CITY OF CHESTERFIELD
BOARD OF ADJUSTMENT
MEETING SUMMARY
Thursday, July 12, 2012

The Board of Adjustment meeting was called to order at 6:00 p.m. on Thursday, July 12, 2012 by Ms. Marilyn Ainsworth, Chair of the Board of Adjustment.

I. Introduction of Board and City Staff

The following individuals were in attendance:

Ms. Marilyn Ainsworth, Chair
Ms. Melissa Heberle
Mr. Leon Kravetz
Mr. Richard L. Morris
Ms. Katherine Hipp, Alternate

Mr. Harry O'Rourke, City Attorney, City of Chesterfield
Ms. Aimee Nassif, Planning & Development Services Director, City of Chesterfield
Ms. Kathy Reiter, Administrative Secretary, City of Chesterfield
Court Reporter, Midwest Litigation Services

II. Approval of January 5, 2012 Meeting Summary

Mr. Kravetz made a motion to approve the Meeting Summary. The motion was seconded by Ms. Heberle. Upon roll call, the vote was as follows:

Marilyn Ainsworth	**Yes**
Melissa Heberle	**Yes**
Katherine Hipp	**Yes**
Leon Kravetz	**Yes**
Richard Morris	**Yes**

The motion passed by a vote of 5-0.

III. Request for Affidavit of Publication

The Chair noted that the Affidavit of Publication and exhibits for the Petition had been placed on the dais.

IV. Public Hearing Items:

The Chair read the Opening Comments for the Public Hearing.

A. **B.A. 01-2012 1483 Country Lake Estates Drive (Mark and Kelly Bulanda):** A request for a variance from City of Chesterfield Ordinance 1238 for Lot 30 of Country Lake Estates to allow construction of a structure within an "undisturbed area" on a 24,187 square foot tract of land zoned R-1 PEU. (18V320388)

Staff Presentation:

Ms. Aimee Nassif, Planning & Development Services Director for the City of Chesterfield, outlined the exhibits supporting the request for a variance to allow construction of a structure within an undisturbed area.

Ms. Nassif stated the following:

- The petition tonight is a request for a variance from the development conditions required by Ordinance 1238 for 1483 Country Lake Estates Drive, Lot 30 of Country Lake Estates which would permit the property owners to remove trees and vegetation from an established do not disturb zone.
- She pointed out that the variance request in front of the Board this evening is to disturb, or clear within a do not disturb zone; it is not for the approval of a batting cage.
- Country Lake Estates is a Planned Environment Unit or PEU, which is a zoning procedure that allows a developer to increase the number of homes or density in a proposed development. PEU's are a common practice used for preserving the topography of the land, natural features and things of that nature. The PEU in this case is what established a do not disturb landscape buffer along all the properties that border the Wildhorse Subdivision. This buffer means that no vegetation, trees or the topography can be disturbed or removed unless a tree falls or is damaged from a storm or proposes any danger. Generally, nothing can be removed or planted in this area. It is to remain in its natural state.
- Ordinance 1238, (Exhibit 5) which approved the PEU included a 50 foot buffer along all the properties including Lot 30. It was required in the ordinance that it be shown on the Site Plan.
- Ms. Nassif referred to Exhibit 6, which is the approved Site Development Plan showing the do not disturb buffer. The ordinance requires a 50 foot buffer; but there is a discrepancy on the Site Development Plan for Country Lake Estates which shows Lot 30 having a 40 foot buffer and all other lots having a 50 foot buffer. In speaking with the City Attorney, whenever there is a conflict, the City's legislation does govern, so the 50 foot undisturbed strip is required for the lot.
- The Applicants state that the do not disturb area was not shown on their Record Plat. Ms. Nassif proceeded to show the Record Plat of the subdivision noting the location of Lot 30 (Exhibit 12). She explained that after a Site Plan is approved, a Record Plat is then approved by City Council. The Site Plan lays out the criteria and design requirements of a development. The Record Plat establishes the legal lot lines so that a property can be subdivided. A Record Plat does not create or establish design or development criteria. That is why the landscape buffer or any other criteria associated with this development are not included on the Record Plat..

- The conditions that are accepted into this PEU or any Planned District ordinances are required in perpetuity. Conditions and requirements cannot change after a property is built on or changes hand. They still must remain intact.
- Although the Petitioners state they did not know about the buffer, it does not negate the fact that the buffer requirement does exist.
- Ms. Nassif added that over the years there have been other properties in the subdivision where trees have been removed from the do not disturb area. Unfortunately, the City does not have the manpower to always know if people are abiding by the rules. It only recently became known to the City that some trees were removed from other properties. No additional action has been taken since there is not enough information on who owned the property when the trees were removed. However, clearing is not permitted or authorized so when the City does receive information, as in the Applicants' situation, the requirement is enforced.
- When the Board is considering a variance request, they must find that a hardship exists with the property. A hardship cannot be created by the Applicant; it must be proven by the Applicant. In reviewing this application and all their documents, Staff feels a hardship has not been proven. The Board of Adjustment must also consider if approving this variance, that it would not break the integrity or spirit of the ordinance. Staff does believe that the spirit of the ordinance would be broken if Lot 30 was permitted to disturb this landscape buffer.
- Lastly, the Board of Adjustment is the last recourse for an individual to hear an appeal for a variance. The Board cannot create conditions in an ordinance that the City has established. There is an Ordinance Amendment process if a property owner wants to amend an ordinance that governs their property. One can petition to do so with a Public Hearing in front of the Planning Commission and then a hearing in front of City Council. The Applicants in this case chose to come before the Board of Adjustment instead.

Discussion

In answer to questions from Mr. Kravetz concerning the Applicants' lack of knowledge about the buffer, Ms. Nassif stated that the City does not get involved with the individual sales of homes so it is not known what is received at the time of a sale. However, there is a section in the City code that says if a planned ordinance is in effect for a property, the property owners and any future owners should receive a copy of that ordinance. Generally, they do get a plot plan and a record plat. Record plats are now different, having more information on them than before. They should receive trust indentures and all the requirements and restrictions from their trustees, but the City has no idea if that happens.

Petitioner's Presentation

Mr. Michael Doster, who is representing the Petitioner, and **Mr. Mark Bulanda**, the Petitioner, were sworn in by the Court Reporter.

Mr. Doster, 16090 Swingley Ridge Road, Chesterfield, MO, stated that this appeal to the Board of Adjustment is only about Lot 30 of Country Lake Estates, 1483 Country Lake Estates Drive and only about Mark and Kelly Bulanda. Mr. Doster then added the following:

- They are appealing on two alternative grounds. Not only is there a request for a variance, but the Applicants are also appealing the denied application for a permit to build the batting cage. It is felt that it was an error under the City's regulations and an error under law.
- They feel there is no need for a variance because there is no enforceable restriction that would require the Bulandas to honor any kind of the non-disturb zone whether it is 40 or 50 feet.
- The exhibit list, which has already been entered, is a joint list with the City.
- The variance request is an "area variance", which is subjected to a review under the practical difficulty standard, which is a lesser standard than the hardship standard.
- They take the position that there is not an existing legally enforceable regulation or restriction that binds Lot 30 to a non-disturbance area. Ordinance 1238 requires the developer to submit a Site Plan showing a 50 foot non-disturbance zone, which was done. However, in the case of Lot 30, it shows a 40-foot non-disturbance zone.
- If the Board believes there is an enforceable restriction against Lot 30, then they are requesting a variance.

Mr. Doster then outlined his PowerPoint Presentation showing pictures of the Bulandas' property, along with neighboring properties (Exhibit 14).

- He points out on slide #2 that the plat shows no reference to an undisturbed area. It is their position that the undisturbed area should have been shown on the plat. Another way that it could have been handled was to have drawn the lot line short of the rear of the property and create a "common ground" area.
- Slide #6 shows the back yards of neighboring properties where there has been clearing and structures added in the do not disturb area. He points out that the Bulandas followed the law and applied for a permit while others in the subdivisions have not.

Harry O'Rourke then reminds the Board that Mark Bulanda has already been sworn in and is under oath.

Mr. Mark Bulanda, 1483 Country Lake Estates Drive, Chesterfield, MO stated the following:

- He and his wife bought their home in 2001. The documents received from the Trustees at that time were the property plat, Ordinance 1219, the indentures of the subdivision, warranty deed and an escrow agreement (Exhibit 15). They had a survey done and a title search. There was no mention of a non-disturb area in any of those documents. They were not made aware of this until just recently

when they started the process of wanting to build a batting cage. Also, they had not received Ordinance 1238 or the letter from Mr. Griesedieck (Exhibit 7) until November of this year.

After Mr. Bulanda's statement, Mr. Doster, gave him a copy of Exhibit 15 and then identified the various documents that make up this exhibit.

Mr. Doster pointed out that there was no mention of a non-disturbance area in any of the documents of Exhibit 15. For the record, Mr. Doster noted that Ordinance 1219 approves the Trust Indentures and the Record Plat for Country Lake Estates Addition subdivision and that it was adopted by the City of Chesterfield on January 6, 1997. Mr. Bulanda agreed.

Referring to Exhibit 17, the survey for Lot 30, Mr. Doster asks if there is any indication of a non-disturbance zone to which Mr. Bulanda answers "none".

Mr. Doster then moves to Exhibit 16, Mr. Bulanda's copy of the Title Insurance policy issued at the time of sale. He stated that before the Bulandas closed on the sale of the house, they received a commitment for title insurance that had some exceptions listed on it which showed what the title was subject to. This title insurance policy, which was issued after they closed, had the same exceptions on it. Mr. Bulanda agreed.

Referring to the Title Insurance Policy, Mr. Doster asked Mr. Bulanda the following questions (shown in *italics*):

- *Is there any reference to the Site Development Plan?* Mr. Bulanda responded "no".
- *Is there any reference to Ordinance 1238, the PEU?* Mr. Bulanda responded "no".
- *There is a reference to the Plat, correct?* Mr. Bulanda responded "yes" noting that it is recorded in Plat Book 345 pages 41-43.
- *Item 13 on the "Exceptions" lists the Indentures, is that correct?* Mr. Bulanda responded "yes."

Mr. Doster stated that a 40 foot non-disturbance zone constituted an approximately 25% loss of the Bulandas' property; with a 50 foot non-disturbance zone, it ends up being 30% of the property not being used. Mr. Bulanda agreed. When asked if he paid real estate taxes on the entire lot, he responded "yes".

During questioning from the Board members, the following points were clarified by either Mr. Doster or Mr. Bulanda:

- The Plat Mr. Bulanda was referring to in his presentation was Exhibit 12 (on display board) and is also part of Exhibit 15.
- While Mr. Bulanda owned the home for the past 10 years, he stated that he first found out about the non-disturbance zone in November, 2011.
- Mr. Doster explained the relevance of Title Insurance with respect to this situation. Getting a commitment for Title Insurance is part of standard due

diligence when buying a house. In this case, there is a Title Insurance Policy that does not reflect the Site Development Plan. It is relevant because the Bulandas had no notice of the Site Development Plan and while the City relies on the Site Development Plan, it is not part of the Title examination. In addition, the Ordinance was not recorded in the Title Insurance.

- Mr. Doster explained that the practical difficulty here is the fact that while living in their home for 10 years, the owners had no idea that they could not use 30% of their land even though they pay taxes on it.
- Mr. Bulanda stated that he, not his contractor, applied for the Municipal Zoning application.
- Mr. Doster indicated that the Bulandas may have no recourse to the Title Company. It may not be the Title Company's fault if the Site Development Plan was not recorded or not recorded properly.
- Mr. Bulanda stated that they did notice the buffer was there but also noticed that most of the other property owners did things with the land within the do not disturb zone.
- Mr. Doster pointed out that this proceeding is not about the proposed structure – it is about whether there is an enforceable restriction creating the buffer.

Mr. Kravetz then asked Ms. Nassif if the Board could grant the variance with restrictions placed upon it – such as whatever they choose to do within the non-disturb would not be allowed to create a disturbance to their neighborhood. Ms. Nassif replied that the Board of Adjustment does not have the authority to put restrictions on a variance. The only question before the Board is whether they will allow them to disturb in a non-disturb zone. Nothing can be done in a non-disturb zone - even landscaping is not permitted.

Mr. Doster disagreed with Ms. Nassif's statement and then noted that Ordinance 834 specifically states the following:

> *In passing upon Appeals, where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such Ordinance, the Board has the power to vary or modify the application of any of the regulations or provisions of such Ordinance relating to the use, construction, or alteration of buildings or structures or the use of land.*

Ms. Nassif stated that the Board has the authority to modify a setback, or to modify whether they can move in the do not disturb zone but the Board cannot create conditions, new changes or new items that would modify the ordinance in order to allow building in the do not disturb area.

Mr. Doster felt that Ordinance 834 gives the Board the authority to impose a condition with respect to whatever decision the Board makes – and it would only apply in this case. He stated it would not modify the City's ordinances. He gave an example of imposing conditions that would require a certain percentage of trees to

remain; or requiring trees be kept within 15-20 feet of the boundary with Wildhorse Subdivision.

Ms. Nassif then made the following comments:

- The requested structure would require permits from the City and St. Louis County. The property owner who put in playground equipment within the do not disturb zone did not require a permit for the equipment, which is why the City was not aware of it. She does not intend to issue tickets to property owners who did not live there when the property was cleared.
- Ordinance 834 also notes that in passing on appeals where there is a practical difficulty, the Board needs to insure **that the spirit of the Ordinance is observed**. Staff would argue that the spirit of this PEU Ordinance is not going to be observed if the Board grants a variance to allow the removal of trees in a do not disturb zone.

Mr. Doster stated that the spirit of the Ordinance is to provide a visual and sound barrier between one lot in one subdivision and one lot in another subdivision. He pointed out that the proposed location of the batting cage is in the middle of the tree mass. He felt the Board could require that the tree mass, other than where the batting cage is, be preserved, which he felt would provide a visual and sound barrier.

Ms. Nassif then clarified points that were referenced earlier, as follows:

- Exhibit 6 is the approved, recorded copy of the Site Development Plan for Country Lake Estates. It was recorded accurately and correctly with St. Louis County at 12:17 p.m. on July 23, 1996 and includes the book and page from the Recorder's Office. This is a public record available at St. Louis County and the City.
- The PEU is a zoning procedure which allows a developer to increase the number of homes or density in a proposed development. PEU's are used for preserving the topography of the land, natural features and things of that nature and must remain intact in perpetuity. The developer agreed to the do not disturb zone so he could build the number of units he wanted.
- With respect to "loss of property", property owners can use this area but cannot remove any of the trees or clear-cut it. Grass is allowed to be mowed and poison ivy removed.
- There are several properties in the subdivision who have infringed upon the do not disturb area, which the City was not aware of at the time it occurred.

Regarding the Site Development Plan, Mr. Doster stated that it is not known how the Recorder of Deeds logged it in, or where it was logged in - but it is known that it does not show up in Lot 30's title.

The Chair then accepted joint Exhibits 1-17 into evidence.

No Speakers were present to speak in favor of the variance request.

Speakers – In Opposition:

Mr. Bill Matson was sworn in by the Court Reporter and it was noted that he had previously submitted a letter dated June 3, 2012 in opposition to the variance request, which is a part of the public record (Exhibit 9-1).

Mr. Matson, 17649 Bridgeway Circle Drive, Chesterfield, MO stated the following:

- He is one of the two property owners to the west of Lot 30.
- He is "vehemently opposed" to the requested batting cage.
- If the subject area is cleared, the batting cage will be almost as close to his deck as it will be to the Applicant's home.
- The side of his home that will be facing the batting cage includes his deck, family room, kitchen and one bedroom.
- He has concerns about the noise that will be generated from the batting cage and feels that it will affect his "integrity of life" and the salability of his home.
- The Country Lake Estates covenants do not allow outdoor television aerials, satellite dishes larger than 18", above-ground pools, tents, fences, or dog-runs. Speaker noted that the fence for the batting cage would be 70 feet long, which is almost 50% of the entire back lot line. In addition, the mesh wall for the batting cage would be 12 feet high.
- For the interest of the neighbors and the City of Chesterfield, he is asking the Board "to support the integrity and the spirit of the neighborhood and the City of Chesterfield."
- He feels the variance request is not due to unnecessary hardship imposed upon the family.

Discussion

Ms. Hipp asked Mr. Matson if he thought there was a "practical difficulty" on the part of the Applicant. Mr. Matson replied that he wants to be able to sit on his deck without disturbance. He noted that he purchased his home because of its wooded lot and pointed out that because of some previous clearing of trees, he can see another house even when the trees are in full foliage. He feels the buffer should have been maintained as he prefers to look at woods.

Mr. Morris asked Mr. Matson if he was aware of the do not disturb zone when he purchased his home. Mr. Matson replied that when he purchased his home in 1993, the entire area was wooded by the Weyerhauser estate.

Ms. Nassif pointed out that when Premier Homes requested the change of zoning and PEU in 1996, several residents from the Wildhorse Subdivision spoke before the Planning Commission requesting that buffers be put into place. Subsequently, Premier Homes requested that the City increase the size of the buffer area.

Due to previous clearing, Mr. Matson stated that he planted five pine trees to increase the buffer on his side.

For the sake of expediency and clarification of the record, Mr. O'Rourke asked that Speakers only add something new to the record and not repeat what has already been stated. He stated that Speakers could express their agreement with previous speakers.

Mr. Mike Jurkiewicz was sworn in by the Court Report and it was noted that he had previously submitted a letter dated July 9, 2012 in opposition to the variance request, which is a part of the public record (Exhibit 11-2).

Mr. Jurkiewicz, 1487 Country Lake Estates, Chesterfield, MO stated that his property is next door to Lot 30. He then read his letter of July 9th which included the following points:

- He is opposed to the request for the variance to build on the landscaped buffer area, which would involve removing most of the trees in the buffer area, grading and excavating the area resulting in a level floor with artificial turf.
- Construction of the 70-foot structure would result in significant noise and loss of serenity and character of the neighborhood.
- He objects to the request because of significant loss of property value and because it would create water drainage problems due to grading and excavation. This would alter the water flow and drainage and create very serious risks for flooded basements, yards and erosion.
- He specifically purchased his home because of the serenity of the setting, which will be lost if the request is approved.

Discussion

Ms. Ainsworth asked if the Subdivision Board had met and approved the request. Ms. Nassif replied that she did not know if the full Board met, but the meeting packet includes a letter of approval from one of the Trustees, who states in the letter that he is representing all of the Trustees.

During questioning from Mr. Doster, Mr. Jurkiewicz clarified the following points:

- He bought his home four years ago.
- He did not disturb the non-disturb area of his lot and he is not aware of any disturbance in this area prior to his purchase of the property.
- He is not aware of any clearance of his property prior to his purchase nor is he aware of whether his neighbors know of any clearance of his property prior to his purchase.

Ms. Hipp asked which lot Mr. Jurkiewicz resides at. Mr. Jurkiewicz replied that it is lot 29.

Mrs. Chrissy Jurkiewicz was sworn in by the Court Reporter and presented photographs which were marked as Exhibits 18 thru 28 and were admitted as part of the record.

Mrs. Jurkiewicz, 1487 Country Lake Estates, Chesterfield, MO made the following points:

- She has concerns about trees being removed. Trees have been identified with red bands but it is not clear whether the banded trees would remain or be removed. *Exhibits 24 thru 27 show photos of the banded trees.*
- The exhibits also portray homes in the Wildhorse Subdivision behind their property, which are more noticeable when the trees lose their foliage. Speaker noted that if the trees are cleared, the proposed batting cage will be closer to these homes than to her property.
- Her property includes a significant incline with most of the back yard being above the patio space.
- The property owners were given documents showing the do not disturb zone.
- Referring to an earlier comment from Mr. Kravetz about Trustees handing out plat records when moving in, she stated that such documents are normally given at the time of closing. When she moved into her home, the only thing she received from the Subdivision Trustees was a neighborhood directory.
- The lot that was cleared and includes the playground equipment belongs to the Trustee who gave her the neighborhood directory. She feels that he is in clear violation of many things but clearing the lot was the biggest because he changed the lay of the land. This Trustee told her that the batting cage has been put in the *playground equipment* definition.
- She does not feel that a batting cage belongs in a neighborhood – but belongs in a park.
- She asked that the Board oppose the variance.

Discussion

Ms. Heberle asked if the Trustee referred to by Mrs. Jurkiewicz is Mr. Jimmy Liebe, the Trustee who wrote the approval email. Ms. Nassif stated that he is.

Mrs. Jurkiewicz stated that there was never a meeting for the residents and noted that the batting cage would set a precedent in the neighborhood. She indicated that three of the Trustees are friends of the Bulandas. She expressed concern that the batting cage would interfere with her life and "could ruin the aesthetics of two subdivisions".

During questioning from Mr. Doster, Mrs. Jurkiewicz clarified the following point:

- Exhibit 28 presented by Mrs. Jurkiewicz is a photo of her property.

Mrs. Vivienne Topping was sworn in by the Court Reporter.

Mrs. Topping, 1482 Country Lake Estates, Chesterfield, MO, made the following points:

- Her property is across the street from the Bulandas.
- When she purchased her home over six years ago, she was not "given exhibits or extra information".

- She expressed concern about run-off from a neighboring subdivision that is filling the lake in Country Lakes' subdivision and has concern that she will "lose the waterfront that she paid extra money for". She has had to install French drains to protect her home.
- She now has concerns about how the proposed batting cage would affect her property.
- The homes in Country Lake Estates Subdivision are on deep lots with beautiful foliage. She noted that during the summer she does not see her neighbors' property across the lake, but does see it during the winter months.
- The appeal of the neighborhood is the "forest and the lake".
- She noted that the Trustee who approved the batting cage has a trampoline in his yard.
- She has concerns that if a batting cage is approved, it will set a precedent for other such equipment in the neighborhood.
- She suggested that the batting cage be moved to an area that doesn't affect the trees or within the neighbors' viewing.
- If approved, Mrs. Topping asked how many trees would be removed and asked how this would affect drainage. She also asked who would be responsible for expenses to her property for any water damage that could be a result of drainage issues.
- She concurs with all the other letters sent in opposition to this variance request and asked that the Board not allow the variance.

Responding to Mrs. Topping's concerns, Ms. Nassif stated that if the variance is granted, the Engineering Staff would review for any drainage issues. Staff would not permit any grading or structure to be built that would cause additional water run-off on to adjacent properties. It has not been determined how many trees would be removed because Staff has not gotten to that point in the Application process.

Mr. Dennis Wells was sworn in by the Court Reporter and it was noted that he had previously submitted a letter to the Board in opposition to the variance request.

Mr. Wells, 17661 Bridgeway Drive, Chesterfield, MO stated that he is a resident of the Wildhorse Subdivision and he and his wife are original owners of their property and have lived there for 21 years. He has extensive experience in working for municipalities – the last 20 years he worked as a municipal director of public works. In this capacity, he has signed hundreds of site development plans so he is familiar with the process and what is involved in creating restrictions.

Referring to comments made by the Applicant's attorney, Mr. Wells made the following points:

- Regarding whether the provision is an enforceable restriction, Mr. Wells stated that it is not uncommon for Councils to impose restrictions on development plans. Zoning ordinances include building setbacks, easements, and numerous site restrictions associated with land use for the protection of the neighborhood,

adjacent residents and to be in conformance with what the city believes is appropriate for its municipality. It has been his experience that this type of provision is enforceable.

- He feels that the do-not-disturb area should have been shown on the Applicant's property survey. He thinks that the Title Company may not have done due diligence on what should have been reported.
- Regarding paying property taxes on the do-not-disturb area, he noted that the other property owners also pay taxes on this area. He noted that he pays taxes on easements on his property on which he cannot build any structures.
- The area was not established as common ground because developers do not like to establish common ground. Usually there are requirements from the municipality based on housing density and developers do not make money on common ground therefore they prefer restrictions on the properties that they are selling – this then does not affect the sales price.
- Regarding the view that this is a hardship on the property owner, he noted that all the other property owners in the area have dealt with the same hardship.
- There may have been people intruding on the do-not-disturb zone but he doesn't think it was done with the knowledge of the people who are adjacent to it. He stated that on the property behind his, the owner cut down some trees but since the Speaker was home and saw what was happening, he contacted the City. An inspector was sent out and the activity was stopped.
- The do-not-disturb area was established as a result of residents meeting with the developer of Country Lake Estates to express their concerns. At the time, Council agreed with the restriction and discussed why it was being included.
- There are two public batting cages in the nearby vicinity – one in the Valley and one in Ballwin.
- While his property is not directly behind the Applicant's property, he is concerned with a precedent being set if this is allowed. He asked that the Board not grant the variance request.

Discussion

Prior to being questioned by Mr. Doster, Mr. Wells stated that he was in attendance to respond to the Board, the Board's attorney, to any employee of the City but was not there for cross-examination by a private attorney or other parties. He suggested that Mr. Doster ask Mr. O'Rourke questions that could be referred to him and then he would respond. He stated that he is not in a court of law and he will not respond directly to Mr. Doster.

Mr. O'Rourke advised Mr. Wells that this Board sits in a quasi-judicial capacity and its decisions are based on evidence in front of the record. Mr. Wells then stated that if the Board prefers, it can ignore his testimony as he did not agree to being cross-examined by Mr. Doster.

Mr. O'Rourke stated that he would ask Mr. Doster to ask whatever questions he may wish and that Mr. Wells should answer as he wishes.

During questioning by Mr. Doster, Mr. Wells stated that he was employed by the City of Berkeley, California as a Senior Engineer, Assistant City Engineer and Deputy Director of Public Works over a time span of 20 years. He was employed as Director of Public Works by the City of Webster Groves for 20 years. In these positions, he had some code enforcement responsibilities on some properties.

Following are questions from Mr. Doster (*noted in italics)* followed by Mr. Wells' response:

If you had a situation where two people violated the same provisional code, and you were responsible for enforcing it, would you enforce against one and not the other? No matter what capacity I was in, if we allowed somebody to do something knowingly, we would not have gone back at them. If somebody had done something and somebody else said they wanted to do the same thing just because somebody else did – no, no if we didn't know about the first guy.

What if you knew about a violation committed by two people? It would depend upon the seriousness of the violation. There have been cases where I have gone back and made that person restore that property to the most original condition possible.

What I'm asking you is to assume that the violation is the same code provision violated with the same seriousness. I've answered the question – that's it - as far as I'm going to. My response is the same.

So you would or wouldn't enforce it? I've answered the question.

Mr. O'Rourke stated that he is hearing an objection that the question has been asked and answered. He then stated that he is overruling the objection and asked Mr. Wells to answer the question. Mr. Doster then repeated the question.

I want you to assume that you had two people, each of whom violated the same provision of the code, each of whom committed a violation that was the same degree of severity, assume that you knew about it – would you enforce it against one and not the other? Or would you enforce it against both? I knew about it before the fact or after the fact?

You know about the violation now. Okay, after the violation occurred.

Assume it's a continuing violation. As a continued violation, I would enforce the ordinance against both of them.

The Board was then asked if they had any questions for Mr. Wells.

Mr. Kravetz told Mr. Wells that he is "the most hostile witness, or person" he has ever seen come before this Board in 15 years. He stated that everyone present is here for one purpose: "To maintain the integrity of the City of Chesterfield."

Mr. Wells apologized to the Board if that was the impression he gave. In the past, he has never been subjected to a cross-examination by another attorney when before Boards of Adjustment, Planning Commissions, or Public Work Commissions and he again apologized.

Ms. Nassif referred to Mr. Wells' comment that he had previously called the Planning Department when he noticed trees being removed and asked Mr. Wells if the Department took action by inspecting the site and stopping the activity. Mr. Wells said this was correct.

Mrs. Marti Lutter was sworn in by the Court Reporter and it was noted that her husband had previously submitted a letter to the City opposing the variance request, which has been included in the meeting packet.

Mrs. Marti Lutter, 17637 Bridgeway Circle Drive, Chesterfield, MO stated that she and her husband have lived in the Wildhorse Subdivision since it was first developed – they are at Lot 8. She noted the following:

- The area between the two subdivisions is a habitat for wildlife and is "part of the beauty of living in this community."
- The buffer was put there for a reason and she feels that if the City allows one to have a variance from it, even though others have done it, a precedent shouldn't be set for having it done again.
- She asked the Board to consider the beauty of the area and not to destroy it.

REBUTTAL

Chair Ainsworth stated that the Petitioner is granted a rebuttal to those speakers in opposition.

Mr. Doster stated that for the record he would like to say that whatever action is taken is not precedential – it does not control anything else; it only controls this case. He thinks the facts of this case are unique in that the Applicants did not have any notice, including anything on their title.

Mr. Doster went on to say that there is the matter of many violations in the neighborhood and he believes they are in the nature of continuing violations because if you disturb the non-disturbance zone, and the condition of the disturbance continues, then it is a continuing violation. Nothing has been done to anybody – even on the Jurkiewicz's property, the previous owner cleared out a lot of foliage and growth in the alleged non-disturbance area.

Mr. Doster stated that after hearing the testimony, it concerns him that there is "selected enforcement". His client has owned his property for ten years and submitted an application to put in a batting cage but was told this wasn't permitted because it's in the

non-disturbance zone. While at the same time, there are other property owners along the same stretch who have disturbed the site and nothing is being done to them.

He feels there is a situation of "selected enforcement" and does not think this is right under the law and is not fair.

If the Board is inclined to grant the appeal, he felt the Board could impose a condition saying that no trees could be removed other than those trees that are necessary to construct the batting cage. His clients are not interested in disturbing the larger trees to the extent that they can avoid it.

Mr. O'Rourke stated that the time for public speaking is closed and acknowledged that two members of the audience were raising their hands in order to make further comments. He noted that they were both previous Speakers but that there is no process for a rebuttal from a witness who has already given testimony.

CONCLUSION

William Morris made a motion to approve the variance to allow construction of a structure within an "undisturbed area" on a 24,187 square foot tract of land zoned R-1 PEU. The motion was seconded by Melissa Heberle.

Discussion

Mr. Kravetz stated that he appreciates that the Petitioners have "done the right thing." He noted, however, that they had no alternative because in order to get a building permit for a structure of that magnitude, they had to come to the Planning Division.

Mr. Kravetz went on to say that he does not believe this situation is "selected enforcement." The code is being enforced because they came to the City for a building permit – they were not singled out. He appreciates the passion of those who have spoken – both for and against the variance.

Mr. Kravetz referred to comments made that the Petitioner is paying taxes but noted that everyone pays taxes on the boundary lines of their property – whether there is a buffer or no buffer.

Upon roll call, the vote to approve the variance request was as follows:

Marilyn Ainsworth	**No**
Melissa Heberle	**No**
Leon Kravetz	**No**
Richard Morris	**No**
Katherine Hipp	**No**

The motion failed by a vote of 5 to 0 and the application was denied.

Mr. O'Rourke thanked everyone in attendance for their participation and involvement in the process.

Chair Ainsworth then recognized the presence of Mayor Geiger and Councilmember Fults.

V. Election of Officers

A. Chair
B. Vice Chair

Chair Ainsworth asked for nominations for the Chair of the Board of Adjustment. Leon Kravetz nominated Marilyn Ainsworth. The motion was seconded by William Morris. Upon roll call, the vote was as follows:

Melissa Heberle	**Yes**
Leon Kravetz	**Yes**
Richard Morris	**Yes**
Katherine Hipp	**Yes**
Marilyn Ainsworth	**Yes**

The motion passed by a vote of 5-0.

Marilyn Ainsworth accepted the position as Chair of the Board of Adjustment.

Chair Ainsworth asked for nominations for Vice-Chair of the Board of Adjustment. Ms. Ainsworth nominated Leon Kravetz. The nomination was seconded by Melissa Heberle. Upon roll call, the vote was as follows:

Marilyn Ainsworth	**Yes**
Melissa Heberle	**Yes**
Leon Kravetz	**Yes**
Richard Morris	**Yes**
Katherine Hipp	**Yes**

The motion passed by a vote of 5-0.

Leon Kravetz accepted the position as Vice-Chair of the Board of Adjustment.

VI. Adjournment

The meeting adjourned at 8:15 p.m.