

**MINUTES OF THE
MIAMI COUNTY BOARD OF ZONING APPEALS
JUNE 17, 2020**

**MIAMI COUNTY ADMINISTRATION BUILDING
COMMISSION CHAMBERS
201 SOUTH PEARL STREET
PAOLA, KANSAS 66071**

ATTENDANCE:

CHAIR: Absent

VICE-CHAIR: Tom Bach

MEMBERS PRESENT: Ken Berg, Ken Patrick, Lloyd Peckman,
and Larry Sumner

MEMBERS ABSENT: Chris Brown and Mark Ross, Chair

PLANNING DIRECTOR: Teresa Reeves

COUNTY COUNSELOR: David Heger

PLANNER: Kenneth Cook

SECRETARY: Angie Baumann

COUNTY COMMISSIONERS: None present

COUNTY CLERK: Not present

PRESS: Not present

MINUTES

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MIAMI COUNTY BOARD OF ZONING APPEALS

1. Call To Order:

Vice-Chairman Tom Bach called the meeting to order at 7:03 p.m.

2. Pledge of Allegiance

3. Roll Call:

Five members were present for Roll Call, which constituted a quorum.

4. Disclosure of Any Ex Parte Communications or Potential Conflicts of Interest

None disclosed.

5. New Business

a. 18004-VAR: Nolan

Kenneth Cook presented the staff report for reconsideration of a request for a variance from the Floodplain Regulations, specifically Section 12-7.06 (Conditions For Approving Variances For Agricultural Structures) of the Miami County, Kansas Zoning Regulations, as well as those criteria and conditions set forth in Sections 12-7.04 and 12-7.05 of said Article. The applicant constructed a 60'x22' structure for agricultural use at existing grade without a floodplain development permit or building permits. The applicant is requesting a variance from the requirement that the lowest floor of the agricultural structure be elevated a minimum of one (1) foot above the base flood elevation as provided for in Section 12-6.01.7 and 12-7 to allow the floor of the structure to be approximately three (3) feet below the base flood elevation and wet-floodproofed. The subject property of approximately 91 acres is zoned Agricultural (AG) and addressed as 25910 Spring Valley Rd, which is located in the Southeast Quarter of Section 14, Township 16, Range 24, Wea Township, Miami County, Kansas. Ronald and Phyllis Nolan, property owners of record.

Cook offered to cover the staff report in detail, and to make a full presentation; or, to focus on the highlights. He expressed that if the Applicants have not had the opportunity to review the staff report, he is glad to go through it more specifically.

Ronald P. Wood, attorney for the Applicants, directed Cook to present however he prefers to do so.

Cook noted that the original staff report, which was dated December 19, 2018, showed that Planning Director Teresa Reeves authored the report. He clarified that he wrote the original report and simply failed to remove Reeves's name and replace it with his name on the first page of that report. He added that he also wrote the current staff report.

Cook reported that the Board of Zoning Appeals, at its December 19, 2018 meeting, heard the Applicants' request for a variance from the Floodplain Regulations, and in consideration of the conditions specified in the Zoning Regulations the Board determined that the variance should not

be granted. The request was denied. He added that pursuant to their right to do so, the Applicants appealed the Board's decision with District Court. He reported that the District Court heard the matter and remanded it back to the Board for an additional hearing. Cook then read aloud the following from the Court's Journal Entry, dated November 1, 2019:

“ . . . for the failure of Defendant Miami County Board of Zoning Appeals to address the specific conditions and make findings thereof regarding Floodplain Overlay Districts as found in Article 12-7.06 of the County's zoning regulations prior to issuing a decision in this matter.”

He noted that the Court also provided for additional hearings on this matter.

Cook stated that requests for variances from the Floodplain Regulations are a bit unique compared to most requests for variances, such as variances from setback requirements. He explained that for most variances, the Zoning Regulations do not provide additional specific criteria that must be met in order for the Board of Zoning Appeals to grant the variance, except for Article 23 of the Zoning Regulations, which coincides with K.S.A. 12-759(e)(1). Cook stated that Article 23 of the Zoning Regulations and K.S.A. 12-759(e)(1) essentially list the same five criteria, with the exception of a slight difference in the wording adopted by Miami County. He reported that both the Zoning Regulations and the State statute provide that all five standards must be met before the Board of Zoning Appeals may grant a variance.

Patrick asked if there are additional requirements beyond those five standards that must be met.

Cook answered that Article 12 – Floodplain Overlay District (F-P) of the Zoning Regulations (the “Floodplain Regulations”) provides additional, specific criteria and conditions the Board must consider (e.g. the type of hazard; how another property might be impacted; etc.) Cook noted that a couple of sections in the Floodplain Regulations provide specific conditions the Board must find are present in order to grant a floodplain variance.

Patrick noted that these make it more, rather than less, difficult to grant a Floodplain Variance.

Cook agreed, and referenced the following document from FEMA, which is included in the meeting packet: *Floodplain Management Bulletin: Variances and the National Flood Insurance Program, FEMA P-993 / July 2014* (the “FEMA bulletin”). He explained that the document specifies that before a variance from a floodplain management regulation may be granted it must meet not only the floodplain management variance criteria, but also all other variance criteria found in State statutes or local zoning regulations, many of which also provide that if any individual criterion is not met then the floodplain variance application should be denied.

Bach asked where in the meeting packet the Order from District Court can be found.

Cook directed Bach to the Journal Entry of the District Court (Page 000164 of the meeting packet), remanding the matter back to the Board for additional hearings to make specific Findings. Cook noted that the Board had certainly made Findings on the five standard variance criteria. He explained the Board previously found that the proposed variance did not comply with those five criteria; the Board had adopted staff's Findings on those five criteria; and, the Board had specified that the proposed variance didn't meet FEMA's flood insurance requirements. Cook stated that because there had been significant discussion on the additional floodplain management variance criteria he believes the Board had intended to include all of those criteria in its Findings.

Bach stated that the Journal Entry specifically references Article 12-7.06 of the Zoning Regulations.

Cook stated that 12-7.06 may be found in the previous (December 19, 2018) staff report (Page 000026 of the meeting packet), where the specific conditions are provided, followed by staff's discussion explaining why staff believed the proposed variance did not meet some of those conditions, as well as on Page 000015 of the current staff report under the heading "Conditions for Approving Variances for Agricultural Structures".

He stated that the Zoning Regulations, the Floodplain Regulations, and the FEMA bulletin provide that the Board must ensure the proposed variance meets the standard variance criteria and also all of the criteria in the Floodplain Regulations. He added that the criteria in the Floodplain Regulations cross a number of different sections of the Zoning Regulations (Sections 12-7.04 – Floodplain Management Variance Criteria, 12-7.05, and 12-7.06. Cook directed the Board to Page 000022 of the meeting packet for discussion on Section 12-7.04. He then read aloud the following:

“ . . .when reviewing such applications for variances, the Appeal Board shall consider all technical data and evaluations, all relevant factors, standards specified in other sections of this article, and specific criteria.”

He stated that the 11 criteria in this Section may be found on the pages that follow (Pages 000023– 000025 of the meeting packet). He then read aloud the first two floodplain management variance criteria from Section 12-7.04:

- 1. Danger to life and property due to flood damage;**
- 2. Danger that materials may be swept onto other lands to the injury of others;**

Cook explained that the specific criteria in Section 12-7.04 (Floodplain Management Variance Criteria) are for the Board to take into consideration when making its determination; although, they are not intended to qualify, nor disqualify, the application.

Patrick noted that if even one (1) of the standard variance criteria cannot be met, then the Board must deny the request.

Cook clarified that the Court wants to ensure the Board indeed takes into consideration the variance criteria in the Floodplain Regulations. He added that staff wants to ensure that the record of tonight's hearing is accurate; and that the Board is looking at all of the standard variance criteria in the Zoning Regulations (Article 23) as well as the variance criteria in the Floodplain Regulations (Article 12).

Cook then read aloud the following from Section 23-6.08 – Variance from the Floodplain Regulations:

“As specified in Article 12 of these Regulations, Floodplain Overlay District (F-P), the Board of Zoning Appeals shall have the authority to grant variances from said floodplain regulations, provided, however, that in addition to the standards and conditions established in this Article, the Board of Zoning Appeals, in reviewing variance applications in the Floodplain Overlay District (F-P), shall consider those evaluations, factors, standards, and criteria specified at Section 12-11.”

Cook clarified that “this Article” means Article 23 – Board of Zoning Appeals, and opined that this provision is intended to mean that if the proposed variance fails to meet one of the standard variance criteria then the case fails—even if the proposed variance meets the floodplain management variance criteria. He noted that the standard variance criteria and the floodplain management variance criteria are relatively similar.

Cook noted that Page 000002 of the meeting packet provides background information regarding Article 23 of the Zoning Regulations, and leads to his discussion of several court cases. He pointed out that in *Hacker v. Sedgwick County*, 286 P.3d 222 (Kan. Ct. App. 2012) (Page 000003 of the meeting packet) the court had specified that if one of the variance criteria is not met then a board of zoning appeals is to deny that request. Cook reported that the *Hacker* court had found that only four of the five conditions had been met. However, the *Hacker* court found that the fifth condition—whether the need for the variance constituted an unnecessary hardship on the property owner requesting the variance—had not been met; therefore, the variance request was denied. Cook further reported that the *Hacker* court also referred to another court case—*City of Olathe v. Board of Zoning Appeals* (Page 000004 of the meeting packet), in which that court had found that the hardship was self-created, specifying that “. . . there is no good-faith exception to the rule that an unnecessary hardship cannot be self-created.” Cook noted that the *Hacker* court had also referenced *Cooper v. City of Kansas City, No. 61,980, unpublished opinion filed November 4, 1988 (Kan. App.)*, in which a property owner, who had built a commercial building, which intruded nine inches onto a side yard setback, requested a variance to cure the violation of the regulations. The board of zoning appeals granted a variance, finding that this was a good-faith error of the engineer, and was not the fault of the property owner. However, the Court of Appeals subsequently found that this was a self-created hardship because it was the action of the engineer, with whom the property owner had contracted. Therefore, the request was denied.

Cook commented that the *Cooper* case is relatively similar to the case being considered tonight, with regard to the Applicants’ reasoning that their contractor built the shed without obtaining permits, even though they did not necessarily intend for that to occur. Cook stated, however, that it is still a violation of the Regulations.

Patrick commented that this may be a reason for the Applicants to have a discussion with their contractor, but it is not a reason to go before this Board.

Cook noted that the Board has already considered the standard variance criteria A, B, C, D, and E and that he will likely go over each more specifically. He explained that at the end of the hearing staff will suggest that the Board address each one of the standard variance criteria, as well as the conditions for approving floodplain management variances, which he has compiled into a single document for the Board’s use. He noted that staff wants to ensure that each criterion has been considered by the Board and is on the record. He noted that if the Board disagrees with staff’s findings then staff will revise the document to comply with the Board’s findings.

Turning his attention to Page 000005 of the meeting packet, Cook stated that the Applicants are requesting a variance from the Floodplain Regulations and specifically the requirement in Section 12-6.02.1.b, which states that:

“all non-residential structures be constructed with “the lowest floor, including basement, elevated a minimum of one (1) foot above the base flood elevation, or together with attendant utility and sanitary facilities, be floodproofed to at least one foot above base flood elevation so that below the base flood elevation

the structure is watertight with walls substantially impermeable to the passage of water and with structural components having the capability of resisting hydrostatic and hydrodynamic loads and effects of buoyancy.”

Cook believes the structure is currently in the range of three feet below the base flood elevation; and, in order to comply with the Regulations the lowest floor would need to be raised at least three to four feet higher than it is currently.

Cook noted that Section 12-7.06 allows for the granting of variances for agricultural structures if certain criteria are met, including the floodplain management variance criteria as well as the standard variance criteria. He explained that the FEMA bulletin provides specific information for floodplain administrators to reference in order to ensure they are viewing variance requests in the same way FEMA would. He added that FEMA is responsible for the National Flood Insurance Program (NFIP) and is also the agency charged with auditing the County for compliance with the NFIP. Cook stated that in addition to relying upon their general knowledge, staff consults case law in the subject matter and relies heavily upon the FEMA bulletin to maintain consistency in every floodplain case.

Patrick asked if this is what FEMA would be looking at, which is therefore what staff looks at. Cook confirmed, and added that the FEMA bulletin is staff’s guidance document, which clarifies the intentions in the Federal Regulations for floodplain management variance criteria.

Cook then read aloud the standards in the Federal Regulations for considering variance requests, which are provided in Section 2 of the FEMA bulletin (Page 000043 of the meeting packet):

“To grant a variance from floodplain ordinances, in addition to meeting the requirements set out by State law, the community must determine:

- Good and sufficient cause and exceptional hardship exist;
- The variance will not result in additional threats to public safety, extraordinary public expense, or fraud or victimization of the public; and
- The variance is the minimum action necessary to afford relief.”

He added that in addition to the Floodplain Regulations and State statutes, we must also comply with State (federal) law.

Cook stated that in addition to the standard variance criteria the Regulations provide criteria and conditions for agricultural and accessory structures that must be met in order to grant a variance. He reported that the Applicants had originally submitted to Miami County an application for a variance for an accessory structure to be used for the storage of materials. Cook noted that the variance standards provide that an accessory structure in the floodplain cannot exceed 400 square feet in size. He further reported that staff had advised the Applicants’ previous agent (Dale Staten of THUNDERhead), who also represented the Applicants at the previous hearing, that a variance wasn’t even an option due to the size of the structure. Cook reported that the Applicants then asked to revise the variance application to reflect that the structure is agricultural because agricultural structures in the floodplain do not carry a size limit. The Applicants agreed to complete all documentation, showing the structure will be limited to agricultural use.

Cook then read aloud the following from Section 12-7.04 – Floodplain Management Variance Criteria (Page 000007 of the meeting packet):

“ . . . consider all technical data and evaluations, all relevant factors, standards specified in other sections of this article”.

Staff takes the position that the specific criteria listed in this Section do not include specific standards or criteria that must be met; rather, they are intended to ensure the Board of Zoning Appeals is taking into consideration those specific areas of danger and concern; the necessity of the structure at the proposed location; and the need for a variance from the Floodplain Regulations. Cook offered to go through the specific criteria, as found on Page 000022 of the meeting packet.

He then explained that Section 12-7.05 – Conditions for Approving Floodplain Management Variances (Page 000025 of the meeting packet) addresses specific conditions that must be met in order for the Board of Zoning Appeals to grant a variance. He proceeded to address each of the conditions of Section 12-7.05:

1. Generally, variances may be issued for new construction and substantial improvements to be erected on a lot of one-half acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, providing items two (2) through six (6) below have been fully considered. As the lot size increases beyond the one-half acre, the technical justification required for issuing the variance increases.

Cook noted that during the previous hearing, the Applicants’ agent stated that the Applicants could possibly have built higher; but, doing so would have created other issues such as how water flows across the property and the cost of required improvements. He reported that the subject property is 91 acres in size; and for a property that is greater than ½ acre in size Section 12-7.05 requires applicants who desire a variance to provide increased justification for the need for such a variance. Cook reported that the Applicants’ reasons for the variance were that their contractor had built this structure without a permit; and, that they had wanted this structure to be built at the same elevation as the previous structure, even though the two are structurally independent of each other. In staff’s opinion, the Applicants have not provided increased justification for the variance, as required in Section 12-7.05.

2. Variances may be issued for the reconstruction, rehabilitation, or restoration of structures listed on the National Register of Historic Places, the State Inventory of Historic Places, or local inventory of historic places upon determination, provide the proposed activity will not preclude the structure’s continued historic designation.

Cook commented that the structure, which was built in recent times, is not on the National Register of Historic Places.

3. Variances shall not be issued within any designated floodway if any significant increase in flood discharge would result.

Cook stated that the structure is not located in the floodplain (floodway).

4. Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.

Cook does not believe the variance being requested is the minimum necessary; rather, he believes the Applicants are seeking total relief from the Floodplain Regulations because of someone else's error in the construction of the structure.

5. Variances shall only be issued upon: (a) showing of good and sufficient cause, (b) determination that failure to grant the variance would result in exceptional hardship to the applicant, and (c) determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances.

With regard to (a) "good and sufficient cause" Cook commented that there are other locations on the subject property where the structure could go; and, there are ways in which the structure could have been constructed in compliance with the Regulations. He added that there is no unique characteristic of the site that would force the Applicant to build at this specific location on the property. With regard to (b) "exceptional hardship to the applicant" Cook stated that difficulties for the Applicants do not constitute an exceptional hardship to the Applicants, especially considering that the hardship appears to be self-created. With regard to (c) "cause fraud on or victimization of the public" Cook commented that if the Board grants the variance, staff would ensure that documentation was recorded with the Register of Deeds so that future property owners would be aware of the condition that exists on the property and how the structure may be used.

6. A community shall notify the applicant in writing over the signature of a community official that: (a) the issuance of a variance to construct a structure below base flood level will result in increased premium rates for flood insurance up to amounts as high as \$25.00 for \$100.00 of insurance coverage and (b) such construction below the base flood level increases risks to life and property. Such notification shall be maintained with the record of all variance actions as required by this article.

Cook explained that this condition does not qualify or disqualify the granting of the variance; rather, it is a requirement if the variance is granted.

Cook then read aloud the following from Section 12-7.06 – Conditions for Approving Variances for Agricultural Structures:

"Any variance granted for an agricultural structure shall be decided individually based on a case by case analysis of the building's unique circumstances. Variances granted shall meet the following conditions as well as those criteria and conditions set forth in Sections 12-7.04 and 12-7.05 . . ."

Staff's opinion is that the requested variance does not meet all of the conditions of Section 12-7.05 and it also does not meet all of the criteria of Section 12-7.06. He then addressed each of the conditions of 12-7.06:

1. All agricultural structures considered for a variance from the floodplain management regulations of this article shall demonstrate that the varied structure is located in wide, expansive floodplain areas and no other alternate location outside of the special flood hazard area exists for the agricultural structure. Residential structures, such as farm houses, cannot be considered agricultural structures.

Cook noted that there are other areas on the subject property that are not located in the floodplain. He acknowledged that some of those areas may be difficult to access because of the slope of the grade, but those areas are available. He added that the bigger issue is that the structure could remain in the exact same location as long as it is elevated in a manner that complies with the Regulations. He again acknowledged that elevating the structure would create some difficulty for the Applicant with regard to bringing in more fill, etc.; but, it would be possible; and, the structure would then comply with the Regulations.

2. *Use of the varied structures must be limited to agricultural purposes in Zone A only as identified on the community's Flood Insurance Rate Map (FIRM).*

Cook noted that the property owner typically must sign an owner affidavit, stating that the agricultural structure will be for agricultural use only. The affidavit is then recorded with the Register of Deeds so future property owners are aware the structure is restricted to agricultural use. He reiterated that if a variance were granted, staff would want such an affidavit to be recorded. Staff would also want additional information regarding the variance included on such affidavit. He added that if the current or future property owner were to change the use of that structure then a change of occupancy would be required, and the entire structure would also be required to be brought into full compliance with the Regulations.

3. *For any new or substantially damaged agricultural structures, the exterior and interior building components and elements (i.e., foundation, wall framing, exterior and interior finishes, flooring, etc.) below the base flood elevation, must be built with flood-resistant materials in accordance with Section 12-6.01(4b) of this article.*

Cook noted that the structure's materials appear generally to be flood-resistant and consist mostly of metal or wood. He noted that some electrical components were installed in this part of the structure, which would either need to be removed or inspected to ensure they were installed in compliance with the Building Codes and that they will not be impacted by floodwaters.

4. *The agricultural structures must be adequately anchored to prevent flotation, collapse, or lateral movement of the structures in accordance with Section 12-6.01(4a) of this article. All of the building's structural components must be capable of resisting specific flood-related forces including hydrostatic, buoyancy, and hydrodynamic and debris impact forces.*

Cook reported that the Applicants had been working with an engineer, who was looking at footings and flood vents. He added that design criteria would have to be complied with.

5. *Any mechanical, electrical, or other utility equipment must be located above the base flood elevation or floodproofed so that they are contained within a watertight, floodproofed enclosure that is capable of resisting damage during flood conditions in accordance with Section 12-6.01(4d) of this article.*

Cook noted that the Applicants are not proposing any electrical equipment in the structure. He clarified that some of the previously installed electrical components would need to be addressed.

6. The agricultural structures must meet all National Flood Insurance Program (NFIP) opening requirements. The NFIP requires that enclosure or foundation walls, subject to the one percent annual chance flood event, also referred to as the 100-year flood, contain openings that will permit the automatic entry and exit of flood waters in accordance with Section 12-6.02(1c) of this article.

Cook reported that the Applicants had been working with an engineer, who was providing documentation in this regard.

7. The agricultural structures must comply with the floodplain management floodway encroachment provisions of Section 12-6.05(2) of this article. No variances may be issued for agricultural structures within any designated floodway, if any increase in flood levels would result during the one percent annual chance flood event, also referred to as the 100-year flood.

Cook stated that the structure is not in the floodway.

8. Major equipment, machinery, or other contents must be protected from any flood damage.

Cook noted that the Applicants' agent had specified that they would be storing a tractor, but that the lowest part of the tractor was high enough that it would not be impacted if floodwaters came into the structure. The tractor's implements supposedly would not be damaged in such an instance. Cook pointed out that it would be difficult for the County to document and ensure that this condition is being met continually.

9. No disaster relief assistance under any program administered by any Federal agency shall be paid for any repair or restoration costs of the agricultural structures.

Cook stated that the Applicants would need to be aware that they cannot qualify for any federal monies for the repair of the structure, if damaged.

10. A community shall notify the applicant in writing over the signature of a community official that: (1) the issuance of a variance to construct a structure below base flood level will result in increased premium rates for flood insurance up to amounts as high as \$25.00 for \$100.00 of insurance coverage and (2) such construction below the base flood level increases risks to life and property. Such notification shall be maintained with the record of all variance actions as required by this article.

Cook stated that if a variance is granted the County would be required to notify the Applicant, in writing, that the cost of flood insurance may be higher for structures built below the base flood elevation. Staff would recommend that this also be included on the owner affidavit pertaining to the structure and that the affidavit be recorded with the Register of Deeds. He explained that a future property owner needs to be aware that if they have a federally-backed mortgage on the property they may possibly be required to carry flood insurance, the premiums for which can be as high as \$25 for each \$100 of coverage.

11. Wet-floodproofing construction techniques must be reviewed and approved by Miami County and a registered professional engineer or architect prior to the issuance of any floodplain development permit for construction.

Cook stated that this is something that would be addressed if the variance is granted.

Cook directed the Board to Page 7 of the current staff report (and the pages that follow), and noted that all of the specific conditions have been addressed. He also noted that he has provided additional commentary and reference to other documents, especially the FEMA bulletin.

He then read aloud the fourth bullet point on Page 8 of the current staff report:

“The one-half acre threshold is meant to be a general cutoff point and is related to the intrinsic qualities of the site or parcel; as the regulations state, “deviations from that limitation may occur” provided sufficient cause has been demonstrated by the applicant in accordance with the variance criteria. However lots larger than one-half acre, in nearly all instances, have sufficient space to elevate structures on fill to or above the BFE without resulting in adverse drainage impacts on adjacent properties and structures, whether or not the adjacent structures’ lowest floor elevations are at or below grade.”

He concluded that the distance between the subject structure and any other neighboring property or structures is great enough that even if the structure were to be elevated and built in compliance with the Regulations there are ways to mitigate any kind of increase to flood levels.

Cook noted that the issuance of a building permit in 1999 (for the second structure) is discussed near the bottom of Page 11 of the current staff report. He reported that a building permit was issued, and it was in the floodplain. However, staff has researched records and can find no reference to a floodplain development permit being issued. He commented that he does not know how this occurred—whether the County’s planners at that time just happened to miss that the property was in the floodplain; whether they had some difficulty pinpointing the precise location on the large, paper maps that existed at that time; whether someone issued the building permit without first ensuring that the structure would comply with the Floodplain Regulations; or some other reason.

Patrick asked Cook if a building permit (for the second structure) was indeed issued. Cook confirmed, and added that it was for a structure to be used for the storage of boats and a lawnmower. He reported that, originally, no utilities were planned; and, the application specified no electrical or sanitary facilities were to be included with the structure. However, when the permit was issued a note was written on the permit, stating that electrical would also be added to the structure. Cook also noted that the permit specified there would be no sanitation facilities with the structure, and no information about plumbing or HVAC in the structure was included.

Cook reported that he was able to find documentation evidencing one inspection requested for the electrical service of the structure; however, the contractor never requested any other inspections of the structure. He further reported that the County ultimately expired the permit because it had been in the system for so long and no other inspections were requested or done to ensure the structure was built in compliance with the Regulations. He added that there was no occupancy permit officially issued for the structure. Cook indicated that the statute of limitations makes it more difficult to force compliance on a structure built so many years ago, and the County does not plan to do so.

Cook pointed out that it was noted in the District Court case that the other structure has a bathroom facility as well as a septic system attached to it. He reported that the County has no record of building permits for a bathroom in any of those structures, nor record of a sanitation permit for the installation of a septic system.

Cook then addressed the following statements included in the Plaintiffs' brief that was submitted to District Court (Page 000012 of the meeting packet), noting it was asserted that the County did not enforce the Regulations, and thereby, essentially waived its right regarding the third structure. He then read aloud the following from the Plaintiffs' brief, with regard to the third structure:

“. . . the county was made aware of the third addition but took no action regarding it. It appears the county once again waived their rights as it pertains to that barn”.

He reported that when staff was made aware that the (third) structure had been constructed without a permit staff began working with the Applicants and their agents / contractors associated with the project, and informed them that the structure was built in the floodplain; built without a permit; and needed to be brought into compliance with the Regulations. Cook further reported that a building permit application was later submitted, and that staff performed a number of reviews and provided comments to the Applicants. He stated that staff's final comments directed the Applicants to work with an engineer to ensure the structure complies with the Floodplain Regulations; and, to work with the State to ensure the structure complies with State requirements. He added that staff had suggested the Applicants obtain the necessary State permits prior to applying for local permits.

Bach questioned the relevancy of this information, and commented that District Court has not asked the Board to review this aspect.

Cook responded that during the District Court hearing the argument was made that if staff was so concerned about this structure, then the County would not have allowed a bathroom to be built in the existing structure and also would not have allowed the septic system to be placed in the floodplain. Cook clarified that staff had never stated that they would not pursue enforcement; in fact, staff had actually proceeded to do so. He reported, however, that the County did not issue a violation notice, and instead had tried to work reasonably with the Applicants and their contractors in an attempt to bring about compliance. Cook further reported that staff was under the impression the Applicants were working on this. However, when the next application was submitted (for the Boundary Line Adjustment), and following staff's conversations with the Applicants' representative, it became apparent to staff that the Applicants were not working to bring the structure into compliance. He stated that a violation notice was then sent to the Applicants.

Bach commented that the issue Cook is referencing is separate from what the Board is supposed to be considering this evening.

Cook responded that he believes it is somewhat relevant because the Applicants have argued in District Court that this is a reason why the variance should be issued.

Bach commented that the statute of limitations has basically ran out; therefore, this issue has no validity in the matter of the variance request.

Cook responded that staff's perspective on this particular issue (construction of the second building) is that it occurred in the past and staff will not pursue it. However, those past issues should not be held against this specific variance case. He reasoned that if staff waives every requirement of the Zoning Regulations for each property that is discovered to have a violation, there eventually will be no Zoning Regulations.

Cook reminded the Board that there had been discussion at the previous hearing with regard to FEMA's flood insurance requirements (for participants in the National Flood Insurance Program), and that the Plaintiffs' brief to District Court had called this into question. Cook noted that he has provided in the current staff report additional documentation and direct quotes taken from the federal statutes.

Cook concluded that staff has determined the variance request does not comply with the standard variance criteria, as found in Section 23-6.04 of the Zoning Regulations and in State statute 12-759(e)(1), all of which, the Board of Zoning Appeals must find have been met in order to grant any variance request. Cook added that the variance request, specifically, does not meet three of the five standard variance criteria; therefore, staff recommends denial of the variance request. Cook stated that the variance request also does not comply with all of the criteria in Sections 12-7.04 – Floodplain Management Variance Criteria; 12-7.05 – Conditions for Approving Floodplain Management Variances, and 12-7.06 – Conditions for Approving Variances for Agricultural Structures; therefore, the proposed variance fails to meet the Board of Zoning Appeals requirements for granting a variance; and, it fails to meet the requirements for the granting of a floodplain variance. Staff suggests denying the variance request again.

Bach opened the public hearing at 8:08 p.m., and invited the Applicants' representative to speak.

Mr. Ronald Wood approached the podium, and introduced himself as the attorney for Ronald and Phyllis Nolan. Attorney Wood described his birthplace and upbringing and his current place of residence, and noted that his uncle is Walter Stone. He then stated that his clients have lived here for 47 years, and he estimated the amount of taxes they have paid to Miami County. He went on to describe his clients' affiliations in Topeka, Kansas, and in Michigan.

Attorney Wood then directed the Board to look at the pictures of the current shed (the Current Shed East Elevation) on Page 000104 of the meeting packet. He noted that the subject of the request is just a "little piece" with a garage door and a little door. He reported that a year or two ago, during the 100-year flood—and he remarked that it seems there have been a lot of 100-year floods recently—floodwater came through all of the buildings and his clients cleaned it all up. He noted that the structure that is the subject of this request housed a tractor, which was not damaged because the tractor is higher than the floodplain. Attorney Wood suggested that if the Board grants the variance his clients will sign a liability waiver, stating that the County will not be held responsible for any damages. He expressed that this is quite an ordeal over "a little garage".

He noted that the District Court dismissed this matter without prejudice. With regard to the statute of limitations, Attorney Wood does not expect the Board to make a ruling. He then read aloud the following from K.S.A. 19-2960(d):

“No zoning regulations shall apply to the use of land for agricultural purposes nor for the erection or maintenance of agricultural buildings as long as such agricultural buildings are used for agricultural purposes and no other.”

He explained that there are no exceptions to this State statute, and that the reason behind this statute is that Kansas is agricultural. He warned that this statute will come into play if the Board rules against his clients and they go back to court, because he and his clients believe they are allowed, for agricultural purposes, to build this little slice of garage for a tractor.

Attorney Wood then remarked on the length of the meeting packet.

Attorney Wood asserted that when the Board considered this request at the previous hearing, no one—the Applicants’ agent at that time, nor County staff, even addressed Section 12-7.07 of the Floodplain Regulations, which is what District Court has specified the Board must consider.

He went on to address the following floodplain management variance criteria from Section 12-7.04:

1. *Danger to life and property due to flood damage*

Attorney Wood stated that this is not applicable.

2. *Danger that materials may be swept onto other lands to the injury of others*

Attorney Wood stated that the property is located in the country; that nothing is going anywhere, even if it’s flooded, and that it didn’t go anywhere last time. He remarked that a concrete and metal building is not going anywhere, and added that the Applicants put holes in the back of the building to help water flow through it.

3. *Susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;*

Attorney Wood acknowledged that the Applicants have had some flooding, but it didn’t cause damage to the building built in 1991—with no permit needed; nor, was there damage to the building built in 1999, for which a permit was obtained. He stated that although the Floodplain Regulations were in effect at that time, nothing was said about it. He added that this issue would have never come up if it wasn’t for the fact that his clients hired a contractor, who they assumed had obtained the required permits.

Attorney Wood noted that it was at the time the Nolans had traded some land (applied for a boundary line adjustment) to purchase an additional five acres from their neighbor, when they received the County’s notice of violation.

He argued that no neighbors have complained nor will complain about this, and it is not an issue.

4. *Importance of the services provided by the proposed facility to the community;*

Attorney Wood indicated that this is not applicable.

5. *Necessity to the facility of a waterfront location, where applicable;*

Attorney Wood noted that this is also not applicable.

With regard to the remainder of the conditions for approving variances for accessory structures, Attorney Wood stated that staff has already addressed them.

With regard to showing “good and sufficient cause”, Attorney Wood reasoned that Mr. Nolan needs a barn for his tractor, and that he would rather not keep the tractor outside. He acknowledged that Mr. Nolan could park his tractor outside in that same area and without a barn. He commented that it is better, however, to have the tractor inside.

With regard to exceptional hardship, Attorney Wood argued that this is a hardship to the Applicants, who will have to tear down the building and try to build it elsewhere. He further argued that a hardship exists because the Applicants hired a contractor, whom they assumed would do the job correctly.

Attorney Wood stated that we are all residents of Miami County, who are trying to make Miami County better, and who are also trying not to interfere with our neighbors' activities. He stated that he bought land on the Louisburg golf course; and, if the owner of the golf course decides to convert the golf course into a pasture with 50 head of cattle, then he cannot say anything about it or sue him to prevent him from doing what he wants with his own land.

He then reasoned that this little garage isn't hurting anyone, and he questioned how it could be hurting the County. He asserted that he could find nothing in the meeting packet that shows any federal regulation, which provides that granting such a variance will increase the cost of flood insurance. He argued that it may cost these particular property owners more money if they ever want to insure the place. He further argued that there are other areas of floodplain that have been developed.

Attorney Wood then turned his attention to Section 12-7.07 (Conditions for Approving Variances for Accessory Structures), and stated that the District Court judge had indicated the Board had not included this Section in its previous consideration. He then read aloud the following from that Section:

“Any variance granted for an accessory structure shall be decided individually based on a case by case analysis of the building's unique circumstances.”

He explained that this Section talks about a 100-year flood and the “threat to public health and safety”. He then addressed the following conditions in Section 12-7.07:

1. Use of the accessory structures must be solely for parking and limited storage purposes in Zone A only as identified on the community's Flood Insurance Rate Map (FIRM).

Attorney Wood asserted that the Applicants are storing their tractor in that building.

2. For any new or substantially damaged accessory structures, the exterior and interior building components and elements (i.e., foundation, wall framing, exterior and interior finishes, flooring, etc.) below the base flood elevation, must be built with flood-resistant materials in accordance with Section 12-6.01(4b) of this article.

Attorney Wood reported that the Nolan's agent, who represented them in the previous hearing had approached staff and asked how to resolve this issue. Attorney Wood further reported that holes were cut into the back of the structure; and part of the structure was also raised in an effort to comply with whatever the County wanted.

3. The accessory structures must be adequately anchored to prevent flotation, collapse, or lateral movement of the structure in accordance with Section 12-6.01(4a) of this article. All of the building's structural components must be capable of resisting specific flood-related forces including hydrostatic, buoyancy, and hydrodynamic and debris impact forces.

Attorney Wood believes that the contractor returned to the site and better anchored the metal. He asserted that when the water came through there, it didn't hurt anything.

4. Any mechanical, electrical, or other utility equipment must be located above the base flood elevation or floodproofed so that they are contained within a watertight, floodproofed enclosure that is capable of resisting damage during flood conditions in accordance with Section 12-6.01(4d) of this article.

He interpreted this condition as meaning that such equipment can be put in the structure, as long as the equipment is above the base flood elevation. He stated that if this is going to be a problem for the County, then his clients will agree not to have electricity in that part of the building.

5. The accessory structures must meet all NFIP opening requirements. The NFIP requires that enclosure or foundation walls, subject to the one percent annual chance flood event, also referred to as the 100-year flood, contain openings that will permit the automatic entry and exit of flood waters in accordance with Section 12-6.02(1c) of this article.

Attorney Wood reported that the openings are already in place.

6. The accessory structures must comply with the floodplain management floodway encroachment provisions of Section 12-6.05(2) of this article. No variances may be issued for accessory structures within any designated floodway, if any increase in flood levels would result during the 100-year flood.

He asserted that the building isn't going to increase flood levels.

7. Equipment, machinery, or other contents must be protected from any flood damage.

Attorney Wood stated that Mr. Nolan's tractor isn't going to go anywhere; and, even if it did, it would be Mr. Nolan's responsibility. He added that there is nothing downstream that will be harmed in any way.

8. No disaster relief assistance under any program administered by any Federal agency shall be paid for any repair or restoration costs of the accessory structures.

Attorney Wood stated that his clients are not asking for this.

Attorney Wood argued that what is being considered is just a little piece, compared to the two bigger parts that were built in 1991 and in 1999. He believes this is something that should be approved, and reasoned that he and his clients, who are taxpayers, are not against the County. He commented that it is becoming a little expensive to live in Miami County, especially for those who want to retire. He further remarked that Miami County is chasing people away to Linn County and to Missouri because it's been said those places do not have the taxes nor the regulations that Miami County has. He scoffed at the size of the meeting packet, remarking that a 500-page packet is overkill for a little garage. He asked the Board to vote to grant the variance and move on to more important issues.

Mr. Ronald Nolan approached the podium and thanked the Board. He stated that he is present this evening, not because this is a big issue for him. He reported that the building, which he described as a nice little building to keep some things, has been on the property for two (2) of the 47 years he has lived there. He stated that it is not an important structure; and, if he's told to tear it down, he'll tear it down. Mr. Nolan explained that as a Miami County citizen, who has enjoyed living here and being part of the community, he takes issue with how this is being handled by County

administration; and, this is why he is willing to pay a reasonable amount of money for the opportunity to have this Board consider why he feels this is burdensome for someone who is not trying to do anything to anyone. He added that this little structure clearly does not create a problem for anyone.

Mr. Nolan explained that the structure is attached to the south side of two 40' x 60' buildings, which are also attached to one another. He argued that if floodplain was an issue the two 40' x 60' conjoining buildings are in front of anything that would have anything to do with a flood. Mr. Nolan reported that in the 47 years he's lived on the property the only time he's seen a flood that came up to the elevation of these buildings was two years ago; although, he has seen dozens of floods in his bottom field. He reported that during this particular flood, the floodwaters rose 18" in the buildings, but there was no permanent damage to the buildings; and, they cleaned up the buildings in one weekend.

Mr. Nolan stated that he bought 5.8 acres on the north side of their lane because it sits at the same elevation as their property and looks like it belongs with their property. He reported that he paid for three surveys in order to be able to buy that additional acreage, and has already paid for the property. He further reported that when he went to file something in the County's records to show he now owns the property, Teresa Reeves, Planning Director told him that he has a building on his property, which does not comply, and which requires a building permit. Consequently, he still has no ability to put this piece of property, which he has paid for, in his name.

Mr. Nolan expressed that he does not know what is going on here. He also does not know what harm anyone would ever assign to what he was attempting to do, other than that he should have known something before he proceeded. He indicated that what he should have known was not apparent to him because he paid a contractor to build the building, and he had assumed the contractor would have obtained a building permit if required. Mr. Nolan commented that there is no malice of intent; and, it wasn't as though he was trying to avoid compliance. Rather, he just wanted to build the building in that location. He reported that a tractor, tractor implements, and skid loader are currently housed in the building. He expressed that he doesn't know why this wouldn't be considered agricultural equipment on anyone else's property.

Mr. Nolan acknowledged that they would not be having this problem if they had been more attuned to the requirements. He explained that it just did not occur to him that they could be doing something onerous to the County in any way. He added that they still pay all of their taxes and will continue to do so. He expressed his appreciation of the Board's time and consideration of a variance.

There being no further comment, Bach announced the closing of the public hearing at 8:32 p.m.

David Heger, County Counselor, approached the podium, and clarified that K.S.A. 12-758(b) provides that agricultural structures are not exempt from the Floodplain Regulations.

Bach thanked Counselor Heger for this clarification, but noted that this is a separate issue from what the Board is supposed to consider this evening. Bach then read aloud the following from the District Court's Journal Entry, dated November 1, 2019:

“ . . . this matter is remanded back to Miami County Board of Zoning Appeals for the failure of Defendant Miami County Board of Zoning Appeals to address the specific conditions and make findings thereof regarding Floodplain Overlay Districts as found in Article 12-7.06 of the County's zoning regulations prior to issuing a decision in this matter.”

Reeves noted that Counselor Heger was making a clarification.

Patrick added that Counselor Heger is rebutting Attorney Wood's previous argument.

Cook approached the podium and stated that Attorney Wood had previously referenced K.S.A. 19, which is applicable to urban counties—or Johnson County. Cook clarified that Miami County falls under K.S.A. 12. He then read aloud the following from K.S.A. 12-758(b):

“Except for flood plain regulations in areas designated as a flood plain, regulations adopted by a city pursuant to K.S.A. 12-715b, and amendments thereto, or a county pursuant to this act shall not apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings are used for agricultural purposes and not otherwise.”

Cook argued, that it *is* valid to regulate agricultural structures with Floodplain Regulations.

Cook also noted that Attorney Wood had previously asserted the County had never presented any information with regard to Section 12-7.06 (Conditions for Approving Variances for Agricultural Structures). He then directed the Board to the transcript from the previous Board of Zoning Appeals hearing (December 19, 2018), which transcript staff was required to have prepared. Cook asked the Board to refer specifically to Line 14 on Page 000235 of the meeting packet through Line 19 on Page 000241 of the meeting packet, during which time staff indeed presented those criteria. Cook added that he has addressed most of those same criteria tonight, as has Attorney Wood. Cook then referenced the following quote included in the current staff report, which quote was taken from the Applicants' agent during the previous hearing:

“Kenneth had to go through every one of the findings with you guys, and I feel like the only way to get this passed is if I go through each one of the findings that he found in error in negative and positive. And I feel that I can do that. I feel like I've just done that.”

Cook added that the meeting transcript, the meeting minutes, and the staff report for the meeting show that all of that information has been specifically addressed multiple times with the Board.

Cook read aloud the following from Section 12-7.06:

“Conditions For Approving Variances For Agricultural Structures: Any variance granted for an agricultural structure shall be decided individually based on a case by case analysis of the building's unique circumstances. Variances granted shall meet the following conditions as well as those criteria and conditions set forth in Sections 12-7.04 and 12-7.05 of this article.”

Cook asserted that many of the items he had covered with the Board during the previous hearing reflect some of the criteria and conditions referenced above. He noted that although all 11 conditions of Section 12-7.06 were addressed during the previous hearing and during this hearing, the Section (12-7.06) that was noted by District Court specifically states that the Board must also consider these other two Sections (12-7.04 and 12-7.05). He reminded the Board that the Board of Zoning Appeals requirements and the Floodplain Regulations provide that the standard variance criteria of the Board of Zoning Appeals as well as all of the criteria in the Floodplain Regulations must be met.

Patrick clarified that the Board must consider the standard variance criteria; and, if the request meets those criteria, then the Board goes on to consider these additional conditions and criteria.

Cook confirmed, and stated that it would be best to address all of those items (standard variance criteria and the floodplain management variance criteria).

Cook pointed out that Attorney Wood had made reference to the cost of flood insurance. He noted that the current and previous staff reports provide discussion on this; and, the previous staff report provided specific reference to the FEMA bulletin and the Federal Regulations. He added that tonight's meeting packet includes that section of the Federal Regulations, which specifies that if the Floodplain Regulations are not enforced consistently with normal floodplain management criteria the County can be placed on probation or suspended from the NFIP. Cook apologized for the size of the meeting packet, which, he noted, is just under 300 pages. He explained that District Court has specified that the County failed to refer to or provide all of those documents. Therefore, he has included in the meeting packet the local Regulations, the Federal Regulations and the NFIP documents to ensure all documents specifically referenced by District Court are included.

Berg asked if the entire building is in the floodplain or just part of this shed.

Cook answered that the entire structure is in the floodplain. He explained that the original structure was built prior to the existence of a County permitting department; and, the second structure was built with a permit in 1999, but not a Floodplain Development Permit. He further explained that any addition to an existing structure must be built in compliance with the Floodplain Regulations. Cook reported that the Floodplain Regulations also specify that if a structure is damaged by a flood, fire, tornado, or any other means, and the damage is more than 50% of the structure's current market value then the entire structure must be brought into compliance with the Floodplain Regulations. The same is true for any structure that is receiving improvements greater than 50% of its current market value.

Cook reported that if a structure's basement or main floor is below the base flood elevation and the structure is damaged beyond 50% of its current market value the County, as a participant in the NFIP, must enforce compliance with the Floodplain Regulations and require it to be elevated so that it is at least one foot (1') above the base flood elevation. He added that the intent of the Zoning Regulations, with regard to non-conforming structures is to eventually bring all structures into compliance.

Cook stated that although this third structure is significantly smaller than the previous two, the Floodplain Regulations specify that the Board must consider each variance request on a case-by-case basis; and, staff does not have the authority to allow non-compliance of this new structure, even if the previously built structure is not in compliance. He noted that even the County's buildings are not exempt from the Regulations and that the Road and Bridge Department must obtain Floodplain Development Permits prior to performing work on bridges.

Peckman asked Cook to clarify the flood insurance implications if a variance is granted (discussed in Page 000067 of the meeting packet). He added that it is his understanding that granting a variance could cause everyone's flood insurance premiums to increase by \$25 or \$50.

Cook responded that he has updated his discussion on this topic; and he referred the Board to Page 000014 of the meeting packet. He noted that Attorney Wood asserted that he has found no such provisions in the Federal Regulations. Cook clarified that the Federal Regulations—44 CFR Sections 60 and 59—address this. He stated that if it is determined that a requested variance meets all of the conditions of the Floodplain Regulations for approving floodplain

management variances, then he does not believe Miami County would have an issue with FEMA. He then read aloud the following from his current staff report (Page 000014 of the meeting packet), which discusses 44 CFR Section 59.24 (b) regarding the NFIP:

“Section 59.24 (b) addresses what can occur to a community that “fails to adequately enforce flood plain management regulations”, including that the community can be placed on probation and in Section 59.24 (c) continues on to specify that a community may also be suspended from the program.”

Cook explained that if the County were to be placed on probation then every floodplain policy would be subject to an annual surcharge of \$50; and, if the County were to be suspended from the NFIP, which does not happen often, nobody could qualify for flood insurance through the NFIP. He then read aloud the following from Section 3.2 of the FEMA bulletin:

“FEMA evaluates variances granted by a community to determine whether they are consistent with sound floodplain management standards as required for participation in the NFIP.

Cook also read from 44 CFR Section 60.6(a) regarding the NFIP:

“The Administrator may review a community's findings justifying the granting of variances, and if that review indicates a pattern inconsistent with the objectives of sound flood plain management, the Administrator may take appropriate action under Sec. 59.24(b) of this subchapter.”

Bach stated that this has no bearing on what the Board is to be considering tonight. He asked for any final comments before closing the public hearing.

Mr. Nolan approached the podium and expressed that he wishes to clarify that there was no other place on the property to put these buildings. He explained that the elevation from the road to his house increases approximately 100', and increases an additional 50' to the top of the hill. He added that the lane makes a 110-degree turn as it goes up to the top of the hill. Mr. Nolan reported that there had previously been a cattle shed on the bottom portion of his property, where he also had a cattle operation at one time. He commented that there is no practical way to put a building on top of the hill, especially if the cattle operation is below. He added that the buildings replacing the former cattle shed were built on the same site as that cattle shed.

Attorney Wood approached the podium and asserted that, with regard to the second building constructed without a Floodplain Development Permit, the County did not self-report to FEMA regarding its failure to issue the Floodplain Development Permit and won't be doing so for this third building. He argued that this building would not have caused any problems, except for the fact that the Applicants wanted to do a lot split (boundary line adjustment). Attorney Wood commented that this is out of control.

Patrick responded that Attorney Wood is arguing points with this Board that he should instead be arguing with the Board of County Commissioners. He clarified that this Board has very limited authority; and, if he wants to change the law then he needs to talk to the County Commissioners. He suggested that if the law is on his side, then Attorney Wood should argue the law; and if it is not on his side, then he needs to argue the facts.

Attorney Wood commented that it just seems like a lot of problems to cause over such a little sliver.

Bach announced the closing of the public comment portion at 9:00 p.m. and called for deliberation by the Board. He stated that District Court has remanded this matter back to the Board for consideration, specifically with regard to Section 12-7.06 of the Regulations. Bach commented that he is sympathetic, but this Board is limited in what it may do pursuant to State statute, the Zoning Regulations, and in this case, FEMA and the Floodplain Regulations.

Patrick commented that the Regulations are pretty clear; and likely, the only reason why District Court remanded this to the Board is that the Board did not previously specify that it had considered the conditions in Section 12-7.06 and reference them in its Findings. He further commented that he doesn't think anything has changed since the Board previously heard this matter.

Sumner expressed the difficulty in regulating something that has already been done. He stated that application should have been made in the beginning for a permit; and such application would have been denied at that time. Sumner noted that he knows permits must be posted where they are visible from the road; and, if he were to receive a permit, but didn't see it posted he would ask his builder about it. He again commented that a permit should have been acquired, and that two wrongs in the past do not make a third one right. He noted that the Board should not be considering the other two buildings—only the third one. With regard to Condition No. 1 in Section 12-7.06, Sumner stated that there are other areas on the property, albeit difficult to get to, where the structure could go. He suggested that if he were in this situation and he knew he was in the floodplain, then he would raise the elevation of the building. Sumner expressed his sympathy for the Applicants, noting that it is terrible that this has already been done, and that it was done incorrectly. He stated that the Applicants are trying to say this is okay, but the Board's decision has the potential to affect many people in the County.

With regard to the second building's propane tanks and electrical service, none of which were included on the building permit application, Sumner asked if the County has the authority or the manpower to perform an inspection to determine what has been added without a permit.

Reeves answered that this would be more of an issue for the Building Codes and Environmental Health Departments, especially with regard to the wastewater system. It is her understanding that a wastewater system is never grandfathered in. She noted that if something was done without permits, then after-the-fact permits should probably be obtained. Reeves stated that according to the current Regulations, all utilities and HVAC are required to be above the base flood elevation. She added that propane tanks must be anchored.

Sumner asked what assurance the Board has—if it grants the requested variance—that the Applicants will not proceed to add electricity and a bathroom to the building without obtaining permits.

Reeves responded that this happens, and the County addresses it when it becomes aware of the situation.

Bach commented that this discussion is for another time; and, in the interest of time he will entertain a motion.

Reeves suggested that the Board address each one of the standards to satisfy the Court.

Patrick indicated that the Board needs to consider all five standard variance criteria.

Bach noted that the Board should address all of the criteria in Section 12-7.06.

Patrick argued that the Board should begin by addressing the five standards (standard variance criteria).

Cook recommended that the Board reference in its Findings the specific sections of the Regulations. He stated that Sections 12-7.04; 12-7.05; and 12-7.06 are all referenced in the Floodplain Regulations. Section 23-6.04.1 contains the five standard variance criteria; and Section 23-6.08 provides that the standard variance criteria and the floodplain management variance criteria must all be met.

He noted that staff has drafted a Resolution the Board may utilize, and explained that the Resolution specifically includes all criteria to be considered, as well as staff's Findings on each.

Bach stated that he needs a motion to either approve or deny the variance. He asked if it is necessary to address all of the sections of the Regulations Cook has referenced.

Reeves responded that it would be wise to do so. She added that the Board must also address the floodplain issues that District Court has specifically asked for.

Bach asked if Reeves is referring to Section 12-7.06, as well as all of the other sections Cook referenced.

Cook confirmed, and added that Section 12-7.06 also references Sections 12-7.04 and 12-7.05.

Bach again asked for a motion to either approve or deny the variance.

Reeves asked Bach how the Board can know whether to approve or deny the variance if it doesn't address each one of the factors individually. She advised the Board to address each criterion and determine whether or not the proposed variance meets it. She explained that the Board will then have the Findings to either approve or deny the request.

Cook agreed, and added that if the Board ultimately finds that all of the factors are in favor of granting the variance, then the Board would grant the variance. He then distributed to each Board Member a draft copy of the Resolution prepared by staff: *A Resolution Making Findings on Variance Application #18004-VAR (Nolan), Issuing Conclusions of Law and Denying Said Permit*. He explained that the Resolution populates staff's specific Findings, beginning with Section 12-7.04 - Floodplain Management Variance Criteria. He explained that if the Board agrees with staff's Finding for each criterion, then the Board may proceed to adopt that Finding. If the Board disagrees with staff's Findings or wants anything changed staff will make the desired changes.

Berg asked why the Board is walking through all of these.

Cook explained that the Resolution contains all of the variance criteria in the Regulations. He added that the District Court judge, in his Journal Entry, specifically referenced Article 12-7.06. Cook went on to explain that 12-7.06 itself provides that in addition to the criteria in 12-7.06 any variance from the Floodplain Regulations also must comply with the criteria found in Sections 12-7.04 and 12-7.05; therefore all three of these sections referenced in the Floodplain Regulations must be considered.

Berg asked if anything in staff's Findings indicates that the variance should be denied.

Cook responded that he has made a number of Findings throughout the draft Resolution, recommending denial of the variance. Patrick stated that the threshold issue, which should first be determined, is that a building is located in the floodplain and is not allowed by the Floodplain Regulations. He asked staff if he has correctly identified the issue.

Cook and Reeves confirmed. Reeves clarified that the building is not allowed if it does not comply. Cook clarified that the building may be allowed in that location if the building is elevated.

Patrick stated that if the Board first determines there is indeed a building located where it should not be the building has not been floodproofed to meet the required standards, then the Board may proceed to address the five standard variance criteria. With regard to the first item in the standard variance criteria (Section 23-6.04.1.A) Patrick stated that the hardship is self-inflicted, as the Applicants themselves had the structure built.

Reeves directed the Board to address the conditions of Section 12-7.06, as specified by District Court.

Cook added that District Court did not find that the Board had previously failed to make Findings based off of the five standard variance criteria; rather, the Court found that the Board had not addressed specifically 12-7.06 in its Findings.

Berg asked why the Board should have to go back and once again address the five standard variance criteria, instead of addressing the 11 criteria of Section 12-7.06. Bach agreed.

Reeves indicated that addressing Section 12-7.06 would be acceptable.

Cook then read aloud the following from Section 12-7.06 – Conditions for Approving Variances for Agricultural Structures, also found on Page 5 of the Resolution:

“Any variance granted for an agricultural structure shall be decided individually based on a case by case analysis of the building’s unique circumstances. Variances granted shall meet the following conditions as well as those criteria and conditions set forth in Sections 12-7.04 and 12-7.05 of this article. . .”

Staff’s discussion is that the proposed variance does not meet all of the criteria and conditions set forth in Sections 12-7.04 and 12-7.05, and the Board should deny the variance.

Cook then addressed the following conditions from Section 12-7.06.1:

“All agricultural structures considered for a variance from the floodplain management regulations of this article shall demonstrate that the varied structure is located in wide, expansive floodplain areas and no other alternate location outside of the special flood hazard area exists for the agricultural structure. Residential structures, such as farm houses, cannot be considered agricultural structures.”

Cook then proceeded to read aloud staff’s recommended Finding:

“The structure appears to be located in an area that could be considered a wide, expansive floodplain. It appears that other options would have been available to the property owners, including placing the structure on fill so that the lowest floor would have been elevated above the base flood elevation or placing the structure at a different location on the site that is outside of the SFHA . . .”

Attorney Wood interjected and commented that it seems that staff is making a decision for the Board; and, the Board might as well just adopt whatever staff has said. He further commented that essentially the Board is listening to what staff has to say, which it then determines will be the Board's ruling. Attorney Wood warned that he might have to tell the District Court judge what is actually happening here, and explain that his clients walked out of the hearing because this seems like a "kangaroo court".

Bach responded that the Board is entitled to go line by line and determine whether it agrees with staff.

Cook stated that Reeves is suggesting that the Board read each of the items in bold print in the Resolution, and have its own discussion.

Berg expressed that he would be fine with that, and added that the Board does not always agree with staff.

With regard to Condition No. 1 of Section 12-7.06, Sumner noted that the property is so large that the Applicants could have elevated the building. He added that the Applicants knew about the floodplain, and he questions why they would build another building in the floodplain. He indicated that he agrees with staff's Finding on this.

Patrick stated that upon consideration of Condition No. 1, the Board would deny the variance based on that.

Patrick then read aloud Condition No. 2 of Section 12-7.06:

2. Use of the varied structures must be limited to agricultural purposes in Zone A only as identified on the community's Flood Insurance Rate Map (FIRM).

Patrick stated that it appears this is not an issue.

With regard to Condition No. 3 of Section 12-7.06, Sumner asked what the floor of the building is made of.

Cook answered that the current floor is gravel. He noted that it is a metal building, with no drywall. He stated that he is not certain about the interior wall, which is shared somewhat with the adjacent building. He explained that the building is structurally separate; therefore, staff considers it to be separate from the other structure, as opposed to an addition to that structure, even though the two are slightly connected.

Bach stated that he has read through each of the 11 conditions in Section 12-7.06, as well as staff's Findings. He does not believe he could explain the Findings any better than staff already has, and he agrees with staff's Findings. He commented, with regard to Attorney Wood's description of this hearing as being a "kangaroo court," that he views staff as professional agents, who understand what they are talking about. He welcomed the Board members to suggest changes to the Findings, if they have any.

Patrick stated that the base facts, which likely nobody disputes, are that this is a floodplain; the building's floor has not been elevated to the height required; and, this is a self-inflicted wound. He added that nobody did this to the Applicants; rather, the Applicants had this done. He commented that the Applicants may have a complaint with their contractor, but that is between them and their contractor. Patrick further stated that if the Board denied the variance based on the standard variance criteria, it wouldn't even get to these conditions in Section 12-7.06.

Bach agreed, but noted, however, that District Court has remanded it to the Board to specifically address Section 12-7.06 and the 11 criteria in that Section. Bach expressed that this Board should not have had to do this; but, as this is something the District Court judge has ordered, the Board must do so. He once again invited the Board members to provide any changes to staff's Findings. He added that he is relying upon staff's expertise, agrees with staff's Findings and is prepared to rubber-stamp them. He once again expressed that he does not believe the Board should have to be doing this.

Sumner agreed, and noted that he does not understand the District Court judge's ruling because the Board had previously addressed all of these criteria.

Bach clarified that it is not that the Board didn't address all of the criteria; rather the judge has remanded this to the Board to address all 11 criteria in Section 12-7.06.

Sumner stated that he thought the Board had previously addressed all of those.

Patrick stated that the Minutes of the previous hearing indicate that the Board indeed did so.

Bach again invited the Board members to provide any changes they may have to staff's Findings.

Berg expressed that he cannot provide Findings that are any better than what staff has already presented. He also believes the District Court judge, will then determine whether to kill this off or accept it.

Patrick commented that the judge did not want to be the "bad guy"; therefore, the judge remanded this to the Board.

Bach once again asked the Board if there are any objections or changes to staff's Findings. There were no objections or changes.

Sumner moved to accept staff's Findings and to deny the variance. Bach suggested that the motion also include that the Board has specifically considered the 11 conditions in Section 12-7.06; and is adopting staff's Findings. Sumner agreed to these additions to the motion. Patrick seconded.

Bach proceeded to conduct a roll call vote on the motion for denial of the variance:

Sumner: YES

Peckman: YES

Berg: Regretfully, YES

Patrick: YES

Bach: Regretfully, YES

The motion carried unanimously, (5-0).

Reeves asked each of the Board members to sign the Resolution, affirming their adoption of the Findings.

Sumner noted for the record that he is offended someone would think the Board discriminated against the Applicants based upon their age. He noted that he read this in the papers. He clarified that it was the Applicants' agent, during the previous hearing, who commented on the Applicants' age and described them as "stubborn".

5. Old Business

None.

6. Other Business

None.

7. Adjourn

Bach called for a motion to adjourn. Patrick moved to adjourn and Sumner seconded. The motion carried unanimously, (5-0).

The meeting was adjourned at 9:28 p.m.

Approved this _____ day of _____, 20____.

Angie Baumann, Secretary

Chairman / Vice-Chairman

Minutes written by Angie Baumann.