

**DELAWARE-MUNCIE METROPOLITAN BOARD OF ZONING APPEALS  
JUNE 2018 REGULAR MONTHLY MEETING  
MINUTES**

The Delaware-Muncie Metropolitan Board of Zoning Appeals (BZA) held its regular monthly meeting on Thursday June 28, 2018 at 6:30 P.M., in the Commissioners' Court Room of the Delaware County Building, Muncie, Indiana. Chairman James Fowler called the meeting to order.

**PLEDGE OF ALLEGIANCE:**

**INTRODUCTION/CONFIRMATION OF MEMBERS:**

Ms. Moody introduced Zane Bishop who was appointed by the Mayor and will serve out the remainder of Mr. O'Dell's term.

Ms. Moody read the Oath of Office and Mr. Bishop responded in agreement with "I will".

**ROLL CALL:**

Ms. Moody called roll and the following members were present: Mr. Bishop, Ms. Carey, Mr. Fowler, Ms. Kennison, Ms. Mathewson, Mr. Watson, and Ms. Zimmerman. Absent: none. Also present: Ms. Quirk, attorney for the Board.

**MINUTES:**

Mr. Watson made a motion to approve the May 31, 2018 regular monthly meeting minutes. Ms. Carey seconded the motion. Voting in favor: Ms. Carey, Mr. Fowler, Ms. Kennison, Ms. Mathewson, Mr. Watson, and Ms. Zimmerman. Voting against: none. Abstaining: Mr. Bishop. Motion carried, May 31, 2018 minutes approved.

Mr. Fowler discussed the Rules of Conduct for hearings.

**OLD BUSINESS:**

**BZA 04-18      Jurisdiction: Board of Zoning Appeals**

Special Use      Being a continuance of a public hearing on the matter of an application filed by **Jack Welch**, 8600 East Windsor Road, Selma, Indiana, requesting a special use and variance of use from the terms of the Delaware County Comprehensive Zoning Ordinance to allow a major roadside stand consisting of a new building, with a wall sign, to sell wine produced from grapes both grown and not grown on the property and wine related products, and to allow indoor/outdoor events which may involve food prepared by off-site caterers on premises located at 8600 East Windsor Road, Liberty Township, Delaware County, Indiana, as more accurately described in the application.

Jack Welch, 8600 E. Windsor Rd., Selma Indiana, appeared. He stated that he wanted to address a few of the comments from the previous meeting concerning traffic flow and privacy

of his neighbors. He stated traffic counts from 2008 to now actually show a decline in traffic for that area. He also stated that to address the privacy concerns he had planted some trees along the property line to the west to block the view for some of the neighbors.

Mr. Fowler asked if he had any conversations since the last meeting with the neighbors.

Mr. Welch stated that once he planted the trees the neighbor put up a fence.

Mr. Fowler asked what kind of music there would be and if it would be using speakers for sound.

Mr. Welch stated it would be acoustic music only, mostly inside with no amplification.

Mr. Fowler asked how late they were planning to run things.

Mr. Welch stated until 11:00 P.M.

Ms. Moody stated in the application he indicated there would be a maximum of 50 people.

Mr. Welch stated that the capacity of the building was 50 people. He stated they have 16 parking spaces but have room to add more if needed.

Mr. Fowler asked if he would be getting his servers license.

Mr. Welch stated yes. He stated this was a beautiful area and he hoped to make it a destination site.

Ms. Kennison stated she had concerns about the 16 parking spaces being enough for 40-50 people.

Mr. Welch stated that was just the current design but that there was room for twice that many spaces.

Ms. Carey asked if they could immediately accommodate more parking.

Mr. Welch stated yes, they have a gravel parking lot and there would be plenty of room.

Diane Harris, 8440 E. Windsor Rd., Selma, Indiana, appeared in opposition. She stated her property is to the west of Mr. Welch. She stated Mr. Welch talked to her about putting up a fence, but she stated she would rather have trees. She stated Mr. Welch put in 13 small trees that would take many years to mature and provide any privacy. She stated he put the trees on his property, not the property line. She stated she decided to have peace she would pay to have a fence along her entire property. She stated this blocks some, but she can still see the driveway and all of the grapes. She stated his parking was not far from her property and when he adds more parking that would be even closer to her property. She stated this was basically a bar. She stated the extra water would create more of a problem in this area. She stated this was a residential area and 5 acres was needed to be a farm. She stated this was not a farm, it

was a bar and she does not want this in her neighborhood. She stated she was told this was already decided and she hopes the Board decides to vote no tonight.

Claire Davis, 7301 E. Gay View Lane, Selma, Indiana, appeared. He stated there was enough liquor being sold at the reservoir and there was no need for more. He stated the runoff water in recent rains would just be increased by parking. He stated there were no turn lanes and this would make traffic even worse in the area. He stated the applicant has harassed the neighbors and has stated the decision had already been made.

Ms. Carey stated this was a strong allegation to say he had harassed the neighbors.

Mr. Davis stated Mr. Welch was visiting Ms. Harris's husband looking at some fallen trees due to the flooding and Mr. Welch came out discussing how they shouldn't have been taken down.

Mr. Fowler asked if this was the only instance Mr. Davis had witnessed.

Mr. Davis stated yes.

Mr. Watson stated the Board has not made a decision on this request yet.

Mr. Fowler stated he would have to have a retention pond so if anything, this may help the water issues in the area.

Mr. Davis asked about a turn in lane for traffic.

Mr. Fowler stated he would have to obtain a driveway permit.

Mr. Davis stated if there were many cars waiting to turn in, traffic would be backed up on the road.

Mr. Fowler stated the County Engineer would have to analyze the area to see if improvements need to be made.

Mr. Davis asked who would pay for those improvements.

Mr. Fowler stated that would be the applicants' responsibility and up to the County Engineer as to what if any improvements are needed.

David Field, 8750 E. Windsor Rd., Selma, Indiana appeared. He stated he does not understand if a zone has been set why the Board would reverse that considering none of the neighbors are in favor. He stated this was a change that would only benefit the applicant. He stated the music can already be heard 2 houses down and this would be more of a problem.

Sterl Huber Jr., 8910 E. Windsor Rd., Selma, Indiana appeared. He stated he had lived there for fifty years. He stated he was concerned about the septic and retention plans for the property.

Mr. Fowler stated that would need to be approved by the County Engineer.

Mr. Huber Jr. asked if Mr. Welch needed those approvals before or after the Board made its decision.

Mr. Fowler stated that if approved, he would need to obtain all permits.

Bill Walters, Delaware County Economic Development, stated he had been working with Mr. Welch and he believes it to be a good business for the county. He stated it would bring people to the area for weddings and meetings and would employ Delaware County residents and he hopes the Board supports the request.

Mr. Davis stated now that he hears weddings and other events and questions how 16 parking spaces will be enough. He stated that most weddings have more than 50 people and that would increase the noise. He stated that this was not safe for the kids and other events in this area.

Mr. Fowler stated he would be held to the 50 person maximum and with the condition that all permits would need to be obtained.

Mr. Watson stated since the late night music was a concern can that be adjusted.

Mr. Fowler stated the Board can place a time limit as a condition.

Ms. Moody stated the Board can also specify that it is acoustic music only.

Mr. Watson made a motion to approve BZA 04-18, the appeal of Jack Welch, with the hardship as stated in the application with the conditions: 1) That the applicant acquire County Engineering approvals for driveway and drainage permits along with all other necessary permits; 2) That music be limited to acoustic only; 3) That the music shall end by 10:00 P.M. and; 4) That the maximum attendance at any event shall be (50) people. Ms. Carey seconded the motion. Voting in favor: Mr. Bishop, Ms. Carey, Mr. Fowler, Ms. Mathewson, and Mr. Watson. Voting against: Ms. Kennsion and Ms. Zimmerman. Motion carried, BZA 04-18 approved.

## **NEW BUSINESS:**

### **BZA 14-18    Jurisdiction: Board of Zoning Appeals**

Being a public hearing on the matter of an application filed by **Meijer Stores Limited Partnership and Clearwater Muncie, LLC**, 2929 Walker Avenue North West, Grand Rapids, Michigan, requesting variances from the terms of the City of Muncie Comprehensive Zoning Ordinance to allow an increased front setback on Nebo Road, decreased rear setback and decreased buffering and landscape plantings, all for a new car wash to be located on a lot to be platted on premises located at 6260 West McGalliard Road, on the east side of Nebo Road approximately 650' north of the intersection with McGalliard Road, Muncie, Indiana, as more accurately described in the application.

Jim Malcolm, 2821 W. 600 S, Claypool, Indiana, appeared. He stated he was representing Meijer and Clearwater Carwash. He stated Clearwater Carwash would be purchasing a lot from Meijer that would be platted in the near future. He stated access would be brought in on the south side as an entrance only to begin the carwash and upon exiting the carwash, customers would turn right and head to the vacuum area or to the north entrance and exit area. He stated that they need just a few variances and would submit final plans for plantings soon. He stated the requests were largely because for safety, a carwash usually runs in a counterclockwise fashion. He stated along Nebo Road, Meijer already has greenspace that the carwash would benefit from.

Mr. Fowler asked if the south drive would be the only entrance into the carwash.

Mr. Malcolm stated that the north drive could be used.

Mr. Fowler asked why the north drive couldn't be the only entrance.

Mr. Malcolm stated they would not stop people from using the north drive, but once they get used to the flow of the carwash they would start to use the south drive as the entrance and they have arrows to direct the traffic.

Mr. Fowler stated those arrows seemed very small.

Mr. Malcolm stated as people learn how to go through, they will pick the entrance most comfortable to them. He stated that they are not a destination business and that it would predominately be people shopping at Meijer and decided to get the car washed.

Mr. Fowler stated he would not want to see any traffic concerns along Nebo which was already heavily traveled in that area.

Mr. Malcolm stated they had tried to remove as much exiting traffic from the south access road.

Mr. Fowler asked if they had done a traffic count for the area.

Mr. Malcolm stated no.

Ms. Kennsion stated that she does not view a car wash as an impulse but more of a planned visit.

Mr. Malcolm asked if she specifically goes out to get the car washed.

Ms. Kennsion stated yes.

Mr. Bishop asked how going through a carwash in counterclockwise manner was safer since you would be looking at the window frame of the car and have a blindspot.

Mr. Malcolm stated it has to do with the visibility when the driver turns left and having more control and that all cars are different.

Mr. Bishop asked why the carwash was being placed along Nebo Road and not McGalliard Road.

Mr. Malcolm stated they had many reasons to not build along McGalliard.

Mr. Watson stated it would block visibility of the store.

Mr. Malcolm stated it had nothing to do with visibility and had more to do with potential future development.

Travis Jones, 1207 Maryland Ave., Winona Lake, Indiana appeared. He stated he was the Director of Operations for Clearwater Carwash. He stated that people approach a carwash as both an impulse and a destination. He stated that most carwash locations are left turns to work more easily. He stated there would be 4 entry lanes so back up is not really a concern and they would move thru very quickly.

Ms. Zimmerman asked why another carwash when we seem to have many already.

Mr. Jones stated this area was underserved.

Mr. Watson asked how many cars per day they plan to wash.

Mr. Jones stated a conservative number would be 100,000 in one year's time.

No one appeared in opposition

Ms. Moody read a statement from Dr. Brown, Managing Partner of Wildcat Investment Property, who indicates he had no problem with the request.

Mr. Watson made a motion to approve BZA 14-18, the appeal of Meijer Stores Limited Partnership and Clearwater Muncie, LLC, with the hardship as stated in the application. Voting in Favor: Mr. Fowler, Ms. Kennison, Ms. Mathewson, Mr. Watson, and Ms. Zimmerman. Voting against: Ms. Carey and Mr. Bishop. Motion carried, BZA 14-18 approved.

Ms. Quirk stated that the next request was an appeal from the decision of the County Building Commissioner/Zoning Administrator for a building permit issued. She stated the County Building Commissioner/Zoning Administrator has the role of making sure all of the legal requirements for all permits are met and can then issue the permit. The County Building Commissioner/Zoning Administrator is supervised by the Plan Commission's Executive Director. She stated this was an appeal of a decision made by the Building Commissioner which means for tonight the issue to consider was whether or not the County Building Commissioner improperly issued a building permit to Rhett Light. She stated that all other concerns or questions need to be addressed to the Plan Commission. She stated once again this was the single issue of the building permit.

**BZA 15-18 Jurisdiction: Board of Zoning Appeals**

Being a public hearing on the matter of an application filed by **Kevin and Kathy Chambers, Stephen and Elizabeth Driscoll and Perry and Tonya Evans**, 3601 West County Road 1270 North, Muncie, Indiana, 20200 North

County Road 100 West, Muncie, Indiana and 2250 West County Road 1270 North, Muncie, Indiana, requesting an appeal from the decision of the Administrative Zoning Officer under the terms of the Delaware County Comprehensive Zoning Ordinance to appeal the issuance of a building permit for 4 new buildings for a confined feeding operation on premises located on the north side of the road at 2601 West County Road 1270 North, Union Township, Delaware County, Indiana, as more accurately described in the application.

Ms. Quirk stated for the record that Mr. Minnick, the current County Building Commissioner, had sent a letter explaining his process.

Kim Ferraro, Senior Staff Attorney for The Hoosier Environmental Council, appeared representing the applicants in this case. She stated she had prepared some notebooks for the Board that would be referenced during the meeting which she entered for the record. She stated she represents Mr. and Ms. Driscoll who live less than a mile from the proposed CAFO site, Mr. and Ms. Chambers who live less than ½ a mile, and Mr. and Ms. Evans who live adjacent to the site. She stated this appeal is brought to the Board under Article XXXII, Section 5.B.1 of the Ordinance as well as Indiana Code 36-7-4-918.1 which requires the BZA to hear and determine appeals from any decision made by an Administrative Officer or staff member under the Zoning Ordinance. She stated the building permit in this case approves a very unique development that is somehow being considered part of farming. She stated they have 2 arguments, the first being that the Farming Zone does not contemplate this type of industrial use as a CAFO. She stated the second argument was that the building permit was issued as a result of arbitrary decision making and under Indiana Law zoning decisions are to be made for the purposes of public health, safety, and welfare and this was not a product of that. She stated first, the building permit approved a CAFO with 10,560 ween to finish hogs, meaning the piglets are transferred to this facility where they are raised to market weight and then sold. She stated the hogs would be in one of 4 production buildings each with slatted floors above large waste pits that will collect an estimated 4.2 million gallons of urine and feces and wastewater from cleaning. She stated this would then go untreated to be spread on surrounding land parcels which have 45 people living within a ½ mile distance and 200 people within in a mile radius of this facility. She stated before getting into the arguments, she would like to ask the Board if there were concerns about her clients standing to bring forward this appeal. She stated she would present evidence, for example: in Indiana Court of Appeals, there was a challenge to residents standing who lived within a ½ mile of a proposed 8 thousand CAFO and the Court held that they did have standings based on threats to their property rights of use and enjoyment and reduced property value from the noxious odors that would be coming from a CAFO of that size. She stated in some zoning cases you must be a certain distance from a proposed development, but in a situation where you have an industrial facility with an industrial impact there is not a set distance, you look at the nature of the harm.

Ms. Quirk stated the issue of standing was less imperative because there are 3 sets of residents being represented as opposed to one person. She stated we need to keep to the issue of the building permit. She stated the BZA members had received the memos Ms. Ferraro had sent out as well as the information handed out this evening which will be part of the record.

Ms. Ferraro asked the Board members to look at Exhibit E in the book handed out this evening. She stated this was a report by the USDA that discusses the transformation of US livestock agriculture.

Ms. Moody stated that since there were not enough books for all of the Board members, we needed to take a moment to share so everyone could look at the items.

Ms. Ferraro stated that the report acknowledges strong financial pressures that have led to the transformation of livestock farms to industrial farms such as CAFOs leading to air and water pollutions. She stated this is different from traditional farming which were not typically associated with those types of concerns. She stated on page 6, the report talks about the increase in hog production since the 1980's and continues to rise. She stated that in 1992, most hogs came from independent farrow to finish operations that handle all stages from raising to market and negotiate the price. She stated that today most hogs come from operations that specialize in single stages, such as wean to finish CAFOs. She stated about 40 major integrators now control production of about 75% of the 100 million hogs marketed annually in the U.S. She stated that the integrator owns and supplies the pigs and then pays the CAFO owner a flat fee for the hogs. She stated the grower owns the land, the buildings, and pays the cost of building and maintaining those buildings even though the integrator owns the hogs, the grower is responsible for dealing with the waste produced by those hogs. She stated under this system, growers and integrators have very little financial incentive to mitigate the harmful effects of livestock industrialization. She stated that the integrators contract their liability to the CAFO owner and the CAFO owner does not get paid extra for implementing good practices because they are being paid a flat rate and only make more money by raising more hogs, which will produce more waste. She stated this is not the traditional farm with livestock out in the pasture but a very industrial facility that is a large production system. She stated that Exhibit F was a report from the National Association of Boards of Health which also distinguishes CAFO's separate from traditional farms. She stated this report talks about the environmental and public health impacts of CAFO's. She stated pages 2-5 of the report discuss the quantities of biological waste. She stated that human waste must go through a sewage treatment plant and that was not the case for CAFO's, which on average produce 20 times more waste than the human population. She stated page 5-7 of that report, it talked about the variety of dangerous air pollutants produced by CAFO's including ammonia, hydrogen sulfide, methane and particulate matter that can cause serious health impacts to those living nearby. She stated that page 7-8, it was discussed how CAFO's produce extremely noxious odors from the mixture of compounds that are much worse than traditional farms. She stated unlike traditional farms, smells from CAFO's can greatly diminish quality of life, reduce property values, and alter daily activities for people. She stated this distinguishes traditional farms from CAFO's and because of their industrial scale and impact, CAFO's are regulated by the US EPA and the State whereas traditional farms are not. She stated Exhibit G was the Federal CAFO Rule, the definition of a CAFO. She stated Delaware County has not updated its Zoning Ordinance, specifically the Farm Zone, since 1993 and the Zoning Ordinance was enacted in 1973. She stated that in 1993 the Ordinance was amended to add the Farming Zone, Exhibit H, Article 12, which lists permitted uses and a CAFO is not one of those uses. She stated in the back of the book under Legal Authority, a Court of Appeals case that held when a zoning ordinance permits specified uses in specific zoning districts, all other uses in those districts are forbidden absent a special use permit or variance. She stated that a listing of certain things means that a statute only allows those things and those not listed are not permitted which was the case in the Farming Zone.



She stated in that particular case (T .W. Thom Construction) which was very similar to this appeal, the Appellate Court held that a City Ordinance which did not permit Mobile Home Parks, stated they are not just another residential use, but a distinct category of use unlike any other which is the same thing we have here. She stated CAFO's are not just a farming use they are an industrial, agricultural use that is unlike a traditional farm. She stated the definition in Exhibit G describes them not as farms but as facilities and operations with huge numbers of animals that have production, animal confinement, and waste management areas, structures and systems. She stated that the application Rhett Light submitted to IDEM, Exhibit I, was over 300 pages and that a regular farm does not have to submit an application like that. She stated that nothing in the Farm Zone indicates that the drafters in 1993 contemplated an industrial scale polluting CAFO to be equal to a traditional farm. She stated the only requirements in the zoning district was that those specifically permitted farm uses occur on a tract of land with a minimum of 5 acres and at least 200 feet from non-farm structures. She stated that a 200 foot setback on a traditional farm it would not be okay for a 10 thousand hog facility like this one. She stated the 200 foot setback violates the IDEM setback of 400 feet. She stated that the County Commissioners and the County Attorney admitted that CAFO's were not recognized under the Farming Zone. She stated on March 19, 2018 Mr. King stated no one brought it to the Commissioners attention that there were no CAFO regulations in our county. She stated that attorney John Brooke stated that a CAFO was not considered an agricultural use under other county ordinances that he had looked at. She stated that Exhibit J, a news article from March 26, 2018 by the Ball State Daily News where Mr. Brooke was quoted as saying "up to this point the county did not have regulations concerning CAFO's other than to place them in areas zoned agricultural". She stated that while Mr. Brooke argues that Indiana's Right to Farm Act has a definition of an agricultural operation and that means that the ordinance recognizes CAFO's, the purpose of the Right to Farm Act was to limit the circumstance for which nuisance law suits can be brought against agricultural operations. She stated that placing a limit on someone's common law rights to sue has nothing to do with how a county designates a specific industrial use. She stated that Mr. Brooke raised the fact that there were existing CAFO's in Delaware County already and somehow that means they are permitted in the Farm Zone. She stated that if you look at Indiana Code 36-7-4-616 that deals with agricultural nonconforming uses specifically defined as the agricultural use of land that is not permitted under the most recent Comp Plan or Zoning Ordinance. She stated that was the situation here with the existing CAFO's, they are nonconforming uses so any updates to the ordinance would need to grandfather them. She stated that does not prevent the county from prohibiting a current conforming use of land like Mr. Light's farm ground for growing crops from turning into a nonconforming use. She stated that would be a violation of the ordinance which was why the building permit was issued illegally. She stated that even if the Farming Zone allows CAFO's the building permit should not have been issued because it is the product of arbitrary zoning decisions. She stated that a timeline of events was in the front of the book passed around earlier. She stated that on December 12, 2017 Mr. Light submitted his application for CAFO approval to IDEM (Exhibit I) at which point notice was sent to the County Commissioners and 45 households within 1/2 a mile of the site which sparked the community opposition. She stated at the next 2 Commissioners meetings on February 5, 2018 and February 20, 2018, the Commissioners imposed a temporary moratorium on building permits for new CAFO's (Exhibit K). She stated that on March 2, 2018, Mr. Light submitted his building permit application to the County (Exhibit L) and on March 7, 2018 the Building and Zoning Administrator, Mr. Steve Minnick, advised Mr. Light that a temporary moratorium had been placed on permits (Exhibit M), so at the time of his application, there was a moratorium in place. She stated that on

March 8, 2018 a special Commissioners meeting was held were people showed up to voice their concerns about the public health, environmental and property value impacts of a CAFO. She stated that on March 19, 2018 the Commissioners voted to continue the moratorium on building permits to include Mr. Light in order to allow for the development of a new ordinance for CAFO's. She stated that at that meeting Mr. King stated it was not brought to their attention that there were no CAFO regulations in the county, John Brooke stated that a CAFO is not considered an agricultural use in other county ordinances, Ms. Moody and Mr. Brooke advised that IDEM had not issued approval and that Mr. Light still needed to obtain all the proper permits including building, driveway, erosion control, and drainage. She stated that the county placed the moratorium so that they could take a look at the impacts this development would have. She stated that on March 22, 2018, IDEM issued the CFO approval, and on April 2, 2018 at the Commissioners meeting they voted to release the building permit to Rhett Light due to the threat of litigation from Mr. Light's counsel. She stated that Mr. Brooke advised that Mr. Light received his permit from IDEM, and his attorneys had threatened legal action. She stated that Commissioner Henry stated they did not want to get into legal action because he had his permit from IDEM he should receive his building permit. She stated that she sent a letter to Mr. Brooke on April 10, 2018 (Exhibit N) advising him of the legal authority that the IDEM permit (Exhibit I) does not give Mr. Light a vested right to build a CAFO and that the Commissioners are within their authority to continue to hold the building permit application. She stated that at the Commissioners meeting on April 16, 2018, Mr. Brooke stated that he had a vested right because he had applied for a building permit prior to IDEM issuance citing Indiana Code 36-7-4-1109. She stated that she responded to that providing additional authority conclusively that that statute does not give Mr. Light a vested right just because he had applied for the building permit only that whatever law was in place at the time of applying for a permit is what governs the permitting process. She stated that Mr. Light applied when a moratorium was in place so just on the language of that statute, the moratorium should have applied. She stated it also states that the application must be complete. She stated that the moratorium was lifted due to the threat of litigation not out of the concern of public health and welfare. She stated that the 2 cases in the materials tonight (see Legal Authority) state that the mere filing of a building permit does not itself create a vested right that cannot be overcome by change in zoning law, and also whether a developer has a possessory interest in property to be developed is a significant factor in determining whether vested rights exist. She stated that Mr. Light does not own the property that he wants to build a CAFO on, Mr. Gailon Light owns the property and they both live in Hartford City. She stated that the cases confirm that an application must be complete before there was a possibility of vesting. She stated all of these points were made clear to Mr. Brooke, and to the Commissioners looking at the timeline, they purposefully delayed reenacting a moratorium that was proposed shortly after IDEM issued its rule 5 permit on May 4, 2018 and then on May 7, 2018 the driveway permit was issued. She stated at the Commissioners meeting May 7, 2018, Mr. Brooke stated that the moratorium would apply to Rhett Light because he did not have all of his permits yet. She stated shortly after the County issued the drainage permit and the building permit. She stated on May 21, 2018 the Commissioners voted to approve the moratorium and Mr. Brooke stated it would not include Mr. Light because he had all of his permits. She stated that there was a lot of back and forth done without the concerns of the community and asks that the building permit be revoked.

Todd Janzen, attorney at Janzen Agricultural Law, LLC, 8425 Keystone Crossing, Indianapolis, Indiana, appeared to represent Mr. Light. He stated for the record, they are providing some information that will be referenced tonight. He stated he wanted to begin by introducing Mr.

Light who was here this evening. He stated please keep in mind we are talking about this man and his family and the decisions they are making, not a large corporation. He stated the engineer was also joining them at the meeting to answer any questions. He stated he had 3 things to really discuss this evening: the BZA's authority to hear this appeal and if it was appropriate; how the Building Commissioner did everything correct, which as Ms. Quirk stated was the issue; and finally the zoning issues. He stated that the big pictures items to refute would be counsel for the applicants talking about the evils of CAFO's and how they are not mentioned in the ordinance but that is a little tricky. He stated CAFO was a federal term used by the EPA so in Indiana we regulate facilities like Mr. Light's under our CFO, or Confined Feeding Operations regulations, not the CAFO regulations. He stated that by saying CAFO's aren't mentioned is misleading because what we talk about in Indiana is CFO's. He stated CAFO's are a very broad category and we are talking about a single hog farm not just any kind of CAFO. He stated that he had provided a packet tonight which had information including a memorandum and a motion to dismiss that was sent earlier to Ms. Quirk and Ms. Moody to deny this request because from a procedural standpoint, it was not appropriate to bring the approval of a building permit to the BZA. He stated if you look at Tab C in the packet you look at where the authority of the BZA comes from and it is really three levels. He stated first was what was the state authorizing statute to Delaware County. He stated this was an appeal under Section 918.1 (36-7-4-918.1) which says they can appeal any order from an administrative official, or staff member under the Zoning Ordinance. He stated that was very important because what they are actually appealing was the building permit which was issued under the Building Code not zoning permission such as a special use or variance. He stated they are asking the board to decide whether or not something complies with Building Code. He stated the Delaware County Zoning Ordinance in Sub Section 1 states that appeals from the review of an order, requirements or decision of the Administrative Zoning Officer were the types of appeals for the BZA. He stated that it was a little difficult in Delaware County because the Building Commissioner and Zoning Administrator was the same person, Mr. Minnick. He stated it was not important what roles Mr. Minnick has but what role was he playing when he issued the building permit and that was under the Building Ordinance to allow this to go forward. He stated that the Board has three different duties and responsibilities (Tab C); to hear and determine appeals from review of any order or decision made by the City or County Zoning Administrator; for exceptions; and for variances. He stated that overall they do not think is a matter for the BZA so they ask for the matter to be dismissed which has been taken under advisement and appreciate Ms. Quirk stated at the beginning of the meeting to limit this to the question of did the Building Commissioner follow the law when issue the permit. He stated that there were a lot of complaints about things the County Commissioners and the County Attorney may have said or done. He stated that none of what they say in an open forum matters only what is written down in the Building Code and the Zoning Ordinance. He stated that the most important question tonight was did Mr. Minnick follow the laws when he issued the building permit to Mr. Light. He stated that he did not hear any complaints about that which was why we are all here tonight. He stated there was a lot of work that went into getting the building permit including an application, fees to be paid, a site plan to be provided, IDEM approval, a, building plan, Rule 5 plan, a driveway and drainage permit and there was no dispute that those steps were done correctly and provided to Mr. Minnick so we could really end the discussion there. He stated that the applicants had objections to the way manure is handled and the way the building is constructed under environmental rules and those concerns are being taken care of in another forum by challenging the IDEM approval. He stated looking at the packets you would see that Tab D was the Building Application form; Tab E was the Building Permit which

was issued under the Building Ordinance not the Zoning Ordinance; Tab G the letter from Mr. Minnick explaining the procedure he followed to issue the permit and; Tab G the Plan Commission Case Analysis. He stated they are mistaken that this was squeezed in between moratoriums. He stated that the fact was there was no moratorium on CFO's at the time the building permit was issued. He stated that the reason for that was a process to impose a moratorium must be taken. He stated that Indiana Code 37-7-4-602 specifically explains the procedure for imposing a moratorium which was in general like any change to the Ordinance. He stated that proposed changes would go to the Plan Commission then to the Commissioners and after adoption by the Commissioners, it would be published in order to become official. He stated that if that happens then yes, there would be a moratorium but that did not happen here until May 21, 2018. He stated that was the date the Commissioners adopted a moratorium but he was not sure when it was published. He stated that it would still be permissible because the Building Permit was issued on May 17, 2018 which was a few days before that. He stated that it makes sense that Indiana Law would protect a building permit like this. He stated that the Commissioners could easily vote to change things or put a moratorium on something it would be very easy for them, to control everything and decide what gets approved or not. He stated that in Indiana, the law was very clear that if you have all of your application in and have the permit issued that was the law that would apply even if the Zoning Ordinance changes the next day. He stated if that was not the case, there would always be moving target because the Zoning Ordinance could change on any day. He stated that Indiana Code 36-7-4-1109 which counsel ignores in this case but gives case law instead that does not involve zoning and before this statute was enacted. He stated that this was the law and that was what mattered and why the permits stands. He stated that he wanted to talk to why a CFO was a permitted use in Delaware County, if you look at Tab H this was the first page of the Zoning Ordinance on the Farm Zone. He stated that this facility was being built in a Farm Zone, there was no argument to that point and that if you read this page it states that includes the carrying out of an agricultural use or uses as permitted by the Ordinance which goes on to say that includes animal and poultry husbandry. He stated that as you read number 2, it mentions dairies, raising and sales of chickens, hogs, cattle, turkey, other animals; all of which could be CAFO's or CFO's. He stated that number 3 states barns and similar buildings, so it was clear that raising pigs in pig barns is a permitted use under the Delaware County Ordinance. He stated that you could twist things and say that it does not mention CAFO's but why would it mention a national regulatory program put on by the EPA. He stated that maybe in future, it would mention that but at the time the application was applied for and granted that was not the case. He stated that counsel mentions the Right to Farm Act and if you look at Tab G, page 2 there is a statement from the Plan Commission Case Analysis about the 1997 Right to Farm Provisions that were added to the Delaware County Subdivision Ordinance. He stated that we are not talking about the State Law, we are talking about the Subdivision Ordinance and it does mention confined feeding operations so the word was actually mentioned in the Ordinance. He stated that more importantly if you look at the bottom of page 1 in Tab G it mentions that since the adoption of the Delaware County Comprehensive Zoning Ordinance in 1973, confined feeding operations have been considered a permitted use. He stated that it goes on to list a number of farms that are confined feeding operations and have been permitted in Delaware County. He stated that if for some reason Rhett Light was to not get his approval under the same provisions that these other farmers got, it really would be an arbitrary change for no reason because what makes his facility different from the other farmers who in the past received approval. He stated that nothing was different under the Ordinance. He stated that what really needs to be looked at was did Mr. Minnick do his job and get what he needed to

give Mr. Light the Building Permit under the Building Ordinance not the Zoning Ordinance and if he did everything was fine. He stated that CAFO's are not on trial tonight, just the Building Permit.

Mr. Fowler asked if anyone else wanted to speak and stated that it was a little confusing tonight because it was the reverse tonight of how we handle things.

Ms. Ferraro in rebuttal stated that the idea that Mr. Light was not integrated with an outside corporation was wrong because the pigs will come from an integrator somewhere that would be contracting with Mr. Light for him to raise the hogs. She stated that he may own that building but he would be raising them for an outside corporation and producing the hogs on a mass scale. She stated that the idea that this CAFO was not a CAFO does not make sense because in Indiana, under State Law, CFO's included CAFO's. She stated this was a CAFO and that it meets the definition under both Federal and State law. She stated that again raises the argument about Federal regulation to distinguish between that and traditional farms which the Farm Zone contemplates. She stated that she would not agree that a dairy necessarily includes a CAFO, that a dairy can be a traditional dairy with those cows grazing in the grass. She stated that back in 1993 when the Ordinance was enacted that the authors of the Farming Zone contemplated as well. She stated the other point to address was the Mr. Janzen mentioned there was no moratorium in place when the building permit was applied for and that is absolutely not true. She stated that the Commissioners put a temporary moratorium in place in February which was before the building permit application on March 2<sup>nd</sup>. She stated that they did so under their police authority so they did not have to go through the planning process to amend the Ordinance, this was a temporary hold on building permits and it did not require a formal amendment. She stated that the other issue to address was that Mr. Janzen mentioned they were appealing the IDEM permit and that was true. She stated that even if they prevail in the case, IDEM only regulates a very narrow aspect of a CAFO's operation and that is water quality concerns related to nutrients in manure. She stated that IDEM does not regulate pathogens in manure or any way regulates noxious air emissions and odors in manure. She stated that CAFO's and CFO's are in fact exempt from the Federal Clean Air act so even if the appeal was won it would not address one of the major concerns for the people who live nearby. She stated that 36-7-4-1109 that has case law was from March of this year and was not outdated and very clearly stated that a building permit application must be complete before you can even get to the question of vesting. She stated that as the County Attorney mentions numerous times, Mr. Light's application was not complete until right before the second moratorium was enacted so when he applied he had many more steps along the way and that the IDEM permit did not give him any specific right to build a CAFO in Delaware County. She stated that she was not provided the Plan Commissions case analysis even though she submitted a public records request for all communications with the County Commissioners and Plan Commission so she had not had an opportunity to review that information. She stated that all she can go from was that the Right to Farm Act was mentioned as somehow allowing CAFO's in Delaware County even though the Ordinance does not say anything about CAFO's. She stated that the Right to Farm Act even if mentioned somewhere else only pertains to limiting the ability of people to sue agricultural operations for harm and that that has nothing to do with how Delaware County designates an industrial operation like a CAFO.

Ms. Mathewson stated that counsel mentioned a moratorium that was issued in February.

Ms. Ferraro stated yes.

Ms. Mathewson stated that she was confused on whether a moratorium was issued or not because the information that Ms. Ferraro provide had a newspaper article that stated "despite acting on the moratorium".

Ms. Ferraro stated that she should look at Exhibit K.

Ms. Mathewson stated that was the one she was referring to.

Ms. Ferraro stated that the date of that article was March 19 which was after a Commissioners' meeting on that same date. She stated that on that date the Commissioners voted to continue the hold on the building permits that they had enacted back in February. She stated that was what this particular newspaper article was referring to.

Ms. Mathewson said thank you.

Mr. Janzen stated that just to clear up the issue of the moratorium. He stated that there was no moratorium in place on the day that this permit was issued and that even if a moratorium was issued under some police power that he had never heard of, they would also have the police power to lift a moratorium to issue a permit so the whole argument does not make sense. He stated that in order to impose a moratorium, it was considered a zoning amendment because you are effectively taking away a zoning use so you must go through the steps to properly impose a zoning amendment. He stated that was what the statute requires and what the County Commissioners eventually did here in publishing an amendment but that did not happen until after the building permit had been issued. He stated that he disagrees with counsel that the legal case she refers to is right on point with this case. He stated it was the Mainstreet Property Group vs. The Pontones which was not a zoning case but a case about state law that put a moratorium on building health care clinics so it was a State Law not a County Ordinance and not about the specific code 36-7-4-1109 that governs how to amend an ordinance. He stated that even if you do not believe everything he was saying, you need to understand what the question was here and it was not the proper role of the BZA to second guess what the County Commissioners did. He stated just to wrap up, the question was, did Mr. Minnck do his job. He stated that he provided a letter that says he did and it was a very thorough process and the decision to issue the building permit should stand.

Mr. Watson stated Mr. Janzen said this was a CFO not a CAFO.

Mr. Janzen stated yes.

Mr. Watson asked what the definition difference between the two and does it have to do with the number of animals.

Mr. Janzen stated they have different numbers and they do not match up. He stated it would be possible for some things to trigger the CFO numbers but not be what was considered a regulated CAFO.

Mr. Watson asked if he knew those numbers.

Mr. Janzen stated he did not know those numbers right off but could find them. He stated that he knew 600 pigs was a CFO and 2500 was a CAFO.

Mr. Watson asked if this was a large CAFO.

Mr. Janzen stated yes this was a large CAFO.

Mr. Watson stated that he said it was a CFO.

Mr. Watson made a motion to approve BZA 15-18 the appeal of Kevin and Kathy Chambers, Stephen and Elizabeth Driscoll and Perry and Tonya Evans.

Ms. Zimmerman asked if it could be clarified what the Board was voting on.

Mr. Fowler stated he wanted Ms. Moody to do that but he needs a second to the motion.

Ms. Zimmerman seconded the motion.

Ms. Moody stated that this was the reverse of what the Board was used to dealing with and that the motion was to approve the appeal. She stated that if you vote Yes you are voting to void the permit and that if you vote No you are voting to support and sustain the permit.

Mr. Fowler asked if the Board needed any further clarification before the vote.

Voting in favor: Mr. Bishop, Ms. Carey, Ms. Kennsion, Mr. Watson, and Ms. Zimmerman.  
Voting aginst: Mr. Fowler and Ms. Mathewson. Motion carried, BZA 15-18 approved.

**BZA 16-18 Jurisdiction: Board of Zoning Appeals**

Being a public hearing on the matter of an application filed by **Solid Ground, LLC, et al.**, Post Office Box 639, Anderson, Indiana, requesting variances from the terms of the City of Muncie Comprehensive Zoning Ordinance to allow an increased front setback, decreased buffering and landscape planting for a commercial redevelopment of Aldi's and Texas Roadhouse on premises located at 200 West McGalliard Road including the entire block bounded by McGalliard Road, Franklin Street, Berkley Avenue and Walnut Street, Muncie, Indiana, as more accurately described in the application.

Jim Dauss, 227 W. 11th, Anderson, Indiana, appeared. He stated that he represents Solid Ground. He stated that this project started about 2 years ago when Texas Roadhouse was exploring options to replace their existing building and discovered that Aldi was looking to expand. He stated that both projects alone had difficulties so the two decided to work together and do one development that would work for everyone. He stated that this had been a cooperative effort to do a unified development. He stated there were many advantages for doing this including better traffic control on site and onto the site, limiting the number of access points to 3 from 5, and this also solves the issue of how to develop 2 different sites. He stated that because they have approached this as a unified development they had some challenges that they had worked on with the staff. He stated that the corridor standards were written for individual properties and although this site will be divided into 3 separate tracts it will be

developed as one site. He stated that Aldi needed the variances because they would be positioned at the back of the property and that they added some extra buffering in the northwest area around Aldi. He stated that the request for decreased buffering was because if you evaluated each parcel individually, there would be buffer zones down the middle of the property which would have blocked views of Aldi.

Mr. Fowler asked about the tree plantings in the islands appearing to be short.

Mr. Dauss stated the last email he received from staff stated they are short one tree.

Mr. Fowler asked would they add that tree to the plans.

Mr. Dauss stated yes they would be glad to add that tree.

Mr. Fowler stated that the property was unique in its development and would beautify that area.

Mr. Bishop asked why place Aldi to the back of the site instead of fronting McGalliard.

Mr. Dauss stated that was based on their demand and view from the public and the small shops were the ones who needed that the most. He stated that Aldi was the biggest building of the the 3 and that Aldi and Texas Roadhouse were destination sites. He stated that they were also trying to keep the business open during the redevelopment.

Mr. Fowler stated that it would also crowd everything if Aldi were to be moved to the front.

Mr. Bishop asked if there was any planned connection to the Cardinal greenway.

Mr. Dauss stated the Greenway was on the other side of Olive Garden so not really.

Tonya Bennet, 9811 W. CR 500N, Gaston, Indiana, speaking on behalf of her mother Shelia Dalton, appeared. She stated that her mother lives on the corner of Franklin and Berkely and had 3 lots that will be facing the development. She stated that she wants to know what kind of buffering will be in place so as not to affect her house or decrease her property value.

Ms. Moody stated that along Franklin Street, there would be a greenbelt and several trees and shrubs.

Ms. Kennison stated that what was there would only be added to.

Ms. Moody stated yes.

Mr. Watson stated there would be limited visibility of the development through the greenspace.

Ms. Moody stated yes.

Ms. Bennet stated that she just had concerns of the traffic and asked if there would be a hill or something to block her mother's house.



Ms. Moody stated that there was no berm, it would just be the grass, trees and shrubs within the greenspace area.

Ms. Bennet stated that the corner where her mother lives was busy enough and she had concerns of how this would affect her.

Shelia Dalton, 3411 N. Franklin St., Muncie, Indiana, appeared. She stated that at one time there was a fence at Olive Garden but it came down.

Ms. Moody asked if Olive Garden ever replaced the fence.

Ms. Bennet stated no, it was never replaced and the lights shine right into her mother's house and wondered, with a new development how much that would increase the light onto her house.

Ms. Moody stated that she would ask the City Building Commissioner's Office to take a look at having Olive Garden replace their fencing which was a buffering requirement.

Mr. Fowler stated that when Aldi's was put in, they would install the lighting so that it does not shine on residents.

Ms. Moody stated that there was a requirement that all lighting must be down style, shielded and not shed onto surrounding residents.

Mr. Watson made a motion to approve BZA 16-18, the appeal of Solid Ground, LLC, et al., with the hardship as stated in the application. Ms. Kennison seconded the motion. Voting in Favor: Ms. Carey, Mr. Fowler, Ms. Kennison, Ms. Mathewson, Mr. Watson, and Ms. Zimmerman. Voting against: Mr. Bishop. Motion carried, BZA 16-18 approved.

**BZA 18-18 Jurisdiction: Board of Zoning Appeals**

Being a public hearing on the matter of an application filed by **Ivy Tech Community College of Indiana**, 50 West Fall Creek Parkway North Drive, Indianapolis, Indiana, requesting variances from the terms of the City of Muncie Comprehensive Zoning Ordinance to allow no bus-stop shelter, no sustainability feature, and decreased perimeter buffering and landscape planting for a new college building on premises located at 205 West Main Street and property extending south to Jackson Street and west to Franklin Street, Muncie, Indiana, as more accurately described in the application.

J.D. Lux, 310 W. Michigan St., Indianapolis, Indiana, Appeared. He stated that he was joined tonight with the team that had been working on this project including Amanda Wilson, Jennifer Lash, and Cameron Rodman. He stated that this was good news for Muncie because a major investment was being made by the State through Ivy Tech in support of higher education. He stated that if you look at the packet handed out, you would see the downtown view of the Fisher and the StarPress Building. He stated that this would be called the Downtown North Building for Ivy Tech. He stated that where High Street and Jackson Street come together would be the main entrance to the building and they show a rendering of that in the packet. He stated the parking would be mostly in the same location as now and would have more

landscaping. He stated that the total approved in the 2017 budget was 43 million dollars, some to be spent at the Cowan Road location and the Fisher Building with the majority of the money going towards the new Downtown North Building. He stated that one of the requests was to not install a bus stop since the bus station was just across the street. He stated that another request involved the sidewalk along High Street and they will have sidewalk trees not planting strips. He stated that on Franklin Street, there was a property that Ivy Tech did not own. He stated that it was the Scheele building and it would remain along with an area that they had landscaped. He stated that the perimeter buffering along the building was not in compliance and the new building would not be either but it would be an improvement on those setbacks. He stated that they had asked to receive a variance from the sustainability feature but have since worked with staff and found a way to comply.

Mr. Fowler stated that since there was no landscape plan provided he would expect them to continue to work with the staff to make sure they do comply with everything except for the 2 variances.

Mr. Lux stated yes.

No one appeared in opposition.

Mr. Watson made a motion to approve BZA 18-18, the appeal of Ivy Tech Community College of Indiana with the hardship as stated in the application with the understanding that all other landscape requirements, including the sustainability feature, will be met except for those specifically granted a variance. Ms. Zimmerman seconded the motion. Voting in favor: Mr. Bishop, Ms. Carey, Mr. Fowler, Ms. Kennsion, Ms. Mathewson, Mr. Watson, and Ms. Zimmerman. Voting against: none. Motion carried, BZA 18-18 approved.

## **OTHER BUSINESS:**

### **BZA 09-18 Jurisdiction: Board of Zoning Appeals**

Being a request for a rehearing of an application filed by **Bailey's Place, LLC**, 3011 South Whitney Road, Selma, Indiana, based on new evidence supplied by the applicant regarding their request for a variance of use from the terms of the Delaware County Comprehensive Zoning Ordinance to allow an event venue business in an existing building and proposed new structures in a farming zone on premises located at 3011 South Whitney Road, Liberty Township, Delaware County, Indiana, as more accurately described in their request.

Mr. Fowler asked if they sent new letters to surrounding property owners.

Ms. Moody stated that was not a requirement for a request of a second hearing but if the second hearing was granted then yes, notice would be sent.

Mr. Fowler asked if all they were doing tonight was to grant a second hearing.

Ms. Moody stated yes. She stated that if the Board determines, based on new evidence, to allow a second hearing that in no way indicates that the request would be approved.

Kathy Vannice, 325 W. Washington St., Muncie, Indiana, of Ashton Land Surveyor, appeared. She stated she represent the applicants who are seeking a new hearing based on new evidence. She stated that in the new evidence, the owners had contracted Ashton Land Surveyor to provide a site plan including topography and with Pridemark Construction to provide the dimensions of the new buildings. She stated they had also included information from the Assessor to show the age of the existing cabin to be from 1841. She stated the purpose of this use on the property was to help with the preservation of that cabin.

Mr. Fowler stated that when the Board heard this request before the biggest concern that was brought up was drainage. He stated that he was pleased to see a retention pond on these plans and asked where the proposed swale leading away from the road would end up.

Ms. Vannice stated that it would go north towards the Ridge's other property but it does not cross that property line. She stated between the retention pond and the swale they should be stopping all of the water.

Mr. Fowler asked where it would slow release to.

Ms. Vannice stated that to the north there was a grassy area and to the west was a pond on a neighbor's property that they would seek permission from if needed.

Mr. Fowler asked if these calculations were based on long term effects.

Ms. Vannice stated yes.

Mr. Fowler asked if there were 40 parking spaces.

Ms. Vannice stated yes.

Mr. Fowler asked if they planned to expand the parking.

Ms. Vannice stated this was what they needed for the venue this size.

Mr. Watson made a motion to approve a second hearing for, BZA 09-18 the appeal of Bailey's Place, LLC, based on new evidence. Ms Carey seconded the motion. Voting in favor: Ms. Carey, Mr. Fowler, Ms. Kennison, Ms. Mathewson, Mr. Watson, and Ms. Zimmerman. Voting against: none. Abstaining: Mr. Bishop. Motion carried, BZA 09-18 granted a second hearing.

## **ADJOURNMENT:**

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James Fowler, Chairman

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Marta Moody, Secretary