

COUNTY BOARD OF ADJUSTMENT
MINUTES of Meeting No. 362
Tuesday, July 20, 2010, 1:30 p.m.
County Commission Room
County Administration Building, Room 119
500 South Denver

MEMBERS PRESENT MEMBERS ABSENT STAFF PRESENT OTHERS PRESENT

Charney, Chair	Walker, Vice Chair	Alberty	West, Co. Inspector
Dillard		Cuthbertson	
Osborne, Secretary		Sparger	
Tyndall			

The notice and agenda of said meeting were posted at the County Clerk's office, County Administration Building, 15th day, July, 2010 at 10:35 a.m., as well as in the Office of INCOG, 2 West Second Street, Suite 800.

After declaring a quorum present, Chair Charney called the meeting to order at 1:35 p.m.

Mr. Cuthbertson read the rules and procedures for the County Board of Adjustment Public Hearing.

MINUTES

On **MOTION** of **TYNDALL**, the Board voted 3-0-1 (Charney, Dillard, Tyndall "aye"; no "nays"; Osborne "abstain") to **APPROVE** the Minutes of June 15, 2010 (No. 361).

UNFINISHED BUSINESS

Mr. Osborne recused himself from the panel on this case and left the room.

Case No. 2369-Sack & Associates

Action Requested:

Amendment to a previously approved site plan to permit an expansion to an existing church use in the AG district; Special Exception to permit a (Use Unit 2) cemetery in

an AG district (Section 301) on an existing church property. **Location:** 15710 S. Peoria Ave. E.

Presentation:

Ted Sack, Sack & Associates, 111 South Elgin, Tulsa, OK; he represents Holy Apostles Christian Orthodox Church. Mr. Sack presented a new master development plan, an overall plan to outline the development of the church. Mr. Sack stated the church had been before the board before and received permission for the church use of this property. Approximately 18-20 months ago, the church went to the board regarding church cemetery use, which was turned down. At that time there was an indication from the board of a desire to know exactly what the church had planned. The church went to Sack & Associates and asked to have a master plan developed for them and to give some guidance as to their future development. The church wants to be good neighbors, so Sack & Associates developed the plan to take into account the property around the church. The plan shows the new parish temple along with a parish community hall and the change of an all-purpose building to a meeting room and the associated parking that is required to meet the square footage requirement. It also shows the rectory in the southeast corner next to Fr. Ambrose. Fr. Ambrose has been at the two previous meetings, but unfortunately, he is at a funeral today and is unable to attend. Mr. Bearer of Barber & Bartz is here and would like to speak. The neighbors may also wish to speak before he speaks.

Mr. Sack continued to go on with the master plan; it identifies the potential area of the detention facility when that need arises and also a cemetery area or an interment area. In meeting with the neighbors, they asked why that area was picked. In the doctrine of the church, they very much believe in praying and respecting the dead, and they insisted it be out near the chapel. That worked well for the neighbors because it was the most remote location from them. This area of interment is less than a quarter of an acre; it is 187 ft. from the north property line and over 410 ft. from the west boundary and over 205 ft. from the south boundary. From the Peoria side from the center of the street it is 100 ft. from the center of the street, which by the time a structure is built on the other side of the street with that 100 ft. to the center of the street plus the right-of-way for an arterial street with an additional 50 ft. with a 35 ft. setback, which is typical of agricultural or residential zoning on an arterial street, there is 185 ft. from someone on the east side. Sack & Associates also split it up by installing some landscaping in the front to break up the area and to help screen. The cemetery use or interment area has brought the most interest. The consultants have prepared an artist's rendering of how the church would anticipate the interment area to look. It is in front of the chapel where they can pay respect to the buried people, their parishioners. There are very plain markers with a single cross; they do not want to make something that is gaudy. In the package there is a copy of another Orthodox cemetery that is in the San Antonio area. The Holy Apostles Church would like to mark the graves with an iron type cross, as opposed to the wood cross that is shown in the photograph in the packet.

Mr. Sack expressed in many ways, the cemetery use could be looked at as an accessory use to the church. In older parts of the country most of the churches,

especially back East in the older part of the country, have cemeteries associated with them. A lot of the churches, even in the Tulsa area, are trying to provide columbaria for cremation within their facilities. Sack & Associates engineered a church approximately 10 to 15 years ago on 91st Street that had a small cemetery associated with it; actually platting the property and cemetery with it. Mr. Sack stated he could provide a copy of that if the Board would like to see it. He expressed that it was a larger area; it was more like a half acre, as opposed to the quarter acre at this facility. One of the things that is not on this proposal is this is only for the members in good standing within the church; it is not a cemetery that is church-affiliated. It is a church that has an associated cemetery with it for its members.

Comments and Questions:

The board asked how many burial plots could be planned for the proposed site. Mr. Sack stated that it could be a 3' x 10' interment, which could be questionable; he expressed they do a lot of work for Floral Haven, they have done gardens there of all sizes of burial plots. But with the 3' x 10', it would allow for approximately 300 spaces.

Interested Parties:

Robert Bearer, 525 South Main, Suite 800, Tulsa, OK; Mr. Bearer expressed he is here today because he is a member of the parish and he practices law so he has been asked to attend this meeting and supplement Mr. Sack's presentation, although he has never appeared before this board and it is not his principle area of practice. He is here more as a member of the parish, and he wants to speak to three items.

First, Mr. Bearer stated he believes this request is in harmony with the spirit and intent of the code and is not injurious to the neighborhood or detrimental to the public welfare. He expressed under that heading he speaks for Fr. Ambrose who can't be here. Mr. Bearer continued, the second point is that regarding the burden of proof, he would like the board to consider approaching their burden of proof. He thinks the burden of proving injury to the neighborhood and detriment to the public welfare should be on those opposing the site plan. And third, he provided that he would like to bring to the board's attention a federal statute that does affect the Board's decision making here and that is the Religious Land Use and Institutionalized Persons Act 42 USC 2000 cc which has been summarized in the handout. But on these three issues for Fr. Ambrose they think actually this application could have been posed as an accessory use. They regret they didn't do that. The reason is this cemetery really has no function whatsoever, it has no purpose except for (inaudible) for the church. It would be strictly reserved for members of the parish and their immediate family. Mr. Bearer provided the only charges that would be imposed would be those necessary to insure the maintenance of the property long term. The parish is associated with the Diocese of the South and the Orthodox Church of America. The Diocese of the South signs on as the guarantor for all financial applications. It ultimately is the beneficiary under a trust. The department is actually held in the name of the local congregation not the proper corporation but it is held in trust by the diocese of the national church. There is some financial support behind this venture that would assure its maintenance. Mr. Bearer also wanted to take the liberty of trying to share with the Board how important having a cemetery on the

premises is to Orthodox Christians. He continued, maybe not only to Orthodox Christians, as Mr. Sack has said, in the past many churches traditionally were associated with cemeteries in fact the church had its beginnings in the catacombs of Rome where the deceased were buried. Mr. Bearer said orthodoxy is not just a professional or philosophical association of persons who get together because they believe the same things. It is really a lot like Orthodox Judaism it is a way of life, and part of that way of life is remembering and praying for the departed at intervals on the day of their burial, the third day after, the ninth day after, the 40th day after and every year thereafter. In fact in every service of evening and morning prayer, and every divine liturgy on Sundays and Feast Days, the parish prays this prayer and they pray for all their fathers and brethren, the Orthodox who departed this life before them who here and in the entire world lie asleep in the Lord. For this prayer to have any meaning at all assumes that the departed are associated with marriage are laid to rest there and lie here in sleep with the Lord.

Now as far as the burden of proof, Mr. Bearer provided he would like to move to that and recommend at least the Board consider that the burden of actually showing injury to the neighborhood or detriment to the public welfare ought to lie on those opposing the motion because to do otherwise would impose on the applicant the responsibility to prove a negative, that it won't do any harm. He stated that is difficult to show. On the other hand, he has personally spoken with two Glenpool/Bixby developers and an experienced appraiser, and none of those three have expressed any concern about elements of the plan including the cemetery. They have said that they do not believe it would impair the development of the adjacent property if they were developing it. Mr. Bearer expressed he would like for the Board to consider those anecdotal testimonies and weigh accordingly.

Mr. Bearer provided, the Religious Land Use and Institutionalized Persons Act (RLUIPA) says that even the zoning board is prohibited from imposing any land use regulation in the manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly restitution unless the Board demonstrates that in position of the burden on that person, assembly or institution is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest. He provided in May of this year the 10th Circuit applied this act to permanently enjoin on the basis of unreasonable limitations a county's partial denial of a church's special use application for approval of its master site plan in an agricultural district in the case of the Rocky Mountain Christian Church vs. The Board of County Commissioners in Boulder County, Colorado. Under the RLUIPA the applicant's site plan or elements thereof may only be denied if the denial would be in furtherance of a compelling government interest. Mr. Bearer expressed he trusts the Board will agree no such compelling interest prevails in this case so as to deny the plan. He continued should the Board however demonstrate that denial is required, or that modification it is required to protect the compelling government interest, then they would ask the Board to impose only the least restrictive means of furthering that interest and they would be quite willing to submit to any appropriate conditions or

safe guards regarding size, location, screening, illumination, landscaping, whatever the Board may see fit to recommend or impose.

Kurston McMurray, 1515 South Utica, Suite 250, Tulsa, OK; Mr. McMurray is opposed to the application and represents Sharp Mortgage Company. Mr. McMurray, like Mr. Bearer, expressed he does not make this a general place to practice. He stated when he became involved in looking at this application he looked into what it meant to get a Special Exception, what a Use Unit 2 category is, etc. He stated that the Use Unit 2 classification is a list of uses for properties that are on this list because "they have a potential adverse influence on adjacent properties". That is precisely why when the land owner wants to use his property in this manner he has to come to the Board and seek a Special Exception. Other Use Unit 2 uses are an Adult Detention Center, Bus Stations, Jails, Landfills, and on that list is also a Cemetery. These are not typically uses that increase the market value or the pleasure of the neighbors, and that is precisely why they are on this list. So that is why an applicant is required to prove to the Board, which the board hears every single time they have one of these meetings, that the use will be in harmony with the spirit and intent of the code and will not be injurious to the neighborhood.

Mr. McMurray provided that Mr. Bearer mentioned burden of proof, he asked the Board to consider the opposition to bear the burden of proof in this matter. Mr. McMurray submitted to the Chairman of the Board that Oklahoma case law, Supreme Court case law, is pretty clear on who has the burden of proof. It is well established in a case called Volunteers of America, Inc. that the applicant bears the burden of proving the conditions that will authorize a Special Exception. He stated can submit this case to the Board if it need be. Mr. McMurray provided he wants to make sure that it is understood right away in his part of this presentation because he didn't understand that was the applicant's position until he read the additional information that Mr. Bearer submitted to this Board. An exhibit Mr. Bearer presented when they submitted the burden of proof was on us, is contrary to Oklahoma law. Mr. Bearer says it requires them to prove a negative. Mr. McMurray stated he doesn't think it requires them to prove positively that it is in harmony and that is not injurious. Here the applicant hasn't carried that burden. They mentioned in their presentation that previously in December 2008 they presented this application for Special Exception regarding the cemetery to this very Board. This Board made a very specific determination pursuant to these standards, and Mr. McMurray read from the materials that were posted as part of the history, "the Special Exception for cemetery use will not be in harmony with the spirit and intent of the Code, and would be injurious to the neighborhood or otherwise detrimental to the public". That was this Board's ruling or determination in December of 2008. Mr. McMurray suggested this Board's previous rulings should be such that interested parties, like Mr. McMurray's client Sharp Mortgage who owns about 785 acres of land in this area that surrounds and is adjacent to the church's property, and interested parties, like the other land owner's that were here previously, the Herrings and the Ranfords, ought to be able to rely upon this Board's rulings, and use their property appropriately. Ramifications of not following previous rulings are obvious and this is not an application that would justify an about-face on a previous determination.

Mr. McMurray provided that the cemetery and the expansion of the church is not in harmony with the intent of the Code and this Board's previous rulings and would be injurious to the neighborhood. Mr. McMurray stated since he doesn't get in this forum very often he referred to the case law. He thinks this is an unauthorized appeal of that previous December 2008 ruling. There is a case called Hargrave that would suggest that because they didn't appeal the December 2008 ruling within 10 days this is an inappropriate forum for them to reconvene. When that is heard by District Court, if it has to be, Mr. McMurray thinks that would be the salient point for them, for the opposition.

Mr. McMurray provided the application is not like the other ones, in that there is not a whole lot of information; there is not a timeline of accomplishment of all of these events, there is a little bit of information about access, parking is a concern, screening, scheduling of events is a concern. There is also, on the colored master plan a reference regarding an aerobic septic system. Mr. McMurray stated he had not heard much about it and had a lot of concern. If the church is going to expand to 200 or 300 members Mr. McMurray stated he would like to hear about the functionality of an aerobic septic system in that area, as it would affect those on the west, south and north. On the master plan there is a notation that a drainage stream would be blocked off and irrigation changed; he has not heard much from the applicant about that. Sharp Mortgage has cattle and livestock that is serviced by the drainage stream that follows through both properties. It would be unfortunate for that to be dammed up and altered without any further additional information.

Mr. McMurray stated the applicant's burden was to prove that this is in harmony with the spirit of the code. Mr. McMurray provided a brief history to the Board stating in 2004 the church was approved as a church with no site plans, as a small chapel and a church office; that seemed to be okay with the neighbors, it didn't draw much, if any at all, opposition. That seemed to fit the small quaint country chapel. There was no evidence at that time of building a mega-church-looking facility with a cemetery. In April 2005 the Board approved the site plan with the limitation that there be no improvements in the front yard area, and Mr. McMurray quoted that from a previous record of the Board's previous determination. He read the master plan that is before the Board from the applicant, the proposed cemetery and maybe some of the other buildings are in what looks like the front yard; that is east and south of the chapel. Mr. McMurray stated if he were reading the master plan correctly and hearing the applicant the church is asking the Board to overrule itself from its December 2008 determination, and also its April 2005 determination to allow some improvements placed in the front yard of the church. Mr. McMurray expressed that Mr. Bearer told the Board about 2008 where they applied for the cemetery and now, today, they have a master plan. They went from a quaint church to a master plan with bell tower, lighted parking lots, gazebos, playgrounds, a storage building, a cemetery with 300 plots, a new drainage system, an aerobic system that he thinks is spraying septic tank water; the deal keeps changing from the church and the neighbors are feeling mistreated by the way this information is being presented to them in piecemeal. The master plan is not in harmony with what they originally started with in 2004, a quaint country church.

Mr. McMurray continued a brief analogy would be, if he told his neighbors he was going to put a private swimming pool in his backyard that would be okay with the neighbors. But if he added a 30 ft. diving board and septic pool and big water slide that runs 24 hours a day, and he changed the irrigation of his property and then he bulldozed his house and put parking lots with lights that are shining in my neighbor's yard then he charged admission he would have a water park not a swimming pool. That is what the neighbors, the message he would like to convey to the board, feel like. They started with a country quaint church and now they have a water park that the neighbor's did not understand back in 2004 when this began.

Mr. McMurray continued, Chapter 3 of the code defines the AG zoned districts; in Chapter 3 is very applicable to the Board's obligations today. Section 300.1 says the purposes of the agricultural district is to encourage and protect agricultural land until an orderly transition to urban development can be accomplished. Mr. McMurray submitted to the Board in granting this application the Board would not be protecting the orderly transition to urban development as required under Section 300.1. He stated he thought this is particularly applicable to this area of the county. No doubt the Board knows the economic development which has been occurring in the Glenpool area, there has been a Wal-Mart center, banks, restaurants, etc. This is a prime, when he says "this" he is speaking about the church's property and Sharp Mortgage's property and those neighboring it; that is what he thinks the developers would consider a prime piece of development land. The last time he was here in 2008 he provided the Board a sketch of a development that was pitched to Sharp Mortgage Company by a development company, and he represented to the Board this is just one of a number of opportunities that Sharp Mortgage has had with respect to developing the property, and that these opportunities exist for them now. The reason they exist is because the zoning code had been enforced properly and is offering them an orderly transition of urban development just as Section 300.1 contemplates. Sharp Mortgage views this church's application as a threat to their future development plans.

Mr. McMurray continued, since the May 2010 meeting Sharp Mortgage Company has found out the City of Glenpool has a plan to construct a 40-acre cemetery at 161st and Elwood, which he understands is less than a mile away from the subject property. Putting this into context with today's application he thought it offered the church an alternative that is more in harmony with the intent of the code and with this Board's previous determinations. Mr. McMurray thought if they were to investigate and speak honestly about it the City would probably be amenable to selling them or making a deal with them to allow them to have a private section of that public cemetery they are planning to construct. He understands there is a similar Orthodox church in Dallas that has that arrangement with the City of Dallas for this very reason. He also believed the existence of the cemetery probably wipes out all of these threats about the religious land use persons act Mr. Bearer raised. In addition, it can't be a substantial burden to them to reject this application because the code requirements have not been met, and there is an alternative option that is more palatable for them.

In addition, the church has existed, at least in that area, since 2004 and they existed for four years at a minimum before they submitted their application for the cemetery. So, he thought it would be difficult for the church to prove to this Board and a court of law that the cemetery is a substantial burden that then triggers their remedies under that federal act. If it was a substantial burden the church would have bought property that was more easily suited for a cemetery, or they would have made sure that when they bought the property they obtained the approval before they purchased. Sharp Mortgage Company is also in preliminary discussions with the City of Glenpool and they view this application as something that is negative.

Secondly, this is injurious to the neighborhood. There has been previous testimony from the Ranfords and the Herrings that the cemetery and the additional construction of buildings, etc., is something they do not want. The cemetery, in particular, has garnered up fears of those who have property out there. Mr. McMurray asked the Board to recall, there was testimony from Mr. Ranford and Mr. Herring stating their wives would move out and would not develop their land if the Board approved the Special Exception. Those are live concrete examples and evidence of injurious to the neighborhood.

Lastly, there are some practical issues the Board should consider. Is there a risk the applicant would start this cemetery and then relocate the church? What would happen then? Does the church have the financial wherewithal to maintain the cemetery in compliance with Title 8 of the Oklahoma statutes? Mr. McMurray stated he is not an expert in Title 8 but he understands there has to be a trust in place; it has to be fully funded; it has to comply with the state requirements of how to maintain it insuring public safety and safeguards; and has to comply with certain regulations as to avoid an abandoned cemetery. There has been nothing presented to the Board today that would show the church has any experience in how to run and maintain a cemetery. And that is Sack & Associates, Inc. burden, not the neighbors. They want the Special Exception they should come forward with proof that this is not going to be injurious because they know how to maintain and run a cemetery.

Practical issue number two, there are 39 new parking places that face directly toward north. From past experience, 39 parking lot spaces would shine lights right onto the neighbors to the north and disturb them. On the map it shows 40 ft. from those parking spaces to the church's neighbor to the north, that Mr. McMurray would suspect is no longer than from here to there (referring to physical points within the County Commission room). Mr. McMurray thought this is an issue the church has not addressed and there has been nothing said about that, and it's their burden. Facing to the west there's 12 more parking spaces. He mentioned the drainage system, there's a drainage stream. This is the next issue. The drainage stream runs through the southern part of the property and onto the west, onto Sharp Mortgage Company's property. He can't tell from the master plan if they are proposing to dam up that water and put a detention pond there. That would definitely negatively affect Sharp Mortgage's property. It will block water flow and fills to his ponds, and ponds are used to care for his livestock and cows. The aerobic system is that an airborne aerobic

system, where is it sprayed? They have not provided the Board anything with regard to how that would work. They can't provide the Board, or the neighbors, any comfort as to how that would work. There is a high pressure gas line easement that they believe runs along the eastern property line. These are things that Mr. McMurray doesn't think they presented to the Board. Mr. McMurray would submit to the Board that according to 1680.3 the Board must determine the Special Exception is in harmony and not injurious.

Mike McConnell, Crown Hill Cemetery, 4301 East 66th Street North, Tulsa, OK; Mr. McConnell is here on another completely different matter but heard some things he wanted to address. There were very good points made by both folks. Mr. McConnell stated he is a professional cemeterian and while some of the things Mr. McMurray questioned are real concerns such as the trust funds, what happens when the cemetery fills up and so forth. For that amount of land Mr. McConnell strongly questions whether 300 people could be buried in the area in question, he believes somewhere between 250 and 270 could be buried. The parking he would think would be in favor of the church, 8' x 17' parking space, they are going to be assembling there for the services anyway. There are rules about trusting the land to the state board but he doesn't know if the church would fall under those same rules; a trust does not need to be established if it is a non-perpetual care cemetery. If the church is a perpetual care cemetery they must trust 10% of everything they sell. But they are not selling property so there is nothing to post. There are two government bodies that govern cemeteries which in time will eventually move over to the state insurance board; but right now cemeteries are governed by the insurance board and the state banking commission, they do hold the trust and you are audited randomly. But those issues will not apply, for the most part, if you are not an operating cemetery for profit. Each burial has an aerobic system because it has concrete liner. There are companies that will come out and dig a grave and their insurance would stand in place for anything that may or may not go wrong, and they will also put a concrete liner in the ground and there are ways to do that so everybody is protected. Mr. McConnell seriously doubted if this 40 acre cemetery around the way is going to be built, but that depends on the State Cemetery Board; he is also the second Vice President of the State Cemetery Association. He would hate to see, he doesn't live in that area, something that might affect these folk later or come into play and affect myself or other cemeteries.

Rebuttal:

Robert Bearer, commented to the meeting in December 2008. He stated he wouldn't characterize it exactly the same way as Mr. McMurray did, an out-an-out denial. He thought the Chairman stated that there was not enough information in the application at the time. He also remembers Mr. Hudson stating he could not support the application as submitted, and the site plan was totally inadequate at that time. He suggested the applicant should provide more information to the neighborhood for support. He provided that was the genesis of this site plan before the Board today.

As to the question of whether they would ever be a mega-church, no way. The Orthodox Christian Churches in the Orthodox Christian Church of America are typically

a maximum size of about 250, and that is not what would be called a mega-church. Actually that's pretty small.

Mr. Bearer continued, as far as no improvements being in the front yard, which is true. One of the former approvals by this board was that there were to be no improvements to be in the front yard but it would be his position that is a decision that could be modified if this site plan were satisfactory or approved. He expressed he doesn't see that as something to be permanently binding upon the Board that made that rule. As far as scheduling services I didn't know that was an issue, but that can certainly be addressed.

As far as the piecemeal planning, they certainly apologize for that but they asked the Board to understand that when a church like this starts it starts as a mission effort, with 4 to 6 families, they rent property in a strip center and try to make it do. And in this case this congregation has an extraordinary way of beautifying property; these people love art, they love beauty and he thinks the neighbors can be assured this property will be developed in a tasteful manner. What is built there will be very good when it's finally permanent. As far as a timeline for development that's, again, a function of the youth of the parish. It has to have a certain critical mass before it can afford to implement this plan. The second item in the plan would be the house for Fr. Ambrose which has been approved by the parish council, and Mr. Bearer believes an agreement has been signed and guaranteed by the diocese. So, the house would go forward because there is funding but the rest of the plan would have to wait for maturity of the congregation.

The church never made a proposal for a cemetery and a site plan like this partly because of lack of size, lack of funds, they couldn't afford to hire a firm to design a plan, and now they are getting around to it. Even now it would take awhile for the plan to come to fruition.

As far as light shining on the neighbors, the church would be more than happy to look at screening of some kind, and that was explained in a meeting.

Mr. Charney interrupted at this point to interject on two or three points to save some time for the Board, the staff, and participants of the meeting. In regards to three items, one was the lighting, one was the drainage that Mr. McMurray addressed, and one was the aerobic system. There are third parties that govern that and address that, they are a part of the construction process. Those issues are never addressed at the Board level; and he thinks it is important for everyone to know. The Board recognizes it as being critically important in the construction process, the platting process, and the building permit process where they will have to design a stormwater detention facility and make sure it doesn't impair downstream flows. That is so the post-development issue doesn't increase flows and there isn't improper diversion of water. Those are all very real concerns, He just wants to make sure everyone here recognizes those aren't the Board's concerns when there are third parties that address those at different stages of development. He asked Mr. Alberty if that is a fair description of the Stormwater Management concept.

Mr. Alberty stated, "Yes, the county engineer would review all drainage plans, detention plans, and any requirements that remain. Obviously the Board is concerned about those issues but it's not an issue that you technically address in this stage."

Mr. Charney stated, "In determining the actual land usage and I think with regard to the aerobic system's capacity I know there is strong engineering and DEQ input, an approval process where those functions, decisions, analytical processes are handled by other parties other than us and they aren't put into our maintenance and decision making. I just wanted everyone to know that, and we recognize the importance of them but not here."

Mr. Charney continued, "Lighting, as well. I have heard there are ordinances and factors that we look to as to how certain lighting can occur, and these are part of our approval if it were to be. I know many times we have said that there must be certain lighting that is shielded so that they are not visible from a certain distance. So, those are all things we care about but the engineering components are often addressed at later stages, if this were to be approved."

Mr. Bearer thanked Mr. Charney. Mr. Bearer then stated his final two points would be as far as Mr. McMurray raised the issue of relocation of the church. He doesn't think that is something that should be of concern. This church is, the way these parishes plant, once they are planted the land is consecrated and dedicated in the names dedicated to church use forever. If the church were to grow larger than that 250 size, what would happen would be a different parish would be started somewhere else. Some people would leave, not bring a detriment to this parish but they would leave, the parish would remain and a new mission would be set up in a geographic area that is proximate, more proximate, to the new members. But this parish would remain there in perpetuity.

Finally, as far Title 8 goes Mr. Bearer does not believe the Title 8 applies to church cemeteries but if it does they will comply with it. The church may decide that it is a good thing to comply with anyway, but he doesn't think it actually applies to church cemeteries he thinks they are exempt.

Mr. Charney asked, "Do you have anything new to rebut, Mr. Sack, with regard to technical issues, we will give you a moment please then we are going to close this portion."

Ted Sack came forward. He stated they need to keep in mind the fact about development around the cemetery. The cemetery use here is very incidental, and it is very small. It has 3% of the property.

There is quite a large development, a very high-end development that was put in just recently called Tanglewood, down on Harvard, just south of 91st Street. He never heard of problems, of that development having trouble due to being next to the cemetery. As

small as this is he doesn't think the neighborhood will really ever know that it is there. And, he just doesn't think it is harmful to anyone. The master plan is something for them to grow into. Sack & Associates pushed the church to give them their dreams and their ideas as to where they wanted to end up. Mr. Sack thinks this is going to be something achieved over the next 10 to 20 years; it is going to take some time for them to get this. But the plan tries to address all the different issues, like detention. It doesn't attempt to design it but set aside for it, like the aerobic system, it is not designed but it is set aside for it.

Mr. Charney stated, "At this point we will conclude and close the public comment portion of this particular case. We'll deliberate openly amongst ourselves (the Board members) and to reach a conclusion or see if a motion is capable of being formed. Again, the applicant is seeking two things, an Amendment to a previously-approved site plan and a Special Exception to permit cemetery use. With that, is there anybody who would like to make any introductory comments or thoughts?"

Board Deliberation:

Mr. Charney stated he recalled this case coming before them previously; "I remember that we needed more information. So I wouldn't feel as though we were overruling ourselves or ignoring a previous decision as much as I remember not having enough information and thinking we needed something more; and I know that's what I recall thinking at the time. This is exactly what I wish we had more of, quite frankly. This is a very thorough site plan; whether we agree or not is a different matter but this helps immensely in making decisions and I think that this is exactly what we needed to make a thorough decision so I don't necessarily consider it as piecemeal as just it evolved to the point that there finally was an appropriate master plan to us to review. That is how I recall our previous thoughts."

Mr. Tyndall stated, "I don't think this is going to stop growth to that area. I don't see that it is a growth stopper, and it has not stopped it in other areas. I don't see why this small one would stop it down there." Mr. Charney interjected, "I agree." Mr. Tyndall continued, "They have done a good job with what they have done, with their construction and their appearance down there so far. I can support this application."

Mr. Dillard stated, "We just traveled to Boston down to Philadelphia and it seems like in other parts of the nation cemeteries are pretty much part of the church, and it didn't stop growth in Boston. I didn't see any stopped growth in Philadelphia, and I didn't see any deterioration in values of property that was nearby. When I read the Code, the Code defines "accessory use" as one that is customary, incidental and subordinate to the principal use. The principal use of their building is that of conversion to salvation, or whatever, church usage they do. I can support it too."

Mr. Charney said, "My feelings are similar." He didn't view a church use, even in an agricultural setting, as an intense use. He stated when he thinks of intense uses, the Wal-Marts, the restaurants, he thinks of that as significant intense use. He thinks of churches, and he has seen and been involved in many developments near, around, and

adjacent to churches, and he thinks the neighbors view them as a low intensive use; maybe a couple times a week there's people there. There are things that he thinks should be addressed with regard to them; one of them is lighting, and he was glad it came up. He thinks if it were approved he might be concerned and make certain that lighting on the perimeter is the down lighting, making certain that lighting is as unobtrusive as possible. He continued that he doesn't view the church as an intense use and he doesn't see it as a threat to future development. Mr. Charney stated he has found sometime more intense uses are pleased to see areas begin to fill in with uses such as this. It's not one that is bothersome, and it is one that he has seen residential development thrive adjacent to. He said he views this as a lot of information. This site plan demonstrates, on a perimeter showing the cemetery plots on the perimeter where there would be a later plat right up next to it, it is virtually impossible for there to be a home site immediately adjacent to the cemetery the way it is insulated by the parking lot, the structure, and an arterial street on one side. He stated whenever he looks at it he feels there is sufficient information and he feels like the applicant has met the burden whether it be the applicant's burden or the opponent's burden to establish that there has been no showing of adverse impact upon the surrounding neighbors. Mr. Charney stated he would like that the finding be made in the record that the Board considered it and that the Board might have, Mr. Charney would like to make a motion that the Board approves the amendment as submitted per site plan; that special attention be given to the perimeter lighting to be completed upon consultation with County staff. The motion is to be binding; the applicant has demonstrated there would be no adverse impact. The Special Exception is in harmony with the spirit and intent of the Code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

Board Action:

On **MOTION of CHARNEY**, board voted 3-0-0 (Charney, Dillard, Tyndall "aye"; no "nays"; no "abstentions") to **APPROVE** the Amendment as submitted per site plan; that special attention be given to the perimeter lighting and completed according to County staff recommendations; to a previously approved site plan to permit an expansion to an existing church use in the AG district; Special Exception to permit a (Use Unit 2) cemetery in an AG district (Section 301) on an existing church property; finding the Special Exception will be in harmony with the spirit and intent of the Code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare; for the following described property:

LT 1 BLK 1, HOLY APOSTLES CHURCH

Mr. Osborne came back to the panel to participate in the discussion of the remaining cases.

NEW APPLICATIONS

Case No. 2378-Fred Owens

Action Requested:

Variance of the land area per dwelling unit required in an AG district from 2.1 acres to 1.25 acres (Section 330); and a Variance of the required 40 ft. setback from the rear property line to 10 ft. (Section 330); to permit an existing second dwelling on the subject property. **Location:** 12717 South Elwood Avenue

Presentation:

Fred Owens, 12717 South Elwood Avenue, Jenks, OK; he stated the reason he filed this request for Variance is because the previous filing for 5-year Variance had expired. The mobile home is currently set at 20 ft. from the rear property line, which was approved at the previous meeting.

The Board asked why the plan designated 40 ft. and the applicant keeps referring to 20 ft. Mr. Owens stated that at the previous meeting he had asked for 10 ft. and the Board approved the 20 ft. setback.

Mr. Cuthbertson stated the confusion is the site plan still shows 10 ft. and the site plan was not revised when the motion was filed.

Mr. Owens stated he had filed the same paperwork because he thought it was going to be an extension of the existing filing, when in fact it is a new application even though the trailer home has been there five years.

Mr. Owens stated, basically, the mobile home is there at 20 ft. as agreed to and the five year variance extension expired, so he would like to ask for a ten year variance this time. There has been no significant development, except that one piece of property on 126th Street that was purchased which in effect land locks the land behind him.

The Board asked Mr. Owens if he had completed the requirements of his previous application and in total compliance of his requirements, and Mr. Owens replied affirmatively.

The Board asked if any of the neighbors had contacted Mr. Owens in regard to opposition to what he wanted to do. Mr. Owens stated he had been contacted by a neighbor, but the neighbor wanted to know why he was re-filing a variance request, but no one has an objection.

Comments and Questions:

Mr. Osborne asked why there had been an initial timeframe on the original application. Mr. Charney responded that in the past the Board likes to make sure certain things are being done properly and maintained.

Interested Parties:

No interested parties were present.

Board Action:

On **MOTION** of **OSBORNE**, the Board voted 4-0-0 (Charney, Dillard, Osborne, Tyndall "aye"; no "nays"; no "abstentions") to **APPROVE** the Variance of the land area per dwelling unit required in an AG district from 2.1 acres to 1.25 acres (Section 330); and a Variance of the required 40 ft. setback from the rear property line to 10 ft. (Section 330); to permit an existing second dwelling on the subject property, changing the setback from 40 ft. to 20 ft., and for a time limit of 10 years; for the following described property:

S166 N898 W660 NW SW SEC 1 17 12

Case No. 2379-Kevin Brown

Action Requested:

Variance of the minimum land area required per dwelling in the AG district from 2.1 acres per dwelling unit to 1.84 acres per dwelling unit (Section 330) to permit two dwellings on the AG/RE zoned lot. **Location:** 320 West 92nd Street North

Presentation:

Kevin Brown, 310 West 88th Street North, Sperry, OK; he stated he wanted to install two mobile homes on the property. It is a little less than four acres. There is an existing mobile home set up and an abandoned mobile home, and the abandoned mobile home will be removed from the property, then a new second mobile home will be set up and tied into utilities. Only one property owner has called to ask why he received a notice. The perk testing is complete.

The Board asked if the same owner had the land, and if the second dwelling was a manufactured home to be installed on the land. Mr. Brown replied affirmatively. The Board also asked Mr. Brown to confirm that he was not proposing to segment a piece of the land in preparation to sell to another party in the future. Mr. Brown said that had been considered. Mr. Charney pointed out to Mr. Brown that would not be possible because of different issues involved, such as street frontage issues, easement issues, etc. and if the Board were to grant permission for a second dwelling to occur it would not necessarily mean it is financeable or sellable or that a mortgage could be obtained. Mr. Brown stated he understood.

The Board asked who would be occupying the homes. Mr. Brown stated it would be his wife, himself, and a couple of children, then a neighbor with three children.

The Board asked Mr. Brown about the septic system, and he stated he had the septic professionally evaluated and it would support ten people. Mr. Brown stated the mobile homes would also have footings, skirting, and be per code.

The board asked about a concrete parking pad. Mr. Brown stated the property used to be a nursery site and there are concrete parking pads in existence, and the driveway is a type of lava rock that has been there for years.

Comments and Questions:

The Board stated they are comfortable with the request due to the size of the tract.

Interested Parties:

No interested parties were present.

Board Action:

On **MOTION** of **CHARNEY**, the Board voted 4-0-0 (Charney, Dillard, Osborne, Tyndall "aye"; no "nays"; no "abstentions") to **APPROVE** the Variance of the minimum land area required per dwelling in the AG district from 2.1 acres per dwelling unit to 1.84 acres per dwelling unit (Section 330) to permit two dwellings on the AG/RE zoned lot, finding by reason of the size of the lot, larger than many in the area, and it's unusual panhandle shape will permit two dwelling units to be situated on it, and any mobile home must comply with the Code, properly skirted, hard surfacing parking and other conditions required by Code. The existing abandoned mobile home must be removed prior to the new mobile home being placed on the property; for the following described property:

**PRT SW NE BEG 850E & 175S NWC SW NE TH S362.7 W150 S452.30 E267 N815
W117 POB LESS N25 THEREOF FOR RD SEC 23 21 12 3.679ACS**

Case No.2380-Joe Kelley

Action Requested:

Special Exception to permit mining and dirt removal (Use Unit 24) in an AG district.

Location: SW/c of E. 66th St. N. and N. Mingo Rd. and the east side of the same intersection.

Presentation:

Joe Kelley, 10006 North 177th East Avenue, Owasso, OK. Mr. Kelley represents Jet Trucking, and this is a continuation. They have been operating a dirt operation just north of this location for about 18 years. They need to expand their pit further south to be able to continue the dirt operations. Mr. Kelley presented a memorandum dated July 15th from a concerned opposing party. One of the objections is the applicant has been polluting Bird Creek. We think what the opposition is calling pollution is having dirt fall into the creek, because the operation excavates downward from the creek bank. The second objection was the applicant was causing flooding upstream from this site, but there has been more development within the watershed. The last objection is regarding the mineral rights. The former owner filed a Quit Claim Deed to Tulsa County and later sold a portion of the land to Mr. Lavendusky, who is in the audience. As for the mineral rights, dirt mining comes under a non-coal mining permit, which is where dirt mining is

categorized in the State of Oklahoma, and according to the definition of dirt mining there are no mineral rights involved because dirt is not a mineral, which makes the mineral rights irrelevant to the case because the operation is not drilling a well. Originally the application included land on both sides of Mingo Road, 3.7 acres west of Mingo and 9.14 acres east of Mingo; after discussion with Tulsa County and Mr. Lavendusky we want to remove the 3.7 acres west of Mingo from the application today, and will enter another application for that land in the future.

The Board asked Mr. Kelley about the legal description presented at today's meeting; does it refer only to the east side of Mingo or is it both sides so that in the finding, regardless of the outcome, acknowledge the west side of Mingo? Mr. Kelley stated it did not.

The Board wanted to know how many acres were being discussed at this meeting. Mr. Kelley stated 9.7 acres is the entire gross acreage, but after mining the dirt, it will be closer to six or seven acres.

The Board stated the application shows there to be 27.36 acres. Mr. Cuthbertson stated it was an error because the parent tract in INCOG's system is much larger and the subject property was defined on a case map to reflect the legal description submitted.

The Board asked Mr. Kelley to confirm the property, 9.14 acres, on the east side of Mingo is the request for Special Exception. Mr. Kelley stated affirmatively. The Board asked where the existing operation was located, and Mr. Kelley stated it was directly north of the proposed the operation. There will be no new access point onto Mingo Road for the new operation.

The Board wanted to know if Mr. Kelley was aware of any rules or regulations required by law to be complied with on the termination of mining. Mr. Kelley stated this application actually is under the Department of Mines. The Department of Mines requires an application to be filed to tell them how the operation is going to proceed, what we are doing, and how we are to close the mine. The Department of Mines has rules on procedures for closing the mine and when they approve the closure of the mine that is exactly what the applicant must do.

The Board followed up on the question of the mineral rights. Mr. Charney asked Mr. Kelley to confirm that the sand or dirt is not considered a mineral, and by Oklahoma law the dirt can be sold even if the mineral rights are not owned by the applicant. Mr. Kelley stated the applicant does own the mineral rights but it is a moot point because of the type of operation.

Mr. Osborne inquired about the issues of run-off and leeching of silt into Bird Creek, such as are there engineers taking care of that issue, or is there a permitting office or another department addressing that issue. Mr. Cuthbertson stated that is a technical element that will be reviewed by the Department of Mines, and the County Inspector's

Office will also review. The land use and property is what are at issue at this meeting, not the technical aspects. Mr. Osborne asked if that really was not something this Board would handle, and Mr. Cuthbertson stated he did not think so unless it impacted adjacent property owners.

Comments and Questions:

The Board stated this is not an expansion of 27 acres but an expansion of nine acres only, and it was confirmed by Mr. Charney.

Mr. Charney stated if the request were to be approved, it is for approximately nine acres of land to be determined by an accurate survey, representing only the portion east of Mingo Road which was under the previous application.

Mr. Charney stated that the land in discussion is a floodplain, and putting aside the conservation easement if it does exist, dirt mining is an appropriate land use and it is not injurious to the land. Dirt mining is the only productive thing that can be done with the land. Mr. Charney stated he did not want to demean or diminish the value of conservation easement, but he had no way of knowing if an easement existed. A proper determination regarding a conservation easement can be made outside of this hearing.

After the motion was made, seconded and voted on Mr. Conway requested the following statement be made part of the record, "You four individuals have agreed to violate a court order." Mr. Charney stated he understands there may or may not be a court order, but that is another tribunal's responsibility.

Interested Parties:

Kenneth Lavendusky, 404 North Atlanta, Owasso, OK; he stated that this operation helps the area immensely because 1 cubic foot of dirt removed equals 7 ½ gallons of water.

Jacob Thurman, P. O. Box 345, Owasso, OK; he stated the business has been open since 1993 and he took over the operation in late 2002. He renamed the business but did not change the operation; there is a reaffirmation plan filed with the State. The regulation plan requires the company to seed or sod wherever land has been mined so there is not run-off or silt downstream, and no obstructions upstream. Creek banks have never been disturbed and there are no plans to disturb a creek bank.

The Board asked if the Department of Mines had a required method of preparation for the area to ensure the runoff is minimized.

Mr. Thurman stated there was a requirement of a 3:1 or a 4:1 slope on everything that is reclaimed, then throw out seed or sod the area so there is neither obstruction of silt or discharge downstream nor affecting anything upstream. Mr. Thurman also stated he has not received any violation citation and has never been shut down for a violation in ten years.

The Board asked Mr. Thurman if his request were to be granted, is he comfortable in using his same ingress and egress so there is only one spot entering onto Mingo Road. Mr. Thurman stated affirmatively.

John H. Conway, 2110 Forrest Boulevard, Tulsa, OK; he stated the land in question had been purchased by his grandfather prior to World War II, in 1941. His purchase consisted of a quarter section plus a 20-acre finger on the north side. A number of years ago his uncle was the head of the Corps of Engineers and he convinced his grandfather and several other landowners to form this land into a conservation district, because Bird Creek always flooded, and this is part of Conservation District 30. On August 9, 1961 a Tulsa judge made this land a Conservation District, which technically forbids mining. Since this mining has been started, there have been two floods that flooded a house located on the west side of Mingo Road around 68th Street North.

Mr. Conway stated he owns the mineral rights and he owns the dirt of the land. If the Board were to approve this request, there is the fact that they are breaking the judge's orders of a conservation district; causing pollution on his land because they took out the land and it is now washing inward; and potentially there is theft of the minerals. He cannot sell the land because it is a Conservation District.

Mr. Conway quoted a description of a conservation easement from the American Bar; "the parties agree upon the term of easement; however, in order for the owner to receive federal tax credits the easement must be perpetual, which is the way this land was set up by the Tulsa judge. All the land in the different counties that follow Bird Creek is in perpetual easement. Mr. Conway stated he had a copy of the 1961 order if it needs to be presented.

The Board asked Mr. Conway how far inland the easement extends. Mr. Conway stated the conservation easement is the entire length. All 180 acres except for the 10 to 15 acres sold to the State to rebuild the highway, is the easement. The entire Bird Creek in Tulsa County, Rogers County, Washington County and all throughout the northeast; it is written in the 1961 court order.

Mr. Charney stated the Board does not get into technical issues, such as stormwater detention flow calculations, that are done when the building permit is issued. If there are issues regarding private covenants on land, or certain disagreements; the Board looks at the land usage and the Board focuses on land usage and decide whether it is or is not appropriate based on the information presented. If there are special circumstances involved those are left to the governing bodies or the court system to determine, that is not what the Board does. Mr. Charney wanted the audience to understand there are separate operating functions; the Board examines the land use for today and asks: is there a reason within the zoning code whether the request should be allowed? The Board is not a court of law and the items before the Board are limited to land use planning.

Mr. Kelley's reinforced the fact this request for Special Exception is to permit mining of dirt in an AG zone, and is an extension of an existing operation from the north. All permits are being obtained from all departments or divisions involved, such as, Department of Environmental Quality, Corp of Engineers, etc.

Mr. Charney stated if the request were to be approved, it is for approximately nine acres of land to be determined by an accurate survey, representing only the portion east of Mingo Road which was under the previous application.

Mr. Charney stated that the land in discussion is a floodplain, and putting aside the conservation easement if it does exist, dirt mining is an appropriate land use and it is not injurious to the land. Dirt mining is the only productive thing that can be done with the land. Mr. Charney stated he did not want to demean or diminish the value of conservation easement but he had no way of knowing if an easement existed. A proper determination regarding a conservation easement can be made outside of this hearing.

Board Action:

On **MOTION** of **TYNDALL** the Board voted 4-0-0 (Charney, Dillard, Osborne, Tyndall "aye"; no "nays"; no "abstentions") to **APPROVE** the Special Exception to permit mining and dirt removal (Use Unit 24) in an AG district on the nine acres east of Mingo Road; finding the Special Exception will be in harmony with the spirit and intent of the Code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare. The applicant is required to comply with all mining rules and regulations from the Department of Mines; for the following described property:

A part of Lots 3 and 4 lying in the NW/4 of Section 6, T-20-N, R-14-E, of the I.B.&M in Tulsa County, State of Oklahoma, according to the United States Government Survey thereof, more particularly described as follows, to-wit: Beg at pt on W LN of Lt 4 a dis of 80.0 ft S of NW crnr of Lt 4, TH S along the W ln of Lt 4 a dis of 860.13 ft, TH N 25°45'29" E a dis of 847.12 ft, TH N 70°44'26" W a dis of 301.29 ft, TH S 88°39'48" W a dis of 103.03 ft to the pob. ALSO: Beg at pt on N LN of Lt 4, a dis of 776.71 ft E of the NW crnr of Lt 4, TH E along N lines of Lt 3 and 4 to the W bank of Bird Creek, TH Sthwstrly along the W and N banks of Bird Creek to a pt on permanent E ROW of Mingo Rd, then N 25°45'29" E along the E ROW ln of Mingo Rd to the pob.

After the motion was made, seconded and voted on, Mr. Conway requested the following statement be made part of the record, "You four individuals have agreed to violate a court order." Mr. Charney stated he understands there may or may not be a court order, but that is another tribunal's responsibility.

Case No. 2381-Crown Hill Cemetery (Michael McConnell)

Action Requested:

Special Exception to permit a cemetery and accessory funeral home (Use Unit 2) in the AG district (Section 301). **Location:** 4301 East 66th Street North

Presentation:

Michael McConnell, Crown Hill Cemetery, 4301 East 66th Street North, Tulsa, OK; he wants to open a funeral home inside the cemetery, and to do that in full compliance with the laws that govern funeral homes and cemeteries. Crown Hill Cemetery is over 100 years old and funeral services have been conducted on the site for that time period.

Mr. Charney asked Mr. McConnell if the request were to be granted, would he comply with all the rules, regulations, and requirements for operating a funeral home or whatever would be done at that site. Mr. McConnell stated that the funeral home would only comply with the State Funeral Board's approval.

The Board questioned whether there would be embalming on site. Mr. McConnell stated the facility does not have the means to perform embalming; 90% of funeral homes in Tulsa do not perform their embalming, because there are embalming services in Tulsa. By State statute it is mandatory to have an embalming room on the premises. There is a licensed funeral director on staff.

Comments and Questions

Mr. Charney confirmed that Mr. McConnell wanted to have a funeral home inside an existing structure within the cemetery. The structure does exist, and Mr. McConnell would not be building or creating a new facility.

The Board wanted to know the hours the funeral home would be in operation. Mr. McConnell stated the hours would be general funeral home hours, 9:00 A.M. to 5:00 P.M. There would be no heavy assembly in regards to a funeral on the site because he has a lease option purchase on another building that has been approved by the county for such purposes.

The Board asked Mr. McConnell if the area the proposed funeral home is to be located is industrial in nature or cemetery, and he confirmed it is.

Interested Parties

No interested parties present.

Board Action

On **MOTION** of **CHARNEY** the Board voted 4-0-0 (Charney, Dillard, Osborne, Tyndall "aye"; no "nays"; no "abstentions") to **APPROVE** the Special Exception to permit a cemetery and accessory funeral home (Use Unit 2) in the AG district (Section 301); finding the Special Exception will be in harmony with the spirit and intent of the Code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare; on the following described property:

W/2 SE SE & E/2 SW SE LESS BEG SWC E/2 SW SE TH N54.09 SE49.04 E1273 S40
W1320 POB SEC 33 21 13 (Crown Hill Cemetery)

NEW BUSINESS:

None.

OTHER BUSINESS:

None

There being no further business, the meeting adjourned at 3:40 p.m.

Date approved: August 17, 2010

David E. Cherry
Chair