

BOARD OF ADJUSTMENT REGULAR MEETING

MAY 31, 2017

The Board of Adjustment met in regular session in the Council Chambers, 222 N. Tennessee Street, McKinney, Texas, on May 31, 2017 at 5:30 p.m.

Board members Present: Scott Jacoby, Patrick Cloutier, Kimberly Davison, Randall Wilder, Brad Taylor and Betty Petkovsek. Absent: Brian White.

Staff present: Chief Building Official, Rick Herzberger; City Secretary, Sandy Hart; Landscape Architect, Emily Braht; City Attorney, Alan Lathrom; Attorney for Board, Rebecca Hendricks Brewer; Assistant City Engineer, Michael Hebert and Administrative Assistant, Dee Boardman.

17-547 Minutes of the Board of Adjustment Meeting of March 29, 2017

The first agenda item is BOA 17-547, approval of the minutes of the Board of Adjustment's meeting March 29, 2017. Are there any changes to the minutes as prepared by the city staff? Do I have a motion to approve the minutes as presented?

MR. WILDER: I move that the minutes be approved as printed.

MR. JACOBY: Thank you, Randall.

Do I have a second?

MS. DAVISON: I'll second.

MR. JACOBY: Thank you, Kim.

Any discussion? Nope. All in favor?

MR. WILDER: Aye

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

MR. JACOBY: The minutes are approved. Sign this before I forget it.

17-548 Conduct a Public Hearing to Consider/Discuss/Act on the Request by Andres A. Gonzalez for a Proposed Patio Cover, a 2' Variance from the Ordinance from the Minimum Rear Yard Setback of 20' for the Property Located at 12200 Buffalo Gap Drive, McKinney, Texas.

Next we have BOA 17-548, Conduct a public hearing to consider/discuss/act on the request by Andres A. Gonzalez for the proposed patio cover, a 2-foot variance from the Ordinance from the minimum rear yard setback of 20 feet for the property located at 12200 Buffalo Gap Drive, McKinney, Texas.

I'd like to give an opportunity to Mr. Gonzalez or his representative to make comments about this item. And actually, first, I'm going to let Rick speak. Sorry about that.

Rick, if you could please present it for us.

MR. HERZBERGER: I guess you all are familiar with the agenda process so the building official statement, I'll just read it for the record. The request has been validated and the board has the authority to consider this variance request. Over the last two months I've been working with the applicant to try and find a setback solution to covering the poured patio area with an attached cover. The applicant's hardship could be looked at since the patio foundation was poured in conjunction with the

house in cutting approximately 2 foot of the foundation to meet the 20-foot setback is not advised by the applicant's contractor.

MR. JACOBY: I'd like to give an opportunity to Mr. Gonzalez or his representatives to make any comments about this item. And if you would, please come up and state your name and address for us and you have ten minutes, please.

MR. GONZALEZ: Andres Gonzalez, 12200 Buffalo Gap Drive, McKinney, Texas. Just a couple comments that weren't on the instruction or form that I submitted. Basically, I requested the builder to build the patio cover when I had the cement poured and everything and they told me that it would delay the construction of the house by two months or so because they would have to resubmit to the city and do all kinds of other paperwork. And we were already going behind by -- took a year to get the house. So he told me, no, you'll have no problem building it after the fact. Once I found out about the variance and the problems, that's when I ran into this. I'd like it to be approved because eventually I'm going to wind up in a wheelchair and I'd like to have that area so I can maneuver. Other than that, thank you, Rick, very much for your assistance.

MR. JACOBY: Does the board have any questions? Is there anyone here that would like to speak on this outside of Mr. Gonzalez? We did receive two letters I'll go ahead and read it. The first one was handed in today that they approved of the variance. It's from an Allen, last name is K-O-C-H and a Jane K-O-C-H, 1000 Asheville Lane. The second one was also an approval of the request and it was from a Nancy and her last name is S-U-E-S-S at 908 Ayres Drive.

We've all had an opportunity to consider this request. Do I have a motion regarding this item?

MR. CLOUTIER: I move that this item – we vote on this item. It be approved as applied for.

MR. JACOBY: Thank you, Patrick.

Do I have a second?

MR. TAYLOR: A second.

MR. JACOBY: Thank you, Brad.

It has been moved and seconded that we approve. Is there any discussion? All in favor.

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

MR. JACOBY: The motion has been approved.

17-549 Conduct a Public Hearing to Consider/Discuss/Act on the Request by Eric & Heather Hollister for a 2' Variance from the Ordinance from the Minimum Side Yard Setback of 7' and for a 1-6" Variance from the Minimum Front Yard Setback of 25' for the Property Located at 702 W Louisiana Street, McKinney, Texas

All right. Next we have BOA 17-549. Conduct a public hearing to consider/discuss/act on the request by Eric and Heather Hollister for a 2-foot variance from the ordinance from the minimum side yard setback of 7 feet and for a 1- to 6-foot variance from the minimum front yard setback of 26 feet for their property located at 702 W. Louisiana Street, McKinney, Texas.

Rick, if you'd please like to present on this.

MR. HERZBERGER: Once again the request has been validated and the board has authority to consider this variance request. The applicant has stated that the addition of an attached garage could only be done on this side of the house by way of demolishing an existing addition and incorporating a two-car garage into the matching Victorian-style roof lines. Other locations would require greater variance to either side, rear, front setbacks. And I just call your attention to the applicant's basis for variance on the front of the agenda there.

MR. JACOBY: I'd like to give an opportunity to the Hollister's or their representatives to make comments about this item. If you would, please come forward and state your name and address for us and you will have ten minutes.

MS. HOLISTER: I'm Heather Holister and the address is 702 W. Louisiana, McKinney.

MR. JACOBY: Thank you.

MS. HOLISTER: So just to clarify, that front setback is a 1 foot 6 inch.

MR. JACOBY: Oh, 1 and -- Okay. Sorry.

MS. HOLISTER: So not that much. We are in the historic area of McKinney. We have put in our certificate of appropriateness with Guy Giersch (phonetic) and we have received our approval for that. So he says that it's totally fine to do. Because it's historic, the land was chopped up in such a manner that they were not clearly thinking about modern ordinances and numerous houses in the area require setbacks or already have them because the land was apportioned up later. So we don't feel that we are asking for too much. There are a number of addresses I believe I submitted that do also have smaller or larger setbacks than what we are looking for (audio cuts out) what exactly it is we are trying to do. The original attachment to the house was put on probably sometime in the 1970's based on maps that I can find and it was extremely poorly done. There's no ventilation in what's currently a bathroom. There's wood rot throughout so pulling it down and doing something else with the home is really in the best interest of the building in general. As with the driveway as well, Louisiana, I'm sure you understand, is an extremely busy street so having a wide driveway is going to be really much safer for everyone.

MR. JACOBY: Questions?

MR. CLOUTIER: So this is going to be a garage and attached room on top?

MS. HOLISTER: Yes. Yes.

MR. CLOUTIER: Kind of like a garage apartment type?

MS. HOLISTER: Well, no. It is going to connect to the home so it is an attached garage. We're going to use the space that the house already has. We're not changing anything to the original home, but that attachment that's not original is going to instead become a two-car garage and then above it the master seat that you will enter in the actual home from a landing upstairs.

MR. CLOUTIER: Oh, okay.

MS. HOLISTER: The only other thing I would add is I don't know if my neighbor sent in anything in the mail, but they did provide us with letters - - two of our neighbors provided us with letters prior to our application. I do have those if they didn't mail anything in.

MS. DAVISON: Excuse me. Does the wood deck already exist?

MS. HOLISTER: A wood deck does already exist and part of that will come down and that one also needs to be redone. It's extremely old. (Audio cuts out) The back deck needs to be redone. The front portion that you see in gray on the screen right now is the original front porch and that's staying put.

MR. JACOBY: Thank you very much. See if we've had any -- is there anyone else who would like to speak on that topic? Seeing none.

We have received six letters after the notices went out. I'm going to read them as they have come in. The first one is (inaudible) Cheramy Rusbuldt

at 616 West Virginia Street in which they have protested. They stated the authenticity of the historic district must be protected from the Mc-mansions cropping up all along the streets and homes already. Part of our special district. The second one is for. I cannot read their name, but it is at 704 West Louisiana Street. Patrick Madrigal (phonetic) and they approved. As direct neighbors, we are not opposed to the proposed changes. Additionally, the proposed changes would lower the back deck below our fence line. The third letter from Justin McKinney, 107 North Bradley Street. They approve. As an immediate neighbor, I believe the proposed project will benefit both the owners and the surrounding community. The fourth one is also for an approval. From Cabe (phonetic) Chadick at 620 West Virginia Street. I believe property owners should be able to build what they want. And the next one is from Pat Dowell. It's also an approval. It appears to blend with the original style as to height. And the last one is from 614 West Louisiana Street. It's also an approval. Is there any further discussion?

UNKNOWN SPEAKER: I would like to say that we always look at the protests and try to understand because this is a serious matter, but the wording of the protest deals with Mc-mansions cropping up all over which is beyond the scope of this request. It doesn't address this request. The immediate neighbors indicate that it fits in well and, you know, Guy gave his okay through the historic district which is a higher hurdle than most other neighborhoods have, so I have a tough time applying the protest very accurately to this request.

MR. JACOBY: We've all had an opportunity to consider this request. Do I have a motion to close the public hearing and approve or deny the agenda item?

MS. DAVISON: I move approval for this agenda item.

MR. JACOBY: Thank you, Kim.

Do I have a second?

MR. WILDER: I second.

MR. JACOBY: Thank you, Randall. It's been moved and seconded that we approve. Is there any discussion? All in favor?

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

MR. JACOBY All opposed? The item has been approved.
Thank you, guys.

Board members unanimously approved the motion by Board member Kimberly Davison, seconded by Board member Randall Wilder, to approve the request by Eric & Heather Hollister for a 2' Variance from the Ordinance from the Minimum Side Yard Setback of 7' and for a 1-6" Variance from the Minimum Front Yard Setback of 25' for the property located at 702 W Louisiana Street, McKinney, Texas.

17-550 Conduct a Public Hearing to Consider/Discuss/Act on the Request by Justin Nunn for Opportune Development LLC - Barnes Series for a 6.6" Variance from the Minimum Front Yard Setback of 25' for the Main

House and 3.8" Variance from the Minimum Rear Yard Setback of 10'
for the Detached Garage at the Duplex Property Located at 802/804
Barnes Street, McKinney, Texas

Next item on the list is BOA 17-550.

Conduct a public hearing to consider/discuss/act on the request by Justin Nunn for Oppertune Development, LLC Barnes Series for a 6.6-foot variance from the minimum front yard setback of 25 feet for the main house and 3.8-foot variance from the minimum rear yard setback of 10 feet for the detached garage at the duplex property located at 802/804 Barnes Street, McKinney, Texas.

Rick, would you like to present for the board, please.

MR. HERZBERGER: I would call your attention to existing conditions in the applicant's basis for variance which is taken from the application and information provided that's on the first page of the agenda. The building official statement, the question has been validated and the board has authority to consider this variance request. The replat process requires the creation of nonconforming lots so the variances must be considered before the replat is considered by the city. The replat has been filed and it is part of your packet. If a recommendation is made to approve the various, I suggest you make the motion that said variance approval is only applicable to the submitted plat which is one of the exhibits. The reason for that is, if the plat changes by way of the plat process replat, then your approval would be invalidated.

MR. JACOBY: Thank you.

I'd like to give an opportunity to Mr. Nunn or his representations to come up and make comments about this item. If you could please state your name and address and you have ten minutes, sir. Thank you.

MR. LOWENTHAL: My name is Andy Lowenthal.

I live at 508 Broadly Fin, McKinney. I'm Justin's partner on this project. Basically, in a nutshell, we are just trying to replat these two lots. There's two duplexes that are side by side and currently the property line goes lengthwise through -- through the middle of both structures so you can see there that the dotted line going up and down the -- the dividing line between the lots go through the two houses. And so what we are proposing and trying to accomplish is to replat it so that the property line goes in between the two structures separating them. We don't intend to change the footprint or add anything that would make it any closer to the street than it already is. We are just trying to separate the properties that are conjoined, if you will, because of the property lines right now.

MR. JACOBY: Can you stop at that one,

Rick, for a second go back up a little bit.

So right now, if I'm looking at it right, the green -- whoops -- the green line going -- is that the current property line and you're wishing to flip it to the red line?

MR. LOWENTHAL: Yes, sir, that's correct.

MR. JACOBY: So it goes right through both homes?

MR. LOWENTHAL: Currently it does.

MR. JACOBY: Okay.

UNKNOWN SPEAKER: Would it change the address on them because one of them seems to certainly be a Barnes Street address right now because the one up at the top doesn't have any frontage --

Rick, can you go back down, just kind of leave it where it was --

Doesn't have any frontage to Rains, right?

So that's a Barnes Street address. Then the other one, is that now or will that remain a Barnes Street address?

MR. LOWENTHAL: I believe it will remain. Both duplexes, both structures both front doors, the front of both houses face Barnes Street currently.

UNKNOWN SPEAKER: Okay.

MR. LOWENTHAL: So I think they would both still have a Barnes address. Did I answer that?

UNKNOWN SPEAKER: Well, Rick, could you just leave it right there. Thank you. If we honor this request to go as I see it north/south, the one on the left is not going to have any affiliation with Barnes Street anymore, is it?

Wait.

MS. DAVISON: Vice versa.

UNKNOWN SPEAKER: I'm sorry. Forgive me. I get it. Okay. Yep. Thank you. You answered my question.

MR. LOWENTHAL: Okay.

MS. DAVISON: So historically what happened is the same person owned both lots and then they just built on top of whatever they owned.

MR. LOWENTHAL: Yes, ma'am. When these structures were built in 1960, I think both lots were owned and they just built them the way they wanted them to be at that point.

MR. JACOBY: So if you wanted to sell them right now, would you have to sell both lots and all two houses at the same time?

MR. LOWENTHAL: Yes.

MR. JACOBY: Wow. Any other questions? Thank you.

MR. LOWENTHAL: Thank you for your time.

MR. JACOBY: No problem.

Do I have anyone that would like to speak on this additionally? Nope. We did receive five letters. I'll go ahead and read those in. The first one is from Robert McClintock at 1005 Raines Street. He approved this variance. The next one is from Barbara Ann White at 811 1/2 South Cedar Street, McKinney, Texas. She wishes to protest. Integrity of a historical district, loss of open land and trees, damage to streets, et cetera. The next one is from Kenny Elder at 809 1/2 Cedar Street. They also protest. Part of the beauty of homes in the area is the lot. Building this close to the street and property affects the looks of everyone in a negative manner and affects how others can also build on adjacent properties and would set a bad precedent. The last one is from also Barbara Ann White at 811 1/2 South Cedar Street which she protested. The City of McKinney prides itself in historical district. City of officials in the past have had the foresight to protect McKinney's historical areas. I would hope our present and future city officials would also show the same respect for our historical areas. The variance requested will in no way better our historical districts. It is strictly for monetary value for private development companies. The storm drainage in the area is already overwhelmed. This variance will open the way to even more flooding of homes on Cedar

Street, Baker Street, Pine Street and Rains Street, just to name a few. The integrity of our historical district is at danger.

Is there any discussion on these?

MS. DAVISON: Just a point of clarification. There's no new building, so I am not sure how storm drainage is affected at all. Right?

MR. LOWENTHAL: That's correct. Yeah, the footprints of these buildings will not change. There's going to be no --

MR. JACOBY: The only thing you're changing is just the property line - - or wishing to change is the --

MR. LOWENTHAL: Correct.

MR. JACOBY: The property line?

MR. LOWENTHAL: Correct.

UNKNOWN SPEAKER: Have you talked to any of these neighbors about this? Have you got any – have you explained to them what's going on?

MR. LOWENTHAL: Not specifically about just changing the replat. Again, there's going to be no physical changes being made.

UNKNOWN SPEAKER: Right.

MR. LOWENTHAL: It's just an invisible property line that goes lengthwise that we just want to be crosswise now.

UNKNOWN SPEAKER: It just seems to be a chasm of misunderstanding here then –

MR. LOWENTHAL: I would agree.

UNKNOWN SPEAKER: -- of being on the same page --

MR. LOWENTHAL: Yeah, I don't --

UNKNOWN SPEAKER: -- that, you know, and, again, I've got to filter this through, but I'm trying to figure out where is the harm and I'm having --

MR. LOWENTHAL: That drainage, irrigation, none of that is, to my knowledge, will be affected.

UNKNOWN SPEAKER: Okay.

MS. DAVISON: And no open space issues?

MR. LOWENTHAL: Yeah, the structures are there existing, the positioning of them will not change.

UNKNOWN SPEAKER: Right.

UNKNOWN SPEAKER: Just so I'll understand, you're the partner of the owner of this particular property?

MR. LOWENTHAL: Justin and I, we co-own it.

UNKNOWN SPEAKER: Okay. So would Justin then be the one that would property have more of a relationship with the different neighbors around the area or do you have any familiarity with any of the people that live in this area?

MR. LOWENTHAL: We've only owned this property for a few months. We've introduced ourselves as we've been around the property. If someone's out, we'll walk up and say "hello" to them; but we haven't made it a case to knock on doors and propose this idea. We haven't done that. And to my knowledge, Justin hasn't done that without me. So, no, the short answer to your question is I don't think Justin would be in any more of a position to know that.

UNKNOWN SPEAKER: Okay. Because I think I'm pretty much in the same boat as Patrick of not really making the connection between some of the comments here and what's --

MR. LOWENTHAL: Yeah, when I heard you reading them back, those were my thoughts also.

MR. JACOBY: Thank you. We've all had an opportunity to consider this request. Do I have a motion to close the public hearing and approve or deny the agenda item?

MR. CLOUTIER: So moved.

MR. JACOBY: Thank you, Patrick.

Do I have a second?

UNKNOWN SPEAKER: Second.

MS. DAVISON: We need to make it...

MR. JACOBY: I'm sorry? Okay. This motion --

UNKNOWN SPEAKER: Motion to approve the variances applied for.

MR. JACOBY: Sorry about that. Okay.

UNKNOWN SPEAKER: I recommend we approve the variance to the replat document as submitted.

MR. JACOBY: Got a second?

MR. TAYLOR: Second.

MR. JACOBY: Thank you, Brad. It has been moved and seconded that we approve that we approve the variance on its application for the replat document as it is submitted. All in favor?

MR. WILDER: Aye.
MS. DAVISON: Aye.
UNKNOWN SPEAKER: Aye.
MR. JACOBY: Opposed? The motion has been approved

Board members unanimously approved the motion by Board member Patrick Cloutier, seconded by Board member Brad Taylor, to approve the request by Justin Nunn for Opportune Development LLC - Barnes Series for a 6.6" Variance from the Minimum Front Yard Setback of 25' for the Main House and 3.8" Variance from the Minimum Rear Yard Setback of 10' for the Detached Garage at the duplex property located at 802/804 Barnes Street, McKinney, Texas.

17-551 Conduct a Public Hearing to Consider/Discuss/Act on the Request by Justin Nunn for Opportune Development LLC - Barnes Series for a 6.4" Variance from the Minimum Front Yard Setback of 25' for the Main House and 5.1" Variance from the Minimum Rear Yard Setback of 10' for the Detached Garage at the Duplex Property Located at 806/808 Barnes Street, McKinney, Texas

On to BOA 17-551.

Conduct a public hearing to consider/discuss/act upon the request by Justin Nunn for Opportune Development, LLC Barnes Series for 6.4-foot variance from the minimum front yard setback of 25 feet for the main house and 5.1-foot variance from the minimum rear yard setback of 10 feet for the detached garage at the duplex property located at 806/808 Barnes Street, McKinney, Texas.

Rick, would you please like to present to the board.

MR. HERZBERGER: Once again, I call your attention to the existing conditions in the applicant's basis for variance. We looked at this plat and its two properties so we split this to two considerations and this is the second one for 806 and 808. The request has been validated and the board has the authority to consider this variance request. This replat process requires the creation of conforming lots so the variance must be considered before the replat is considered by the city. The replat has been filed. If a recommendation is made to approve the variance, I suggest you make the motion of said variance only applicable to the submitted plat, the exhibit.

MR. JACOBY: Thank you. I'd like to give an opportunity to Mr. Nunn or his representatives to make comments about this item if they would like? Nope.

Do we have any discussion?

UNKNOWN SPEAKER: No.

MR. JACOBY: Nope. I do have one letter in protest. It is from Barbara Ann White, 811 1/2 South Cedar Street, McKinney, Texas 75069. She protests. The City of McKinney prides itself in its historical districts. City

officials in the past have had the foresight to protect McKinney's historical areas. I would hope our present and future city officials would also show the same respect for our historical areas. The variance requested will in no way better our historical district. It is strictly for monetary value for private development companies. The storm drainage in the area is already overwhelmed. This variance will open the way to even more flooding of our homes on Cedar Street, Baker Street, Pine Street, and Rains Street just to name a few. The integrity of our historical district is at a danger.

Do we have any further discussion?

UNKNOWN SPEAKER: No.

MR. JACOBY: Do we have any motions?

UNKNOWN SPEAKER: I move that we recommend -- I move that we approve the variance and it will be only applicable on the submitted plat.

MR. JACOBY: I'm sorry, first we need to close the public hearing.

UNKNOWN SPEAKER: Oh, I'm sorry.

MR. JACOBY: Sorry about that. I moved my notes. All right. We've all had an opportunity to discuss this request. Do I have a motion to close the public hearing and approve or deny the agenda item?

UNKNOWN SPEAKER: I move that we approve the item only on the submitted plat.

MR. CLOUTIER: Second.

MR. JACOBY: Thank you, Patrick. It has been moved and seconded that we approve to -- is there any discussion? All those in favor?

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

MR. JACOBY: Opposed? The motion has passed. Thank you very much.

Board members unanimously approved the motion by Board member Brad Taylor, seconded by Board member Patrick Cloutier, to approve the request by Justin Nunn for Opportune Development LLC - Barnes Series for a 6.4" Variance from the Minimum Front Yard Setback of 25' for the Main House and 5.1" Variance from the Minimum Rear Yard Setback of 10' for the Detached Garage at the duplex property located at 806/808 Barnes Street, McKinney, Texas.

- 17-552** Conduct a Public Hearing to Consider/Discuss/Act on the Request by McKinney Entertainment, LLC, 110 E Louisiana Street, McKinney, Texas 75069 for an Appeal of an Administrative Official's Decisions Regarding the Enforcement of Section 146-136 - Tree Preservation on Property Identified as Legal Description - 16.784 Acres at Eldorado Parkway & College, McKinney, Texas 75069, McFarland Survey, Abstract 558

All right. Finally, we have BOA 17-552.

Conduct a public hearing to consider/discuss/act on the request of McKinney Entertainment LLC, 110 East Louisiana Street, McKinney, Texas 75069, for an appeal of an administrative's official's decision

regarding the enforcement of Section 146-136, tree preservation on property identified as legal description 16.784 acres at Eldorado Parkway & College, McKinney, Texas, 75069, McFarland survey, Abstract 558.

Rick, could you please present this to the board.

MR. HERZBERGER: Thank you, Chairman. I'll call your attention, which I've sure you've already read, the agenda item on the existing conditions. I'm sure you've read through that and the applicant's basis for the appeal. There is an appeal letter that you'll see with -- and then you'll also see the city's response to the appeal.

The board authority was placed on here because this is the first appeal since I've been here in four years so I wanted to make sure that you had the full information for your authority and when it comes to a point where you consider a motion or anything, I just call your attention to the second page, Decision by Board, what you may or may not do. You may reverse or affirm wholly or partly or may modify the order, etcetera, et cetera.

Building official's statement. The appeal application has been accepted by the building official and the board has authority to hear the appeal.

The city enforcement action has been stayed as no eminent peril to life or property exists. The applicant bears the burden of proof regarding the appeal of the city official's determination. The board does not have the authority to revise the zoning ordinance. It must apply the zoning ordinance as written. The board does have the authority to consider the validity of the determination made by the city officials based on the applicant's appeal statement.

I think you'll note that there's one item that is part of the appeal -- applicant's appeal letter and I wanted to call your attention to it. It is on that second page and it actually shows or there's a request that from the applicant that the board give the authority to issue the permits and I just want to let you know that's not part of your authority. So that's basically it.

MR. JACOBY: Thank you. And just to rectify that --

MR. HERZBERGER: Oh, one last thing.

MR. JACOBY: Yes.

MR. HERZBERGER: We are -- we have -- we have the applicants on that side and we have the city on his side so you'll know who to call up And we have Emily and Mr. Roeder and then we also have assigned to the board tonight attorney, so if you have any questions.

MR. JACOBY: Thank you. And just to clarify, on the appeal letter, what Rick was talking about where McKinney Entertainment request that the board overturn these decisions and require the city to issue the appropriate construction and building permits to allow McKinney Entertainment to return to work on the site, this board cannot order the city to issue these appropriate constructions and building permits. The only thing we can actually discuss here is the actual appeal itself. As far as the permits, we do not make those guidelines.

With that being said, we'd like to go ahead and move into it. I would like to give an opportunity from the representative of McKinney Entertainment, LLC, to make comments about this item. And if you could, please, state your name and address and you will have 15 minutes to please help us learn more.

Thank you, Mr. Chairman, Members of the Board of Adjustment. My name is Bob Roeder. I'm an attorney here in McKinney at 1700 Red Bud, Suite 300. I'm joined in my presentation by my partner Ross Wells. And so I know that the information that you have received regarding this item is voluminous. I hope that you've had a chance to read it and I hope that you've had a chance to look at the pictures. What I want to do is start with a little bit of an overview about why we think this appeal is important and recognize the fact that you have not been involved in an appeal from a city official's decision and so this is significantly different, I think, than

listening to the hardship variance cases that you had earlier this evening. So if at any time you are confused or you want to ask a question, not only about the content but about where we are in the process, feel free to interrupt me and do that. We are not here today to dispute, argue about, and try to recons true the Tree Preservation Ordinance, which is Section 146-136 of the McKinney Code of Ordinances. And in both our appeal letter and the response from the city, you will see a number of sections or number of provisions from that ordinance section recited and those are very important in your understanding of what -- of what our points are and what our argument is.

To start with, I think that the Tree Preservation Ordinance is really the city's attempt to balance the desires of the public to have healthy large trees with the rights of the landowner to maintain and operate his property and so it's that balancing act that we find ourselves in in this kind of a situation.

And I would submit to you that as you consider what will be presented to you today, that if there's any erring on the side of one party or the other that it would be most appropriate to err on the side of the landowner's rights.

The other thing I want to point out to you is, while there's a lot of talk in these documents about cutting down trees and about tree measurements and whatnot, unless you went out to the property and looked at it today, you would draw, I think, a clear conclusion that what was once a very wooded forestry area is now a field and that is not the case. In fact, what you have out there today is a very, very attractive park-like setting.

Now, with regard to the tree ordinance itself or the Tree Preservation Ordinance itself, I'd like to talk for a minute about some critical definitions and they have to do with the concept of what trees are under the ordinance. To start with, we have the concept of a quality tree and as has been pointed out in both our appeal letter and the response, a quality tree is a tree that is at least 6 inches in diameter measured at the breast height at 4.6 feet above the ground that falls on a list in an appendix in the ordinance. And so pecan trees, elm trees, those kinds of trees are quality trees. Bodarks, Hackberries, Honey Locusts, those are not quality trees. And you will see -- you will know that they're not quality trees not because there's a specific provision in the appendix that says these aren't quality trees but because they're not listed as a quality tree. So a tree species by omission fails the test of a quality tree. And one of the important aspects of a quality tree is the ordinance only regulates activities that relate to quality trees.

Now, in addition to the quality tree, you've got a protected tree and a protected tree is that quality tree that then is 6 inches or greater at 4 and a half feet above the ground. And so while you might have a quality tree that's less than 6 inches DBH, or at breast height, if it's less than 6 inches, it doesn't matter if it's a quality tree. It is not protected and the ordinance does not apply to it. I know those are distinctions, but they are distinctions that are important in the understanding of the ordinance. A couple other terms that you have read in the -- especially the response and that is the concept

of clear-cutting and clear-cutting is a very specifically defined term in the ordinance that basically says it is the removal of ten or more trees within a 90-day period that are protected trees. And interestingly -- again, when I think about this ordinance from a much larger scope, interestingly, it doesn't matter whether there are 10 trees out of 20 trees on a one city lot or 10 trees out of 1200 trees of a 17-acre tract. It is just ten trees, okay. So keep in mind that we are not also as artful in our drafting as we should be in considering the consequences of that drafting.

I think another important term to understand is the concept of grubbing and that's a defined term in the ordinance also. And grubbing means -- I want to read it here -- excavating or removing a significant part of a tree's root system. And remember, that's not just running on top of the ground and that kind of stuff, but it is actually digging in and removing a significant part of the tree's root system.

Now, important to the allegations made by the city are that my client should have obtained a tree permit for work that was done about which this appeal applies. And as we pointed out in our appeal letter that you have all read, there are exceptions to when a tree permit is required; but before I get to the exception, let me take you through the tree permit requirements and what their process are.

The ordinance says a tree permit is required when you -- when you begin the construction of any building, paving, grading of a subdivision, a public improvement or a building. And I think our appeal letter to you was very specific in that this activity was not done in furtherance of creating a building -- pardon me -- in furtherance of creating a subdivision or in furtherance of putting in any type of infrastructure. This was a clearing activity of underbrush.

So in our -- from our position, a tree permit was not required for our client to go out and do the work that he did. But if a tree permit were required, here are the steps you've got to go through to get a tree permit. And this is important because I want to contrast what is required to obtain a tree permit to some of the activities that the city has complained that my client did.

In order to get a tree permit, you've got to fill out an application like you do for anything in the city, right. You pay a fee, but you have to then go and get a tree survey performed and that tree survey must locate every protected tree on your property and must put those trees on a drawing and that work has to be done by an arborist, a licensed surveyor, or a landscape architect.

So you and I, unless you are one of those, can't go out and do a tree survey. And anecdotally, I will tell you that I have a number of clients who have done tree surveys in preparation for subdivisions or buildings and the cost sometimes is in the hundreds of thousands of dollars. Think about it. You've got to go through a wooded area. You've got to mark every tree. You've got to put it down with a GPS calculator on a map. You've got to reduce that to a drawing. That is a time consuming and a very expensive task.

And then once you get through doing that, you've got to put together a tree preservation plan. And then you submit all that to the city landscape administrator for review and that review comes back with either a permit or a permit with conditions or no permit.

Now, why do I make a point about what is required to do a permit? And that is, I think the ordinance and the drafters of the ordinance anticipated that there were going to be situations in which having to go through those steps to require a tree permit is overkill. It's perhaps unnecessary. Here is an example. One of the trees that we are at odds about in the appeal is a tree that has been demonstrated -- is demonstrated to have been rotten and you have seen one of the pictures. Ross is going to get up and go through those with you in some detail, but you'll see a picture in which we have put a ruler down in the hollowed-out rotten part of that trunk. Under the landscape administrator's interpretation of this Tree Preservation Ordinance, if that were the only tree we wanted to takedown -- we can see that its trunk is larger than 6 inches in diameter at breast height; but if we wanted to go out there and take that tree down, we would have to have done a tree survey of 1200-plus trees, hired a third party to do that, filed a tree preservation plan in order to get a permit just to take out that rotten stump. So I'm just telling you that there are excesses here and I think that's why some of the exceptions are important.

There is an exception to the requirement of getting a tree permit if all you are going to do is clear underbrush. Now, unfortunately, the term "underbrush" is not defined in this ordinance; but if you go online and go to Webster's Dictionary or whatnot, underbrush is generally defined as shrubs, bushes, small trees underneath the canopy of a wooded area or a forest. And so no permit is required for a landowner to go out there and conduct that underbrush clearing activity.

Now, you will note in the response from the landscape administrator that you've got to have a permit to clear and grub under a tree line of a protected tree; but remember the definition of grubbing and that is removing a significant part of the root system. And so, I think there are different parts of that ordinance that if you're not careful in your reading, you can clearly mistake what is required and what is not required.

So I want to walk you very quickly through our fact pattern, our fact set. I don't think there's a lot of dispute on that. Am I down to two minutes? Oh. Okay. Then what I'm going to do is yield my time to Ross. Sorry.

MR. WELLS: My name is Ross Wells and I'm Mr. Roeder's partner. My address is also 1700 Red Bud, Suite 300, McKinney, Texas 75069. Mr. Herzberger, if you could, please, go to the last page of our appeal letter, please. There are basically three sets of issues. The last document, the last exhibit, the last picture, the last picture on our document, Your Honor. I'm a litigator. I say "Your Honor" a lot, so I'll refer to you as a judge. It looks like this. It's labeled "24-B."

So what this picture is going to show you, like I said, there's basically issues we have here: One is, we're being punished for removing dead trees. The second is, we're being punished for removing logs that have fallen off of limbs high up in trees, and the final issue is that the trees that -- the smaller trees that we removed were less than 6 inches at breast height but more than 6 inches at the ground level. So this photograph right here depicts where one branch fell.

As you can see, this is a heavily-wooded area. It's also in the floodplain so a lot of dead trees and large limbs flow in times of flooding and then when the flood recedes, the wood stays there. And so what my client did was remove some of that including --and you can see on this tree here where several branches fell down. The city landscape administrator went out and saw those tree limbs that we had picked up, saw they were larger than 6 inches and has sought to punish us for removing those trees. In addition --

MR. JACOBY: Well, I got a couple questions, if that's all right, real quick. One of the things that you mentioned, not yourself but Mr. Roeder, excuse me, you guys mentioned that you-all were just clearing underbrush and that you don't need a permit if you're just clearing underbrush as long as you're not grading, pouring -- what was it -- grading, building a structure and I think I'm missing something else. Is that pouring concrete?

UNKNOWN SPEAKER: Infrastructure.

MR. JACOBY: Infrastructure. So I understand you guys weren't doing that at that time --

MR. WELLS: Right.

MR. JACOBY: -- but what are you preparing the land for?

MR. WELLS: For future development.

MR. JACOBY: Would that include infrastructure, buildings, or any type of grading?

MR. WELLS: It might in the future. I take that back. The area where we were doing it -- so as you know, my client is Don Day. Mr. Day is obviously well forced in the city ordinances and so he acquired the property. He looked at the ordinance and he instructed his workers to comply with the ordinance.

MR. JACOBY: Okay.

MR. WELLS: Only after that did the city receive some complaints and the city administrator came out and said you've done it all wrong. And so the area where we were removing these dead trees and small trees was in the floodplain and is not going to be developed.

MR. JACOBY: Rick, can you put the picture of the property up there so maybe you can show us like where -- we don't have a picture of where the floodplain is and where the floodplain is not. And I'll ask the same thing of the city because it might be an interpretation issue. If you can do that aerial photo with the --

MR. WELLS: Be the dash lines.

MR. JACOBY: Okay.

MR. WELLS: I can't read it from here, but one of those lines will be the floodplain. And this is the creek that I referred to that floods.

MR. JACOBY: Yes, very much so.

MR. WELLS: Right. And so if you've been around creeks, there are large dead trees, limbs, and things like that that wash up and then the flood waters recede.

MR. JACOBY: I can see it now.

MR. WELLS: And so we were in this area cleaning up -- I would paraphrase it as cleaning up the property.

MR. JACOBY: Okay. And removing the underbrush and the dumping stuff?

MR. WELLS: Right. Weeds, thorn bushes, things like that that are, you know, in areas that aren't being maintained.

MR. JACOBY: So down in the floodplain there was no grading -- or there will be no future grading, no future infrastructure, no future buildings built below that line of where you guys were removing trees?

MR. WELLS: That's correct.

MR. WILDER: I've got a question. Who determined that they were dead? Did you have a study made or -- and you talked about this 6 inches. Is this a tree that would be 6 inches later on in its life?

MR. WELLS: Let's look at this photograph right here. If you don't mind, Mr. Herzberger. If we look at picture labeled 29.

MS. DAVISON: Can I ask why some of these pictures are sort of black and white? Really -- it's really hard to tell --

MR. WELLS: Right. And so let's take this picture just while we are here, for instance. What this is a photograph of is a piece of tree limb about that thick that's laid down on some leaves and so it wasn't an actual tree stump. It looks like a tree stump. So here you can see, if you'll scroll down a little more, these -- you see those cutouts or disks, some of those had been laid flat down on the leaves and then a picture taken of them. So some of these pictures are from the city landscape administrator. Some of them are from my client.

I would like to show you the hole in the ground, but one of the members of the public who would like to speak has to leave at 6:20 and so we'd ask permission for him to speak now if that's okay.

MR. WILDER: But my question was who determined that these trees were dead?

MR. WELLS: Well --

MR. WILDER: How that study was made.

MR. WELLS: Sure. I'll show you this hole in the ground. I have a picture of it here. This part of my submittal. We made that decision and I can show you this picture. I don't think you need -- there it is. That's one of them. That was declared to be a tree. It wasn't a tree. It was a dead hole in the ground. Frankly, you don't need to be an arborist to identify a hole in the ground as opposed to a tree. It just wasn't a tree. Did I answer your question?

MR. WILDER: Kind of.

MR. WELLS: I am a lawyer.

MR. WILDER: I just wanted to know if you had an expert look at these trees and determine they were dead.

MR. WELLS: The ones that were dead were clearly dead. They were either on their side --

MR. WILDER: But the ones you chopped down --

MR. WELLS: Those were less than 6 inches at the diameter breast height as required by the ordinance. Does that answer your question?

MR. WILDER: Well, kind of. I'll let it go.

MR. WELLS: Would it be okay if the member of the public gives his talk at this time?

MR. JACOBY: Is that all right with you? I'm sorry? So we need to go -- Because of the rules that we have, we have your 15 minutes banked up and then we have the city and they have 15 minutes and then there will be rebuttal time and then after that, they're letting the public speak. So I believe I have to follow that order. I'll get a clarification clear.

MR. LATHROM: Mr. Chairman, I'm not this is an unusual role for me because. Usually I'm advising the board.

MR. JACOBY: Yes.

MR. LATHROM: Board of adjustments.

Ms. Rebecca Brewer is here this evening to advise the board if you have any questions procedurally speaking; but on behalf of the city, I would say that we don't have any objection to allowing a resident to speak.

MR. JACOBY: Okay.

MR. LATHROM: If they need to speak now at this time before the city makes its response to this presentation.

MR. JACOBY: Then we'll be more than happy to let the public or the person who needs to leave, if he would like to come up and speak, we'd be more than happy --

(Audio cuts out.)

UNKNOWN SPEAKER: No problem. Thank you.

MR. RICK WELLS: Chairman Board of Adjusters, Rick Wells, 670 Windy Lane, Lucas, Texas. I'm partner with Don on several things in the city. I can tell you that -- can I hand out a few pictures to you guys? I can tell you that -- (audio cuts out.)

MR. JACOBY: I'm sorry, Mr. Wells. I forgot to tell you, you have three minutes. Sorry about that.

MR. RICK WELLS: I've never seen Don stumped on an ordinance before and we've built a lot of things together and, you know, our goal from the very beginning as we walked these 17 acres, I'm a little different than you. I have been able to walk the property and I have put a pair of boots and jeans on and walked through that underbrush. And so our intent is to leave this property much better than we found it, A.I consider myself somewhat of an environmentalist. I make my living off the land because obviously I own restaurants and I live on an organic farm. So it is very important to me from an environmental standpoint to keep things and make sure they are better than what we found them and I really believe that's where we're headed on this property. We want to make sure that we leave it better than we found it.

A lot of you guys have been in McKinney for a long time and if you drive down Highway 5, you can see the flood that always floods. Sometimes at a 2-inch,3-inch rain, you have that standing water by the storage facility on one end and on the other side where Don's property is. And so a tremendous amount of down trees, tremendous down amount of brush and so forth on that property and I really believe his focus was to get that cleaned up. And if there's anything that we misstepped on, it was certainly because maybe the ordinance in the city is just not very clear about what we need to do or what he needed to do.

But I can tell you that, you know, our hope is -- (audio cuts out) -- leave it better than we found it and to make sure that we comply with the things that we need to, but I can assure you that if you start looking at where it

is today and where it was about six or seven months ago, it is a quantum leap in the right direction and I think that if there's anything that was misstepped it's because if -- if we have to get attorneys up here to a Board of Adjustments to talk about the understanding of an ordinance, then we probably need to take a step back to relook at that to make sure that from a property owner that we can understand that so we kind of stay out of harm's way. Thank you for what you do. I appreciate it.

MR. JACOBY: Thank you. I have a couple more questions, if that's okay, for Mr. Roeder or Mr. Wells. Do you guys have any pictures of before?

MR. ROEDER: No. No. We didn't think there were any reason to take them.

MR. JACOBY: Just out of curiosity I needed to ask does anyone else have any questions before we ask for the city?

MS. DAVISON: When you walk through the process of removing the trees, can you tell us just what steps were taken.

MR. ROEDER: May I call on Mr. Nye who is here that was actually the party that undertook that work?

MS. DAVISON: Sure.

MR. GORELANGTON: Nye Gorelangton, 909 North Waddill Street (phonetic), McKinney, Texas 75069.

MR. JACOBY: Thank you.

MR. GORELANGTON: The question, I'm sorry?

MS. DAVISON: Can you walk through the process of what you did to remove the trees and your qualifications, that kind of thing.

MR. GORELANGTON: Just a laborer. I go out there. We couldn't walk through the place. We went in there at breast height 4 foot 6 inches off the ground, if it was under 6 inches was good to cut. We followed the ordinance to a T. Don made sure without a doubt that we didn't cut anything that didn't need to be cut, wasn't allowed to be cut, shouldn't have been cut. And I think we followed that as plain as we could. It was allowed to be cut at 4 foot 6 inches. We got rid of it. It was in the floodplain.

He paid to get this stuff cleared that we can't build in there. There was no reason for him to spend his own money to cut these trees down to clear the underbrush, to cut the logs, the branches, the stumps to the ground that just catch debris. There was no reason to spend money cutting them so -- but he did to clear it up. It's still -- there's still -- it looks like that on an aerial picture today, exactly like that, short of the homeless shelters we got out of there, the brush that was on the ground, the trees that were dead, the trash, the mattresses, things like that, we hauled off. So my - we went in there -- I went up there with 4 foot sticks and if it was there, we just cut it with chainsaw to the ground. We stacked them up. Any limbs that were in the way that were already down or broken that were larger, we cut up so we could maneuver them and that was it.

MS. DAVISON: When did you start your work?

MR. GORELANGTON: I'm thinking maybe August of last year. Maybe August of last year.

MS. DAVISON: And how much time did you spend?

MR. GORELANGTON: About -- well, from then up until we got a shutdown notice from the City of McKinney.

MS. DAVISON: So what size crew did you have?

MR. GORLANGTON: Three guys.

MS. DAVISON: Working all week every week from August to...

MR. GORELANGTON: No. No. Probably, you know, five days a week probably but some days we knocked off early. If it was raining, you couldn't get down there and we were shut down for two weeks at a time and equipment sitting there. You couldn't do anything. It was a mud hole, you know, and then all of the sudden things get caught up in all the underbrush and the debris all over again and then we're back to square one.

MS. DAVISON: Essentially three or four months?

MR. GORELANGTON: Yeah, something like that. I can't remember the actual date we got the stop work order. Any other -- I mean, as far as your question, sir, how do we determine if it was dead? It was already on the ground, laying over rotting or it was broken off and no limbs on it and just 1 foot, a 3 foot, a 12 foot stump that was just rotten. And if there was branches that were this big -- which there definitely were beautiful branches this big that were already falling off of trees that were out there. And if the branches on the ground I determined it to be dead because it wasn't connected to a tree, if it was a stump that had a rotting hole down the center of it, I assumed it was dead. That was my call. I made all those calls of a dead tree being a dead tree.

There's no sense in spending money to cut down a live tree unless it was under 6 inches that we're allowed to cut to clear the underbrush and open it up so everything else could live and, you know, stop catching trash and people wouldn't sleep overnight in there and burn fires and things like that. So I made the call if it was down, it was dead. If there was nothing growing on a stump that might have been 12-foot high, but it was a stump where the rest of the branch was already broken off and lightning hit it or something, we cut it down. If it was 1 foot, we cut it down. If it was 1 foot off the ground or already broken and rotten, we cut it.

So a lot of these look like all real live massive stumps, but they might have been struck by lightning 12-foot high just hadn't had enough time to rot yet, but I made that call. And, no, I'm not a licensed anything, but I wouldn't cut down a tree that's to me -- the trees make the property. And what we tried to do was clear it out so you could see the beauty of what was there is all we really did. And Don was there pretty much daily making sure we weren't doing things -- you know, I mean, there's -- spending time and energy out of your pocket to pay for getting trees cut just, you know, you can't do -- just doesn't make sense. We tried to follow the ordinance without -- to a T.

MS. DAVISON: Thank you.

MR. GORELANGTON: Any other questions?

MR. JACOBY: Not at this time. Thank you.

All right. I would like to give the opportunity for the representative from the City of McKinney to make public comments about this. If you could please state your name and you will have 15 minutes to present please.

MS. BRAHT: Yes, sir. My name is Emily Braht. I'm the landscape architect for the City of McKinney. In this role I am charged with the responsibility to administer the provisions of the Section 146.136 of the Tree preservation Code of Ordinances. A little background about me.

I'm Kay(phonetic) state grad and obtained a degree in landscape architecture. It's a five-year program. I became licensed through the Texas Board of Architecture Examiners and I have practiced landscape architecture within architecture firms and landscape firms for ten years. I had my own private firm Braht plus Icer(phonetic) Group for 16 and then came to the city and have been here since 2008. I've been practicing as a professional landscape architect for, yes, plus 35 years.

I would like to do a little background and then tend to the preservation ordinance. The primary intent of the Tree Preservation Ordinance is specifically to prohibit indiscriminate clear-cutting of trees and protect and health quality trees and promote the natural ecological, environmental and esthetic qualities of the trees. For clarification, clear-cutting, I think already went through, is any ten or more trees of protected trees within 90 days. And, of course, the quality tree list is within our ordinance and protected trees are those trees 6 inches or greater that are considered quality trees and protected trees. When are tree permits required? Before clear-cutting, before selectively thinning a densely forested area, a tree permit is required per the ordinance. Before critically altering a diseased tree, a tree permit is required. And let me also say

very quickly on that, it is a limited tree permit. People call in all the time saying they have a diseased tree on a piece of property. They just get a permit. They do not have to do a tree survey and the whole presentation as stated earlier. And before any protected tree is critically altered, you also need a tree permit. Critically altering simply means killing the tree by either removing it, damage to the root systems because of work done, et cetera. And before any building, paving, grading or construction on the property, but also before grubbing under drip lines, which is the canopy of the trees, of protected trees. Please note, they have stated one definition but within our ordinance Section F.13(d)9, it also states that grubbing is also noted as -- is to remove brush located within or under the drip lines of protected trees. So going in there and removing the brush with equipment also disturbs these trees and you do have to receive a tree permit to do so. Within your packet is a bunch of background information.

Let's go to some slides, Rick. Slides.

The timeline, you know, that I sent may assist in placing the enforcement action and contact given that McKinney Entertainment did not perform a tree survey or obtain any development permits for work on the property before initiating development-related activities including but not limited to clearing and grubbing of brush located within or under the drip lines of protected trees and selective thinning of densely-forested areas, both of which activities require a tree permit.

Can you go to the...

Some key events.

Just go to the photos. Photos.

Around December 14th, 2006, erosion control noticed that dirt was being stockpiled on the property and a truck was on a site dumping. The truck driver was asked to stop by the erosion control investigator and asked who hired and who owned the property. He indicated that Mr. Day did.

Continue on, Rick.

So that's a picture of them dumping on the site. All that is being dumped at pretty much out of the floodplain. It is out of the floodplain, but please note also that trees -- once that we were out there, we also noticed that trees were -- had been removed not only within the floodplain which has limitations of but also up top. We -- the erosion inspector, myself visited the property the following day and it also appeared that some of the trunks and limbs of their moved trees had already been sold for firewood and hauled away as there was a sign posted on a fence around the property advertising firewood for sale on the property with a contact telephone number.

A letter was sent to McKinney Entertainment representative Mr. Don Day. A meeting was consequently held with all parties and one of the items mentioned was that McKinney Entertainment had hired a certified arborist. McKinney Entertainment's representatives forwarded a copy of that report by request of us to us and it is included within our packet. They did not include it.

We returned to the property. We reviewed it. We returned to the property and we wanted to be as fair as we possibly could. We did make adjustments as needed and sent a revised letter to Mr. -- McKinney Entertainment.

So the appeal. The appeal follows in several different areas. McKinney Entertainment, please note McKinney Entertainment, not their professional arborist that had hired, called 11 trees saplings and complains that the city measured the trees at ground level instead of at the correct 4 foot 6 inches above the ground. They also stated that Tree No. 29 was not a healthy quality tree. McKinney Entertainment states this, not the professional arborist. He states there's advanced decay. Very much the case but it still requires a tree permit to be removed. Tree No. 26 was a dead tree. McKinney Entertainment states this, not their

professional arborist report. Tree Nos. 14, 19, and 23 are all logs from the same dead tree. McKinney Entertainment states his, not their professional arborist. Tree No. 30 was a dead fallen tree. McKinney Entertainment states this, not the professional arborist. And tree No. 24 is a limb that fell from a dead tree. McKinney Entertainment states this, not the professional arborist.

The city response. McKinney Entertainment asserts that it only cleared decades of accumulated weeds, underbrush, trash, fallen limbs, and dead trees as well as saplings, less than 6 inches in diameter measured at 4 foot 6 inches above the ground as allowed in the Tree Preservation Ordinance and that no permit from the city is required because the McKinney code states that the removal of underbrush, not including grubbing under drip lines, please note that, shall not require a permit. However, McKinney Entertainment's assumption that this one section provides an exemption from a compliance with the Tree Preservation Ordinance is flawed. First, the work that was performed by McKinney Entertainment on the property was performed in a densely-wooded area that contained, as they state, in excess of 1200 trees. Large portions of the work were performed under the drip line of these canopies and of other adjacent trees that are still in place.

And so once again, the landscape administrator shall issue a limited purpose tree permit allowing the clearing and grubbing of brush located within or under the drip lines of protected trees.

McKinney Entertainment should have obtained a permit for the work it performed on the property and if McKinney Entertainment had simply inquired as to whether the tree permit was required, they would have learned that it was indeed necessary.

They also state that there were measurement issues. McKinney Entertainment's actions in removing the trees without first obtaining a tree permit and performing the tree survey required in support of such a tree permit prevented the city from being able to measure the diameter of the removed trees at the 4-foot6-inch ground level -- and I'll just refer to it as "DBH" -- in accordance with the ordinance.

The landscape administrator, myself, either had to, one, ignore the fact that protected trees were removed without a tree permit or make a reasonable interpretation of the Tree Preservation Ordinance and apply it to the tree removal that occurred on the property given that the trees were removed without the preparation of a tree survey or an application for tree removal.

Consequently, I evaluated the only evidence that was readily available. The remaining tree stumps that had been cut off the property at ground level. The city simply could not go through the stacks of woods in hopes of piecing together all the pieces of trees removed in proper sequence to be able to measure each removed tree's diameter at breast height. This process of measuring the diameter of removed trees at ground level to determine the breast height was further affirmed by the consultant's report from their certified arborist Ronnie Nelson who McKinney Entertainment hired to evaluate the city's January 18th letter.

In his consultation report, the arborist not only measured the stumps of the removed trees but he also increased the diameter of 10 of the 26 trees which the city asked McKinney Entertainment to mitigate by either payment into the Tree Reforestation Fund or planting additional trees.

Despite this difference in measurement, the city kept the size of its original measurement and did not assess McKinney Entertainment for caliber size indicated by McKinney Entertainment's own hired arborist consultation report. There were a couple trees as noted by Mr. Nelson stated that it appeared to be a certain species, a differing species than I had. The city also accommodated McKinney Entertainment and removed these two trees where the particular species identified by

Mr. Nelson which he said appeared to be a certain species were not a protected species. We removed them.

In addition, as noted above, there were four trees within the 6- to 7-inch caliber size. The city even removed these four trees stating for the required mitigation because they were so close to the minimum 6-inch caliber of protected trees at the cutoff that it was possible that these trunks of these four trees might have been less than 6 inches in diameter at DBH. We removed them. McKinney Entertainment created this need by its own unilateral decision to cut down protected trees without a tree permit or even performing a tree survey and that would have specifically identified the exact diameter and species of each tree. In addition, the diameter of these 11 trees width or is smaller than the diameter of all these same trees as measured by McKinney Entertainment's own arborist. Healthy quality trees? Well, the tree removal on No. 29 because it was not a healthy tree is flawed. A tree permit is required per ordinance dead tries. The city landscape administrator determined that all the trees which are listed within the mitigation list were alive and at the time of removal. Nothing contained in the consultation report indicates that Mr. Nelson, also a professional, believed any trees were dead prior to the removal. If an arborist is going to state a condition of a tree in their consultation report, certainly dead is a condition of a tree that should have been reported.

The city of landscape administrator determined that the logs identified as tree Nos. 14, 19 and 23 were different trees. The consultation report prepared by Mr. Nelson does not indicate that the trees 14, 19, 23 were all part of the same tree either. And rather, Mr. Nelson's report indicates these exact trees are three different trees and the trees were alive at the time of removal by McKinney Entertainment.

Unreasonable tree mitigation charges. We don't set those. Those are within our ordinances. And I would like to quickly mention the following item: The recommendations from their own consultation report was, 1, submit this report to the City of McKinney. 2, review and negotiate for a mitigation option. 3, apply for permitting with the city prior to removing any trees on the site. And, 4, contract a certified arborist to create a tree protection plan.

In conclusion, the forgoing reasons, City of McKinney respectfully requests that the Board of Adjustments uphold the decisions of the administration official for the Tree Preservation Ordinance and they may pay within the mitigation in the amount of \$44,800 into the Tree Reforestation Fund or plant mitigated trees on-site. Thank you.

MR. JACOBY: A few questions, if that's okay.

MS. BRAHT: Yes, sir.

MR. JACOBY: I've become very familiar with Section 146-136 of tree preservations for the City of McKinney. Much more than I ever thought I would and I've lived here for ten years. Actually longer than that, but anyways.

In this 146-136, when I read it all the way through Section K is on violations, I never saw how you came up with how you are mitigating it. Is there a --

MS. BRAHT: That's within our fees. It's in a whole other section.

MR. JACOBY: Because the only --

MS. BRAHT: It's a section of fees within our city.

MR. JACOBY: Because the only thing here that I could find was for was under Section K, Violations, Point No. 4 -- it is either 3 or 4, where it spoke that fined \$100 per caliber inch at a tree critically altered not to exceed \$500 per incident.

MS. BRAHT: Right. There's a Tree Reforestation Fund section within the Tree Preservation Ordinance and the numbers are within the fee schedule for the city.

MR. JACOBY: Okay. The other question I had when I read this is, you know, it talks about measuring a tree at breast height --

MS. BRAHT: Yes, sir.

MR. JACOBY: Between 4 and --

MS. BRAHT: 6 inches, correct.

MR. JACOBY: When I was reading this, it never mentioned if a tree is on the ground, if it's already been cut down, if it's been moved, if it's been chopped up --

MS. BRAHT: Absolutely.

MR. JACOBY: How do you determine what the tree was? I know the tree's gone. I know that there's a stump there. There used to be a tree there. I can see the ruler on the ground, but I have nothing to say how high a tree was, how wide a tree was. How am I supposed to know what that definition is or -- so help me.

MS. BRAHT: Very good question. The issue is that this property -- evidence to this property. Either by choice or by not. Had evidence removed. What is left is a stump and this stump was measured professionally by me and by --

MR. JACOBY: The arborist.

MS. BRAHT: -- the registered arborist from what is left and that is how we did it. If you could find a log, I guess like a puzzle of puzzles in the stacks --

And if you would go back to the pictures, Rick.

MR. JACOBY: There's lots of stacks.

MS. BRAHT: There are a lot of stacks and they're all stacked up. Some of the trees -- keep going -- keep going -- you know, like -- like that, you know -- (audio cuts out) -- like that, you're going to have issues.

Please go back a few -- go back. Right in here.

It's hard to tell by these pictures, but you're going to see a lot of damage to the trees that are already existing on the trunks of these trees also. That's because of the equipment that was in there that was grubbing at the time. That is why we do have a permit required for it and a tree preservation and things like that.

Questions?

UNKNOWN SPEAKER: I do have a question, Ms. Braht. With all the development going on in our city, you must talk to a number of developers and would you say that -- if this is a fair question. If you don't think it is a fair question --

MS. BRAHT: Absolutely. Go ahead.

UNKNOWN SPEAKER: Say you don't want to answer it. Okay.

Do you think you get over asked by developers with respect to trees they are going to be planning to removed, under asked or do you think developers generally do a pretty good job of asking you when there's really an appropriate situation?

MS. BRAHT: (Audio cuts out) do a great job. I will tell you that because they follow a process. They follow a process. If they're going to develop, they turn in site plans, they turn in tree surveys, they turn in the tree preservation plan. All of this is approved through a process through our city and through our civil engineering process and it just goes through a process.

We have a very lenient ordinance. You know, you may remove all trees within pad sites, roads, utilities, you know, right-of-ways, all sorts of things; but there is a process to go through. And if a permit had been pulled, we could have gone through a process with them. Also, a concern of this is a majority of these trees -- and trees were taken on all over the site, not just within the floodplain. But the key thing was a lot were removed in the floodplain and within our ordinance, only 30 percent of our quality trees on a site may be removed from the floodplain. Don't think that that happened and -- but the reason we get permits is to make sure that that doesn't happen because the greatest beauty within our city

are the trees that are within our floodplains and the Parks Departments and, etcetera, use these floodplains for their trails.

MR. JACOBY: Rick, on Page 26, is there any way you can -- this is the picture I'm looking for. Keep going. It's Exhibit 12. Okay. On this picture right here, I see that the dirt that's been dumped there -- and if I'm correctly -- I'm looking down towards the creek, so I would infer -- and please help me because I have never walked this property, never been out to this property. I've driven by it because it is on a main road, but is that in the floodplain there?

MS. BRAHT: No, I don't think so it is.

MR. JACOBY: Is that a tree that's been cut down right beside that's been stacked up?

MS. BRAHT: Yes, that is a tree right there. So that is a tree line -- one of these tree lines --

MR. JACOBY: Yeah.

MS. BRAHT: -- that go like that, that is one of the tree lines.

MR. JACOBY: Okay.

MS. BRAHT: Okay And the dirt is all on the other side of those tree -- that square tree line. It was dumped within the probably -- we don't know.

MR. JACOBY: Correct.

MS. BRAHT: -- what's going there. Particularly, the only thing that's been supplied to the city at this point after all this occurred was a grading plan.

MR. JACOBY: You guys have the arborist report?

MS. BRAHT: Yes, we do and it is included within your --

MR. JACOBY: Okay. Just making sure.

MS. BRAHT: Yes. We requested it.

MR. JACOBY: I read it too. So just have to ask.

Any other questions?

MS. BRAHT: Thank you.

MR. JACOBY: Thank you.

UNKNOWN SPEAKER: Thank you.

MR. JACOBY: I've lost my notes I would now like to give the applicant an opportunity to respond to the City of McKinney representatives, if you guys would like, and you will have ten minutes to respond.

MR. ROEDER: Thank you. I want to start by addressing the arborist report that we had done because it is -- it's apparent that Ms. Braht did not closely read the arborist report. There is no finding in the arborist report as to whether a tree was alive or dead. The only thing that we asked the arborist to do in terms of the report was to check both the species and to check the measurements and to help us ascertain if we could infer a DBH diameter from a stump.

So while she says that the arborist would surely have called a tree dead if it was dead, that is not the fact, that is not the case and there's nothing in that report that says live or dead. The arborists imply took the pictures that we had received from the city. We went out and found those logs or found those stumps and we had the arborist verify or un verify that information.

Interestingly, we found a lot of discrepancies from that first report -- the first accusation and that was what was in the arborist's report. The arborist also made or helped us come to conclusions about if you have an 8-inch cedar tree stump at the ground, it's probably not going to be 6 inches DBH. Just that's the way those trees grow.

So the measurements that you see that she refers to that are 18 inches and 12 inches, those are not measurements -- those are not representations by the arborist that those are measurements of live trees. Those are measurements, in our opinion and based upon our witnesses, of dead limbs, dead stumps, and dead trees. So I want to make sure that that is -- that that's a clarification.

The other thing about the dirt -- and let's not get confused about the dirt. It's our reading of the city's ordinance that you can have dirt stockpiled

on your property without having to get any type of permit for doing that. It's when you start spreading it out and start putting it in lift sand stuff that you're required to get a permit. And so if somebody comes by and says, "Do you need this dirt?" And you say, "Yes, I do," and they -- and you allow them to dump it on your property, you are not required to go get a permit. That is not dirt-disturbing activity. And so from the very outset, again, I want to make clear, the intent here was to follow the ordinance. The intent here was to grub the underbrush. I don't think there's any evidence that we -- that we violated that. I think you heard from the person that actually did the work that they were very careful about the trees they cut down. Is there a lot of wood and stacks out there? Absolutely. And I submit to you that you can go to any floodplain area and stack lots and lots of wood without ever cutting anything except to size it so you can pick it up and move it.

The last thing about this general concept of grubbing under a drip line -- and then I'm going to let Ross have the rest of my time -- (audio cuts out) I'm just going to talk here because these folks have all read the stuff.

Grubbing is grubbing and grubbing is defined and that's removing or destroying tree roots. And, yes, grubbing is not allowed under a drip line of a protected tree, of course, but there's nothing to prevent you from removing underbrush under the drip line of a tree as long as you are not grubbing the roots.

So, again, our concern here is that the city approached this from the attitude that we -- So, again, our concern here is that the city approached this from the attitude that we had done something wrong, not the attitude of, well, maybe you followed the ordinance. The city approached this from the standpoint if you get in any treed area and do any activity at all, you've got to get a tree permit and we are not talking in this case about that limited permit. We're talking about the full-blown tree survey and all that kind of stuff.

So, again, what I started in my opening remarks, there's a balancing act here. And in this case I think the evidence clearly before you is no big live trees cut, only dead trees, no grubbing, no soil removing activities and that the arbor -- and that the city's report just absolutely missed the mark.

Ross.

MR. JACOBY: Mr. Wells, can you give me one second?

MR. WELLS: Sure, of course.

MR. JACOBY: Sandy, can you pause the time for a second. Can I ask Mr. Roeder a quick question? Sorry. You were just talking about grubbing and one of the things that the city brought up and just a point of clarification is on Section 146-136 under F, No. 9, where it says, "Grubbing under drip lines, the landscape administrator shall issue a limited-purpose tree permit allowing the clearing and grubbing of brush located within or under the drip lines of protected trees." And going back on what you just said, where you said if you're just clearing the brush underneath the drip line that you don't need a permit. So can you clarify where you're going with that so I can just -- I have it clear in my head?

MR. ROEDER: Yes. One of the reasons that the city has used for a requirement that we have a permit is that we cleared and grubbed under a drip line. And remember, grubbing is a defined term, okay.

MR. JACOBY: Correct. So if you're just clearing the brush --

MR. ROEDER: So if we are just clearing and we are not disturbing the root system, we are not grubbing.

MR. JACOBY: Okay. Thank you.

MR. ROEDER: That's the distinction there.

MR. JACOBY: Thank you very much.

Do you have a question? Okay. Have another question?

MS. DAVISON: I did. I'm sorry. I was looking at your arborist report.

MR. ROEDER: Yes.

MS. DAVISON: And under the purpose of the report, the arborist said -- actually, it's next under the site visit. It says, "My assignment as a consulting arborist is to review the trees on this site and determine if there are any errors with the mitigation report. I performed a basic visual assessment of the trees using proper arboricultural methods to measure the trees and to determine if the trees in the mitigation report are correct."

MR. ROEDER: That's correct. And what we asked him to do, and I think what that correctly states is, we asked him to review what the city gave us in terms of those pictures. We asked him to check the measurements. We asked him to check the species and that's what he did.

MS. DAVISON: Well, the city's report pretty clearly states that the trees were alive. And if the arborist was supposed to be validating whether or not the city's report was correct, it seems like that should have been described and outlined.

MR. ROEDER: I think -- do you have the January letter from the city? I know you have the March 31 letter.

MR. JACOBY: We have lots of letters.

MR. ROEDER: Just as a point of clarification, the arborist would not opine on live or dead because he said you really can't tell. How long does a tree have to have been cut before you know whether it's alive or dead? You can't tell. And so for the city to make that assertion is as unfounded as, according to our arborist, because you can't tell. The best evidence we have is what our expert or what our eyewitness people tell us.

MS. DAVISON: It seems like that is a big silent item that the arborist should have said, "I can't tell," "Nobody can tell," or should have addressed it in some way; but to just be silent on whether or not their opinion was on whether the trees are alive or dead, that seems to be a really big hole.

MR. ROEDER: Well, it would seem to me that at least with a couple of situations that were pretty obvious and the arborist didn't comment on those obvious situations either. So, again, the limited scope of his engagement was to check the city's work and we focused on size, we focused on species.

MS. DAVISON: Okay.

MR. JACOBY: Thank you.

MR. WELLS: I'm only going to speak briefly, but I think that segues nicely into the point that I was going to make and that is, as to the measurement and as to most of these issues, the landscape administrator has taken the position that she looked at the only evidence that there was and that is simply not true because there was evidence in the form of the worker or the landowner and she made no effort to interview the landowner. She made no effort to ask -- to see the worker, to walk the property with the worker, to walk the property with the landowner, where did you put this tree, where did this tree come from. None of that happened. And that lays bear the intent behind this action and that is to punish the landowner for preparing this property.

I'm going to pass my time to Mr. Day at the time.

MR. JACOBY: Thank you.

MR. DAY: Don Day. I live in downtown McKinney at 110 East Louisiana Street. Before we started this cleanup operation, I read the ordinance. I instructed my guys to cut no trees larger than 6 inches at breast height and to clean up the underbrush and dead trees. I realized there were weeds here that were 10 feet tall. This property had not been touched in decades. Her argument is that we cut 18 quality trees; but if you go through the pictures, 11 of those trees by her pictures, she's measuring up to ground level. My guys measured them at 4 foot 6. Now, her argument is, well, they're not fair so I can only measure at the ground level. I understand her argument, but the ordinance doesn't give her that right. We followed the ordinance.

We measured and then we cut and what we have found is trees at ground level are about twice as large as they are at 4 foot 6. We followed the ordinance on 11 trees. The other trees when you're talking about dead trees, there was four dead trees that make up the other seven -- well, one's a limb. Other six the other parts. One was a rotten hole in ground. There was no tree there.

Two of them I saw personally had broken off. I don't know if it was lightening or if it blew over, but the crown of the tree was laying on the ground and the stump was freestanding and it was dead. Now, I'm not an arborist, but I know when a tree breaks and falls off, it is not a quality tree. So we cut up the dead trees and dead stumps.

There was one tree -- and I have a picture of it -- that was laying on the ground. When it blew down, it took two other trees in front of it. When we got there, all three of those trees were on the ground. The last one that she cited is a limb off of the big pecan tree that was shown.

So you have 11 trees re measured correctly. She's measuring at the ground. You have five trees and limbs that were on the ground. We didn't cut them down. They were there before we got there. That's the whole crux of this case. I can't see how fallen trees can be called quality trees and I don't believe the ordinance allows her to measure at the ground when we followed the ordinance and measured at the 4 foot 6 level. Thank you.

MR. JACOBY: Thank you. Is there any other questions for them?

UNKNOWN SPEAKER: I have a question, Mr. Day. What -- go through your thinking a little bit as to why you -- at this piece of property you wouldn't make a call to Ms. Braht. With all the trees that are there and having that heavy equipment down there and everything doing this, why not ever make that call?

MR. DAY: First off, I read the ordinance. The ordinance says to do the kind of cleanup we did, there's no permit required. I realize there are 4 acres out of the floodplain. There are 13 acres in the floodplain. On the 4 acres out of the floodplain, we had planned on and still planned on putting in an equestrian center and we will have horses there. The horses couldn't get into the floodplain it was so cluttered with debris and trash and leaves going back years. So we were just doing a cleanup operation and that's why we -- nothing in the ordinance indicated a permit was needed. So why apply for one if it doesn't say it's needed.

UNKNOWN SPEAKER: I didn't try to build it to the level of getting a permit, but just a phone call to her to a say, hey, this is a piece of property, got all this stuff out there, is there anything I need to do.

MR. DAY: It just didn't cross my mind.

UNKNOWN SPEAKER: Okay. Thank you.

MR. DAY: And one other comment. You mentioned the heavy equipment. What we have were bobcats. These are fairly small pieces of equipment. These are not big pieces of equipment. I believe also say that after we cleaned it up so the city could get in there, public work sent in their trucks and cleaned out about eight loads of logs that had fallen in the creek that was very similar to the same logs that we cut up. Thank you.

UNKNOWN SPEAKER: Thank you.

MR. JACOBY: Thank you. Any other questions? I now give the representative from the City of McKinney an opportunity to respond to the applicant's comments. You have ten minutes to present your responses.

MR. LATHROM: Thank you, Mr. Chairman. What we really have here is a situation where the property owner chose to selectively clear an area that is densely forested. Most of the trees that were cleared were located in the floodplain. A number of the trees that were cleared were outside of the floodplain. Clearing selectively thinning trees, even if they are in the floodplain, requires a tree permit. That was the choice that was made.

Tree No. 14 of which you saw the measurement, that tree was not located in the floodplain. That tree was located outside of the floodplain where that particular log was situated.

Responding to council member Day's comments with respect to Public Works going in and clearing out eight truckloads full of debris out of a creek, there's a road that runs alongside the creek that affords the Public Works Department an opportunity to get in alongside the creek and to clear it out because there is an aerial crossing of a city line that goes across the creek at that location. So there is access there that affords the city staff, city of Public Works Department the ability to get into that creek bottom area. They do not have to drive through the area that was cleared by McKinney Entertainment's staff.

If I can point to the report that was done by McKinney Entertainment's arborist. It's on Page 44 of the city's response. I would just note that with respect to Tree No. 29 and Tree No. 30, the arborist went into some detail about how the tree had extensive amounts of internal decay. If all we're looking at is just measuring the size of the tree and just, you know, trying to determine the species of the tree, there would be no need for those kinds of comments there.

Again, if it's something that if the trees were dead at the time of cutting, you know, if the arborist can sit there and point to the stump and say this tree had lots of internal decay, it seems to me that that same arborist could point to that stump and point out that that tree was dead if that were the case.

The appeal this evening is not a trial of the Tree Preservation Ordinance. The case as seen in the appeal is a question of whether the landscape administrator's determination was accurate or not, was it flawed, was it mistaken. We will agree that the Tree Preservation Ordinance anticipates that when you come in and you obtain a permit for the removal of trees that you measure those trees 4 foot 6 inches above the ground in order to determine the diameter of those trees. Mr. Nye talked about how they removed the trees. You know, some of them had been damaged, some of them were dead, some of them were laying over. And you've heard that on a number of occasions that they were dead, they were laying over, they were dropped down on their sides. You know, all we had to look at to determine the diameter of those trees and try to project what the height -- what the diameter of those trees were at that 4-foot 6-inch level was the trunk. Because the way that these logs were all stacked, some of the logs, we would assume, because of the sign that was selling wood, firewood had already been removed from the side. So it would be very difficult to go back in and try to pull these logs out of these different stacks around the property and put them back together in order to determine where you are 4 foot 6 inches above the ground.

There's a concept, if you will, in courts of law where if someone damages or destroys evidence that's necessary to prove a point, then you have the ability to offer in evidence that will help provide the answer for the missing evidence. It's dealt with in terms of spoliation of evidence in the courts.

Here we think it was a reasonable interpretation and a reasonable application of the Tree Preservation Ordinance to measure the diameter of the trunks of the stumps of those trees in order to try to establish what trees were actually 6 inches or greater in size, 4 foot 6 inches aboveground level.

We went back in after the first round after the first correspondence with McKinney Entertainment and we removed those trees that we believed there was a possibility they may not have been 6 inches in diameter at 4 foot 6 inches above the ground. We also modified based upon the arborist report from McKinney Entertainment, were moved those other trees that were identified as being a species that was not a quality tree. Or if they identified a lesser diameter for a particular tree, we reduced

the diameter. And so in some instances, it shifted trees from being subject to a higher mitigation requirement down into the 6-inch diameter or over 6-inch diameter range because there are two thresholds that we deal with in looking at tree mitigation. So we made those changes trying to give McKinney Entertainment the benefit of the doubt if there was some question with respect to a particular tree.

It is difficult to determine the exact species of a tree when you are forced to look at the stump of a tree and look at the rings of that tree. You can determine generally if it's a quality tree what type of tree it is. There are a number of changes that the arborist -- the landscape administrator made based on the arborist report where it was just one quality tree for another quality tree. It wasn't -- there were a couple of trees that were identified that were not quality trees. Those were removed from the list. Those are not trees for which the city has sought recompense.

We believe that the city has made every effort to try and avoid punishing the landowner. We all make mistakes. Mr. Nye, who was here and spoke earlier, talked about measuring the trees; but we don't know how he measured the trees. We don't know what that process was. There was nothing offered up regarding those measurements or if the measurements were actually taken tree by tree by tree. If we had a tree survey, we would know the answers to those questions. We could address those. But, again, you're still required to have a tree preservation or tree permit in order to selectively thin a densely forested area and you're required to have a tree permit before you go in and you grub, remove underbrush, and/or damage the root system of trees or you cut down streets and remove them. You're required to have that tree permit.

So with that, we would ask that you uphold the landscape administrator's findings and determination and interpretation of the ordinance. With that, I'll be happy to answer any questions if you have any.

MR. JACOBY: I'm going to ask the same question that I asked earlier under this 146-136 --sorry -- Section F, Paragraph 9, the grubbing under the drip lines. Same question I asked earlier. The landscape administrator shall issue a limited purpose tree permit allowing the clearing and grubbing of brush located within or under the drip lines of protected trees.

MR. LATHROM: Yes, sir.

MR. JACOBY: If they did not do any grubbing, if they were just cleaning up the debris, removing the crud from the floods down there, as they've stated, if they're just doing that, if they're not actually entering the soil, if they are just clearing the debris out of there, do they have to have a permit?

MR. LATHROM: If they are doing is removing dead wood that is laying on the ground --

MR. JACOBY: And trash.

MR. LATHROM: And trash --

MR. JACOBY: Yes.

MR. LATHROM: -- mattresses --

MR. JACOBY: Correct.

MR. LATHROM: -- tent cities, if that's all they're doing, then a tree permit would not be required.

MR. JACOBY: Okay.

MR. LATHROM: But the evidence that we've seen, the photographs that have been presented to you, the testimony that's been provided by Ms. Braht indicates that they were doing more than just removing dead trees that had fallen over or mattresses and trash.

MR. JACOBY: So the question really becomes the intent -- so the question that we're trying to determine up here is the scope of work that was done down there, you know, we have two theories of the scope of work done. We have evidence of trees that had been removed. We have

evidence of trees that have been cut up and we don't know if those had already been fallen. Like you said, had we had the tree -- if we could have gone back in time and the tree survey been done, we would know these answers; but we don't know these answers so that's where we're coming from now. So that's why I was trying to clarify, if they're just clearing trash, tree limbs that have already fallen down, small saplings, if that's all they're doing and weeds because we've all been through those thick forests where you can't walk through it without falling, if that's all you're clearing and with cats, then that's what I was just trying to clarify.

MS. BRAHT: I will say that when we went down there, there was not a blade of grass in large portions of the area. It had been so torn up by equipment removing trees. Also, as I showed you on the one of the --

MR. JACOBY: Pictures.

MS. BRAHT: -- pictures high up, there was issues with scrapings of trees due to the equipment and everything. There was definitely equipment down there being used for grubbing to get it cleared out.

MR. JACOBY: Okay. Okay.

MR. LATHROM: And I would also point out just for my own purposes here, just because a deciduous tree does not have leaves on it in the fall and winter does not mean it's dead.

MR. JACOBY: Correct.

Questions?

MS. DAVISON: I have a question for the city about the meetings that were held with Mr. Day before all this got to this point.

MR. LATHROM: Yes, ma'am.

MS. DAVISON: Can you talk to me about what those discussions were like and what the outcomes of those conversations were? Obviously we didn't get anywhere, but can you just tell me about -- (audio cuts out.)

Okay. I just was curious.

MR. LATHROM: There is a technical legal issue here that Mr. Roeder and I need to talk about before we answer those questions. I think it will be fair to look at the response letter, the January letter from the city to McKinney Entertainment and I think that will provide you with what information we could actually share with you at this point.

MS. DAVISON: My question was that -- okay.

MR. JACOBY: As you can tell, we're not a -- we're not legal.

MR. LATHROM: There was one meeting the staff had with Mr. Day and there was one meeting in which Mr. Roeder or Mr. Wells, Mr. Day, myself, Ms. Braht, city manager Paul Grimes, and I can't remember who else was in attendance at that meeting and then city engineer Mark Hines was at that meeting. And, you know, we had a very cordial meeting and we listened to the presentation and the statements that were made by McKinney Entertainment and their representatives and then the city staff went back and reevaluated and reexamined its inspection and review of the situation there on the property.

MS. DAVISON: Okay. What I was trying to get at is that the comment was made that no conversations that Ms. Braht had not in part of her -- as part of her investigation talked to Mr. Day or the gentleman who actually did the tree removal, but that's not exactly true because you did have conversations with Mr. Day, right?

MR. LATHROM: We did have conversations with Mr. Day. And as I understand it, when -- one of the occasions when Ms. Braht was there at the property, she visited with Mr. Nye. And I apologize. I don't remember his last name. My apologies.

MR. WELLS: May I just clarify?

MS. DAVISON: Sure.

MR. WELLS: I meant before issuing the letter --

MS. DAVISON: Okay.

MR. WELLS: -- she didn't say can we talk about this.

MS. DAVISON: Okay.

MR. WELLS: She issued the letter AND we got the letter and said holy cow -- I'm paraphrasing.

MS. DAVISON: Got it.

MR. WELLS: And then we wrote a letter and asked for a meeting.

MS. DAVISON: Got it. Okay. Thank you for the clarification. That's all right. Thank you.

MR. JACOBY: Any other questions? We do have some people signed up to speak. I'm just going to call you up. When you do come up, you will have three minutes to address and everyone's already completed these. If you have not and you need to, please, if you don't mind, bringing it up.

The first gentleman I have up here is Steven and I apologize -- I'm sorry?

MR. SPAINHOVER: Spainhover.

MR. JACOBY: Spainhover. Thank you.

MR. SPAINHOVER: (Audio cuts out.)

MS. ALCANTARA: Thank you for letting me speak. My name's Jill Alcantara and I live at 2837 DogLeg Trail. I can actually see this property from my backyard. Has anybody ever said that before? I noticed all the work going on this property in November, dump trucks and that is heavy equipment. The stockpiling of dirt and I was actually excited. I had thought that possibly the city -- that the parks department had acquired that property and was beginning the development of a piece of property that would become attached to what used to be the golf course at McKinney.

I picked up the phone and called the engineering department and I was told that, no, there was no building permit, nothing was happening on that property. Well, I knew better. So I was a little bit persistent and I said, well, something is happening and so I was told that, well, yes, but the project is shut down and there's no building permit.

Further follow-up calls on my part revealed the cutting of the trees without the permit and that the project was shut down. It's been said that all the trees cut above 6 inches in diameter were dead. Actually, it was the dead of winter. All the trees looked dead. Those are all deciduous trees. They all look the same. It showed the same in the pictures we've seen tonight. You would have to be an expert. You would have to do something to find out if the trees were dead.

It's also been said that the owner was doing the city a favor for cleaning up the trash that was dumped illegally on that site. This property is protected by a fence with a locked gate and satellite views from 2013 through today 2017 show no trash.

Yes, there have been homeless people that have lived in those woods. There was a guy had himself quite of an encampment for a while, but that's not the same thing as dumped trash through a locked gate.

To me these city ordinances and this tree ordinance -- and, yes, I stand before you a tree hugger -- they restrict us all. They protect us all and they benefit us all. I ask that this tree ordinance been forced as it was written and as I've listened here tonight, it sounds to me that every concession has been made to fairness that the city could make.

MR. JACOBY: Thank you, ma'am. And last I have Mr. George Fuller, Good evening.

MR. FULLER: George Fuller, 6801 Dalmatian Drive, McKinney, Texas 75070. I know a little bit about this property, as well. I looked at this property in depth a while back when I was asked to look at it for some small residential development. And although I can't say what satellite pictures show from 2013, I can say what George Fuller saw as he tried to walk back to the creek area to get a feel for that property. From trees knocked over, blown over, stepping over as much large tree branch debris as you see in any property that's been unattended to for 100 years, that's what was there, No. 1.

No. 2, I think what we have is an ordinance that is not clear. I don't think anyone would disagree with that. The ordinance calls for a tree to be healthy, but it doesn't identify how to you determine if it's healthy. It doesn't state that Mr. Day has to get an arborist to determine if it's healthy or not. There's no criteria. So you can say that he should have done this and he might say he should have not done this. I think the issue is the ordinance. It is one of the primary reasons that I ran for office. We have a lot of ordinances like this that need revamping and clarification, but to penalize and assess such punitive damages to somebody who has not operated outside of the ordinance and is only being accused of operating a very specific interpretation of the ordinance, that's not fair.

So in short, I saw that property. I know what was there. I know the -- I certainly didn't take a full inventory; but when I hear Mr. Day or the other gentleman talk about truckloads of limbs and big debris, I saw it with my own eyes. With regard to measuring, to say that you can't measure a tree at 4 foot 6 after it's cut down, that's correct; but we can make some reasonable assumptions. If I walk outside on the square outside of -- I can't remember the name of the -- of the store, you've got a tree there that's 14 inches at the base, 6 inches at 4 foot 6. It is very normal to have a tree maybe double in diameter at the base as it is at 4foot 6. So to unilaterally apply that measurement would be inappropriate and unjust. Thanks.

MR. JACOBY: Thank you. I have one quick clarification question I just need to ask of Mr. Wells, if you don't mind, or Mr. Nye. You guys started doing the work clearing the debris, clearing the undergrowth because I know these pictures were taken in December. I understand December in Texas everything is dead, the grass is dead, everything else is dead; but when you started work on that, what was -- was it August, September, when things were alive? That's -- sorry, one last question I just wanted clarification on.

(Audio cuts out.)

Yes, understand. That was my last question.

MR. WELLS: And again, if you go back to look at the pictures, I mean, one of the things we're being punished for, it was literally a hole in the ground.

MR. JACOBY: I understand that. I was just wanting to know when you started the work, I know -- I know you didn't start in December. That's -- I was just trying to find a time line of when you started.

Are there any other questions of the board?

Is there anyone here that would like to speak that hasn't spoken?

All right.

We do not have any letters related to this item so there's nothing for me to read into record. We've all had an opportunity to consider this request.

Do I have a motion to close the public hearing?

MR. CLOUTIER: So moved. I move to close the public hearing.

MR. JACOBY: Thank you, Patrick.

Do I have a second?

MR. TAYLOR: I second.

MR. JACOBY: Thank you, Brad.

All in favor of closing public hearing?

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

MR. JACOBY: Any opposed? All right. Do I have -- I'm sorry. One last legal question I have. So when we make a motion to approve or deny this, a motion to approve is a motion to -- can you clarify that real quick? If approved -- (audio cuts out.)

Okay. And if we deny, we're citing that the administrator is correct?

UNKNOWN SPEAKER: Upholding (inaudible.)

MR. JACOBY: Okay. Thank you.

This isn't a normal one, everyone. Sorry about that.

All right. We've all had opportunity to discuss this request. We've already closed public hearing.

Do I have a motion to approve or deny the of an administrator's official decision regarding enforcement of Section 146-136 tree preservation on property identified as legal description 16.784 acres at Eldorado Parkway & College, McKinney, Texas 75069, McFarland Survey Abstract 558?

MR. TAYLOR: You have to repeat all that or can I just say I so move that we vote on it?

MR. JACOBY: Do you want to make a motion to approve or deny?

MR. TAYLOR: I make a motion that we approve.

MR. JACOBY: Make a motion to approve?

MR. TAYLOR: Yes.

MR. JACOBY: Thank you, Brad.

Do I have a second? (Audio cuts out.)

Okay. Do I have a (audio cuts out) --correct. The motion dies. So I will repeat. Do I have a motion to approve or deny the appeal of an administrative official's decision regarding enforcement of Section 146-136 tree preservation on property identified as Legal Description 16.784 acres at Eldorado Parkway & College, McKinney, Texas 75069, McFarland Survey Abstract 558?

MR. COULTIER: I'll make a motion that we deny the appeal.

MR. JACOBY: I have a motion to deny by Patrick.

MR. WILDER: Second.

MR. JACOBY: And I have a second by

Randall. It has been moved and seconded that we deny this request. Is there any discussion?

UNKNOWN SPEAKER: I have to look at this as is it reasonable to have expected that some due diligence be done, is the burden on the due diligence to get done before everything's destroyed in there and I have to -- I have not seen that the -- that McKinney Entertainment met that burden to do the due diligence.

MR. WILDER: Yeah, and I think Ms. Braht, her testimony just reigned volumes with her being an expert in my opinion.

MR. WELLS: I guess my point of view on here is whenever you're looking at something from a legal standpoint, Wells you have to look at facts and we're also having to look at a lot of assumptions here and my problem is, when you're going to hold someone accountable and basically say you're guilty and you did it wrong, not because I'm absolutely positive that you violated the law but I think I can put together a lot of pieces and interpret it in certain way to be able to make my case, that's simply where I have the problem of it.

I know just from your general knowledge from a legal standpoint is that there has to be a preponderance of the evidence of a certain direction and in my belief, I don't disagree with what Patrick says. I actually agree with that concept; but when it comes to holding a decision on which direction we are going to go in, I'm just simply looking at it as it doesn't seem like there's a preponderance of strong evidence saying that they violated this -- that they violated this, that they're having to really twist and interpret it in a very tight way in order to be able to make the case and I just can't -- I just can't believe that that's kind of the way our legal system is set up to where we're going to hold someone guilty when we are not absolutely sure that they violated the law, that we're going to have to try to figure it out and try to piece it together to say they did.

MR. JACOBY: I would also say that after reading Section 146-136, there's a ton of ambiguity all over this section. There's a lot of ambiguity about what the definition of "is" is, in the words of former President Clinton. It's hard for me -- I have a farm, not in this state but in another state. It's on a river. Guess what? There's crap all over it. And guess

what? There's dead trees all over it. And guess what? It's not a nice, easy thing to go in there and do. There's no good way or wrong way to do it. I understand the trees were cut. I got proof that trees were cut, but I don't know how big those trees were.

There's no way for me to determine, me, average person living McKinney, Texas, to be able to determine that. I didn't put my boots on the ground. We're not supposed to go out and walk the property. We're not supposed to look at anything other than the evidence that is presented to me.

It's hard because I can see it both ways; but with all that being said, I guess it's time for us to vote.

Do you have anything, Kim?

Okay. So we have a motion to deny. All in favor of the motion to deny the appeal for an administrative official's decision regarding the enforcement of Section 146-136 tree preservation on property identified as Legal Description 16.784 acres at Eldorado Parkway & College, McKinney, Texas 75096 McFarland Survey Abstract 558?

UNKNOWN SPEAKER: Say aye.

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

MR. JACOBY: All opposed?

UNKNOWN SPEAKER: Nay.

MR. JACOBY: Nay.

So the motion has failed. It was two to three. Two to three the motion failed. So I'm sorry?

(Audio cuts out.)

No. We had three deny, two affirm. (Audio cuts out.)

Correct. (Audio cuts out.)

Wait. I'm sorry. Clarification.

UNKNOWN SPEAKER: What we are doing is, there's only a motion of the affirmative and if it does not pass with a 4 to 1 at least or more, then it is --there doesn't need to be a motion to deny it.

MR. JACOBY: Which way is this going?

(Audio cuts out.)

Go for the city? Okay. Sorry about this.

MS. BREWER: No, that's okay. It's difficult because.

MR. JACOBY: I know it's a four -- I know we have to have four votes out of five in order for anything the so that's why I'm just --

MS. BREWER: Look at it in this context. The appellate wants you to approve what they've asked for.

MR. JACOBY: Correct.

MS. BREWER: Right? So in order for that to occur, it takes four affirmative votes. So in other words, I move to approve the appellant's request. Second, it takes four votes to in favor of that motion.

MR. JACOBY: Okay.

MS. BREWER: If there is no -- if you do not receive four affirmative votes to approve the request, it is denied even without an active motion and vote.

MR. JACOBY: So the motion to deny of two to three is still -- it is not a motion to approve.

UNKNOWN SPEAKER: It is kind of irrelevant.

MR. JACOBY: So it's an irrelevant factor.

MS. BREWER: It is.

MR. JACOBY: So at this point in time --

MS. BREWER: One is more of an affirmative action, an affirmative vote.

MR. JACOBY: Correct.

MS. BREWER: And the other is the effect --the net effect is it's denied by silence or the failure of a vote.

MR. JACOBY: Understood. So in this case we didn't even need to make a motion to deny because we didn't get a motion to approve.

MS. BREWER: Well, if you don't, you can certainly come up -- and Mr. Roeder says he doesn't agree. Let me tell you where I'm reading just so you know.

MR. JACOBY: Well, I noted on here that out of a panel of five, you have to have four votes to approve.

MS. BREWER: It says approval of any request shall require four affirmative votes.

MR. JACOBY: Yes. And if there's ever --if not four affirmative votes, then the appeal is denied.

MS. BREWER: Any request not approved by affirmative vote of four or more members shall be considered denied.

MR. JACOBY: Correct. We've run into this twice.

MS. BREWER: Now, if you want to be more specific.

MR. LATHROM: Let me jump in real quick. Ms. Brewer is actually correct in what she's telling you. What would help us, first of all, if you make a motion or you second a motion, you are not obligated to vote in favor of that motion.

MR. JACOBY: Yes.

UNKNOWN SPEAKER: (Audio cuts out.)

MR. LATHROM: Then there is a vote taken and you have another split vote and you don't have four affirmative votes in favor of it, then that item automatically fails.

UNKNOWN SPEAKER: On record we just need to vote?

MR. LATHROM: On the record. That's the thing, we just need to have a clean record or a clear record.

MR. JACOBY: Let's just go ahead and let me reread it again. Thank you very much. Hope you've enjoyed my reading tonight. My wife would be proud of me.

MR. WILDER: I promise to --

MR. JACOBY: Yes, we'll make -- yes.

MR. WILDER: Even though I'm going to vote against it, I promise to say again.

MR. JACOBY: Do I have a motion to approve the appeal of an administrative official's decision regarding the enforcement of Section 146-136 tree preservation on property identified as legal description 16.784 acres at Eldorado Parkway & College, McKinney, Texas 75069, McFarland Survey Abstract 558. Do I have a motion to approve that?

MR. TAYLOR: I move that we approve.

MR. WILDER: Second.

MR. JACOBY: Thank you, Brad, and it has been seconded by Randall.

All right. Is there any more discussion?

No. Okay All in favor?

UNKNOWN SPEAKER: Aye.

MS. DAVISON: Aye.

UNKNOWN SPEAKER: Aye.

MR. JACOBY: All opposed?

UNKNOWN SPEAKER: Nay.

UNKNOWN SPEAKER: Nay.

MR. JACOBY: This item has not been approved. This concludes the business for tonight's meeting.

Do I hear a motion to adjourn?

MR. TAYLOR: I move we adjourn.

MR. JACOBY: Thank you, Brad.

Do I have a second?

MS. DAVISON: Second.

MR. JACOBY: Thank you, Kim. All in favor? I'm sorry?

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye.

UNKNOWN SPEAKER: Aye?

MR. JACOBY: Any opposed? We are adjourned
at 7:48 p.m. Thank you, guys, and you-all have a great evening.

SCOTT JACOBY
Chairman