all is the north side, because of the fencing and the hedges. The rear is where the driveway is. Everybody can see what's going on in the

rear. And the technical where the front door is and the back door is. The side on the north side, where the two windows were that – it's interesting to hear now that there is pictures going all the way back to the beginning of time for this whole Historic District, because I've seen a picture – I've seen a picture along the way of the window in the kitchen and it was one over one aluminum. That's what it was. I cannot say I've ever seen a picture of the other one, which is now the atrium window. My client tells me it was one over aluminum. I have to go on what my client tells me. But I know the one in the kitchen was one over one aluminum. It was never wood. And it makes sense, because someone had worked on that part of the house in the 80 years since it was built – it's been worked on and it's been replaced along the years. But our point here today – I mean, I could go on and I could assassinate the characters of a couple of the officials who we worked for. We got told people weren't going to consider certain things then they considered 'em. We were told – my client was threatened with criminal prosecutions on two different occasions by the same City official. We went before the City Council; we were afforded no hearing and no trial – there was just a motion and our application was denied. We were there for 10 minutes. I mean, I could do all that, and that was our arbitrary and capricious argument and the District Court agreed with us that those actions were arbitrary and capricious. The Supreme Court – or the Court of Appeals sent us back here. I don't want to pound the table over those things. I think what should have been done for an appropriate standpoint is the testimony of Ms. Atkinson, again, at trial wasn't just side elevations – it was elevations that are not visible from the street. And this house is peculiar – the peculiar way it sits, what's not visible from the street is the north side, which technically is a side elevation. Now, one of those windows was not historic in any way or fashion. So we think the lower standard should have been applied and that's what we're here to ask is that this Board apply that lower standard and waive the strict terms of the ordinance. Thank you.

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:
James Howard moved to approve BOA-1920-7 and BOA-1920-8 as presented. Brad Worster seconded the motion.

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

YEAS	None
NAYS	Brad Worster, Curtis McCarty, Mike Thompson, James Howard, Andrew Seamans
ABSENT	None

Ms. Tromble announced that the motion, to approve the variance and appeal as presented, failed by a vote of 0-5.

Mr. Seamans noted the ten-day appeal period before the decision is final.

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Item No. 9, being:
MISCELLANEOUS COMMENTS OF THE BOARD OF ADJUSTMENT AND STAFF
1. Board of Adjustment Meeting Calendar for 2020 was distributed.

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Item No. 10, being:
ADJOURNMENT
There being no further business and no objection, the meeting adjourned at 6:02 p.m.

PASSED and ADOPTED this 22nd day of January, 2020.

Board of Adjustment