

SPECIAL SESSION
of the Daviess County Fiscal Court
held at the Courthouse in the City of Owensboro,
County of Daviess, Commonwealth of Kentucky
on this 16th day of July 2013
Present were Judge/Executive Al Mattingly and
County Commissioners
George Wathen and Charlie Castlen

DOCUMENTS RELATED TO TODAY'S DISCUSSION
ARE FILED IN JULY 16, 2013 FISCAL COURT FILE

Commissioner Castlen opened the meeting in prayer and led the court in the Pledge of Allegiance to the flag.

Commissioner Lambert was absent.

Judge Mattingly proclaimed July 2013 as Local Homeless Awareness Month.

Bishop Gregory Baize, Chairman of the Homeless Council of the Ohio Valley thanked the court for the proclamation and the ability to serve the community.

By a motion of Commissioner Castlen, seconded by Commissioner Wathen, the court considered approval to lease a 1989 Bombag BW12R Roller to the Daviess County Lions Club. Without further discussion, Judge/Executive Mattingly called for a vote on the motion. All present members of the court voted in favor; motion passed.

Special Session

County Attorney Claud Porter read in summary the First Reading of **KOC 921.667 (2013)** - An Ordinance amending the zoning classification of a 1.870 acre tract located at 3830 Hwy 54 from

A-U Urban Agriculture to B-4 General Business, Application filed by Steve Lambert; John and Nancy Grimes.

Mr. Porter stated, "Hearing and evidence heard at the regular planning commission held on the 9th of May of this year, conclusion and findings of fact recommendation was to deny the classification to amend it. The transcript is available. Applicants Steve Lambert, and John and Nancy Grimes filed a request at planning office for Fiscal Court to decide rezoning and that is why we are here."

Judge Mattingly asked County Attorney Claud Porter, "If any formal action to place proceedings of that planning commission into the record." County Attorney responded "As part of our ordinance we said that we would attached that, so it is attached."

Attorney Charles Kamuf commented to County Attorney Claud Porter, "There were two hearings."

Mr. Porter stated, "We only have one transcript, the one held on May the 9th. We do not have transcripts of any other hearing."

Commissioner Castlen asked about the entry of prior records. He also asked if the May 9th hearing was a separate meeting than the one held on April 11.

Gary Noffsinger, Director of the Owensboro Metropolitan Planning Commission stated that they failed to send a copy of the April hearing.

Judge Mattingly asked if a decision was postponed until next meeting.

Brian Howard, Associate Director of Planning summarized the meeting stating, "Basically at the April meeting, there were lots of questions asked of the applicant as far as how the site would develop." He said the meeting was postponed to allow the applicant to put some information together and present that to the commission, because the board was looking for a site plan or some type of preliminary plan that would show what was being proposed. I would not say there was significant progress at that meeting. I would say that there were more questions than answers. The May meeting is where the answers came."

Judge Mattingly stated, "Were there any facts introduced at that meeting that we should be aware of?"

Brian Howard stated, "I am sure there probably were, yes."

Mr. Porter asked, "Would you like to make the April 11 transcript a part of this record as well?"

Mr. Porter changed the question asking, "Is there any one here who was at the April 11 meeting or the May 9 meeting, who would object to the introduction of the transcript of evidence from

the April 11 hearing before the Planning Commission as a part of the evidence for the Fiscal Courts hearing today?"

Mr. Porter, "Judge, I see no one who has raised an objection to introducing that April 11 transcript, and since that was a part of it and all of them want to make it - I just know that we have not had a chance to review that."

Judge Mattingly, "We have not had a chance to review it, if it's ok to make it part of the record, particularly since we are not going to vote or make a decision at this meeting, we will have an opportunity to review that record as well. Are you ok with that, Commissioners?"

Both Commissioners agreed.

Mr. Kamuf stated, "I have another point of clarification for the County Attorney. It is my understanding, Claud, that there is no new evidence to be presented here today?"

Judge Mattingly stated that he will go through that here today.

Mr. Porter stated, "We will amend our ordinance, when the time comes to include the April 11, 2013 transcript.

Judge Mattingly stated, "We are hearing an appeal of the Planning Commission's decision of the May meeting. Mr. Lambert has requested that that decision be overturned. Daviess County Fiscal Court is a legislative body that has the authority to hear that appeal. What we will base our decision on will be the record of the May and April Meetings. We will not hear any new evidence."

Judge Mattingly read a list of names and representatives for the May meeting, Mr. Lambert, Mr. Kamuf, Bill Hayes, John Stevenson, who was represented by Charles Kamuf - presented a memorandum on Mr. Stevenson's behalf - Judge Jeff Taylor, who was represented by Frank Brancato, Bill and Mrs. O'Bryan, Mike Beckworth, Mr. Hayden.

Brian Howard of Owensboro Planning Commission stated, "The applicant Steve Lambert and former property owners, the Grimes, submitted an application for a zoning change at the April meeting." He further stated, "There were questions raised to what the development would look like. It was postponed until the May meeting. At the May meeting, there was extensive public testimony entered. The staff prepared a staff report that recommended approval of the zoning change, which is based on the review we do of the comprehensive plan, the land use map, within the comprehensive plan. The staff recommended approval of the zoning change. At the public hearing, the planning commission unanimously voted in opposition for denial of the zoning change, with findings of fact, that application was appealed. We operate under the alternative zoning approval process that is allowed under KRS, which a zoning change becomes final within 21 days after the meeting unless an appeal is filed. This instance we had an appeal,

and if an appeal is filed it becomes before the legislative body for final action. That is why we are here.”

Judge Mattingly stated how this process is speedy and keeps us from having to approve every zoning, and development plan that OMPC would approve.

Judge Mattingly asked Mr. Howard what B-4 zoning is.

Mr. Howard explained it is a general business. He stated, “It is the highest level of commercial zoning – office, retail, any kind of restaurant. The plan area that this property is in, the criteria for the comprehensive plan land use map would indicate this it is appropriate in very limited location. What we are looking at in this instance are roadway classifications and logical expansion criteria. The planning staff makes the recommendation of logical expansion.”

Commissioner Wathen stated that he thought the parcel was urban residential and was adjacent to business. He asked, “When I look at the different descriptions there is low density, mid density, and high density urban residential. How do you know which one this is?”

Mr. Howard answered by stating, “The urban low, mid, and high density’s are what you would look at if someone were proposing a zoning change to R3MF, a multifamily residential zone, which is the highest density allowed under multi-family residential zoning. However, in this instance we are looking at the urban residential plan area, and criteria for a general business use within that category.”

Commissioner Wathen stated, “When you get into the different criteria, where it says in a very, very limited use. That is not in the high density. I think that is just in the low and medium densities. It does not say that in the high density. So you have to know if it is high, low or medium before you get that specific.”

Judge Mattingly stated, “Typically, when a parcel is brought to you to be rezoned, is it accompanied by a development plan?”

Mr. Howard, responded stating, “It would have to do with the scope of the project. Often on larger rezoning changes there will be either a preliminary development plan or a final development plan or some type of development component that is submitted with it. Typically, on smaller zoning changes, we don’t require a development plan.”

Commissioner Castlen asked for clarification of how the staff decided to recommend approval.

Mr. Howard stated, “When reviewing a zoning change application, we are looking at what is submitted, what the surrounding land uses are, and what the criteria in the comprehensive plan indicates. We do not have benefit of public testimony at that meeting. So our staff report is one component of what the planning commission can use to make a final recommendation of the zoning change. They also then factor in the public testimony that is entered at the meeting.

One of the things we struggle with, especially in an instance like this where there is a smaller parcel, it is across the street, but it does technically meet the requirements of the comprehensive plan in order to allow us to take application for B-4 zoning change. Does it mean it is guaranteed or by right the property should be rezoned? It just means the comprehensive plan can support an application for zoning change, because it meets criteria. It does not mean the zoning should take place."

Judge Mattingly asked, "What do you provide the planning commission prior to a meeting?"

Mr. Howard replied, "We provide the planning commission a copy of the staff report, a copy of the findings submitted in the zoning application by applicant, and a copy of the identification, notification map that is submitted in the zoning application."

Judge Mattingly thanked Planning Commissioner Larry Boswell for his service on the committee.

Judge Mattingly asked, "In the comprehensive plan, was Highway 54 considered a major growth corridor?"

Mr. Howard stated, "54 is certainly considered a major growth corridor. It is classified as such in our local active management policy."

Judge Mattingly asked, "Are there other corridors where you have a mixture of B-4 and residential and professional?"

Mr. Howard noted, "There are. For example Frederica Street and along Parrish Avenue."

Commissioner Wathen asked, "You were talking about the requirement for a development plan attached with a request for rezoning. Is it normal to have a traffic study done before as well?"

Mr. Howard replied, "It often depends on the scope of the project, but on Highway 54, it is common to have a need to look at traffic impact analysis. In this instance, on a smaller parcel we made sure the applicant was aware that the Transportation Cabinet could look for the need for roadway improvements. We talked to the Transportation Cabinet a couple of times before the hearing to make sure they were aware of what is going on and could weigh in if they had questions."

Judge Mattingly stated, "Specifically to Commissioner Wathen's question, is it a requirement to have a transportation study?"

Mr. Howard stated, "It is not a requirement."

Mr. Noffsinger stated, "I would like to add that you keep mentioning the requirement for a development plan. A development plan is not a requirement to submit a zoning change application unless rezoning to B-1 or B-3 type zone. In this case, B-4, it is never a requirement

to submit a development plan in conjunction with a rezoning. However, it may help the progression of a zoning change and can be more favorable, because it gives details of how a development is going to affect an area or neighborhood. The developer also has an option to do a preliminary development plan, which is much less detailed and in some cases is required if you are going to B-1 or B-3 zone."

Judge Mattingly, "Was there ever a development plan presented?"

Mr. Howard stated, "There was not one submitted, no. I think the applicant submitted a conceptual plan at the meeting for review."

Judge Mattingly, "It was not submitted through your office as a preliminary or development plan."

Mr. Howard, "That is right."

Commissioner Castlen asked Mr. Noffsinger, "When Judge Mattingly asked what was given to the planning commission, what you all gave us was everything that was submitted at that meeting as well, right?"

Mr. Noffsinger stated, "Yes, much of what you received was submitted at the public hearing. We would not have had that information in advance."

Mr. Kent Overstreet, Attorney for Mr. Lambert began by thanking the court. He noted in the event should issues arise, David Weaver from Bryant Engineering who worked on the preliminary plan, as well as Mrs. Paula Wahl, who, subsequent to those meetings, conducted a traffic study. He stated, "First, the staff report said we were in compliance and that it was a permissible use. That the expansion was a logical expansion. One of the findings of fact, made by Commissioner Kazlauskas, was that he did not believe it was a logical expansion. He always thought that an intervening street would somehow stop the contiguous nature. I quoted the language from the plan and the brief that you have, which specifically says it does not have to be contiguous, it can be in near proximity and that an intervening street does not interfere with that. So, a B-4 classification across the street would carry over to this (pointing to map)." I would also like to note that the unimproved lot that neighbors Wood Trace is currently zoned multi-family. So, we would be putting, as Mr. Howard just eluded, the potential for a high-density urban population center and apartment building next to a retail center, a small retail center. Now, one thing you all had asked was about the 1.5-acres, as Mr. Noffsinger stated, the 1.5-acre requirement has been in the plan since the early 1990's. So, I would submit to the court that despite the allegations that just because it is over 1.5-acre, that carries no merit. They have seen no reason and there has been no issue that has caused them to change that 1.5-acre requirement, up to this point. This proposal meets that requirement. There are multitudes of goals and objectives that are set forth in the comprehensive plan that this would meet."

Judge Mattingly stated, "You're implying that there are things the staff did not use in considering this."

Mr. Overstreet replied, "There are provisions of the goals and objectives which could be both for and against. It is our position that the overwhelming majority of the goals and objectives that are applicable to this situation fall in favor of the rezoning." (He referred Judge to a small handout.)

Mr. Overstreet stated, "With the type of retail that is anticipated, we expect those to be unskilled to semi-skilled jobs and obviously some management positions. So, the pay ranges will vary. That is going to create low-income, which is also one of the goals of the plan – to help lower-income folks obtain employment. It is going to add taxes - property taxes. It also meets other goals and objectives by reducing transportation of the neighborhoods. They will have additional shopping that is available to them or services that are available to them. As I point out in here, it is within easy walking or biking distance of a number of various neighborhoods from Thoroughbred East to Wood Trace to Lake Forest."

Judge Mattingly asked for a conflicting example.

Mr. Overstreet stated "They would argue that it is not a compatible land use. That it sits in front of a neighborhood. The response to that is, which Mr. Brancato represents Judge Jeff Taylor, he is the only adjoining landowner. Mr. Lambert, as stated in the record, had an agreement with Judge Taylor that he would double the buffer zone at the back of this property, he has also offered to make other buffering enhancements, such as additional shrubs or trees. It is also important to note that the elevation of the actual center, based on the land itself, is probably going to be 20-30 feet lower, which will provide an additional buffer for noise or light or other concerns they may have. If you have ever been out there, it is surrounded by trees. If you are facing the house that sits on the property now, that line of trees is owned by Mr. Kamuf's daughter. That is the one that is zoned multi-family. So, they have trees to act as a buffer on that side. It is not as if Mr. Lambert could destroy those trees and take down that buffer. Under the zoning requirement, he has to put up a 6-foot fence, trees, and shrubbery that is required, which would be over and above the natural contour already there. It is not a perfectly flat piece of land."

Judge Mattingly asked, "Why should we overturn the decision? How did planning commission harm Mr. Lambert?"

Mr. Overstreet replied, "The finding of fact are insufficient. They are not based on substantial evidence of record as required and in fact Commissioner Kazlauskas makes the finding that it is a traffic problem. That he has a traffic concern. However, Mr. Hayes, the Traffic Engineer, that was presented by Mr. Kamuf, said point blank, that he could not speak to the safety issue, because he had not done any studies. But he went on to say that he assumed the distance requirements and things have been approved, because the Kentucky Transportation Cabinet was okay. The other finding was that it is not a contiguous use – not a logical expansion. That is

totally contrary to actual evidence. The two findings of fact that were made, one is contrary to evidence of record and the other is unsupported. There is no basis in the record that was sited that can overturn this. Secondly, we believe it is a logical expansion. This is going to be a shielded center by virtue of the natural elements that are present. It has varied tall trees, heavy growth, shrubs on Mr. Taylor's side that will back up to the back of this development. Because the development goes back – it is a very odd shape. The ability to develop the very back portion of it is going to be exceptionally limited anyway. The proposal for the retail center has been... It was not formally submitted to OMPC, but Mr. Lambert did obtain a preliminary design that was discussed at the May meeting. And he has a more formalized conceptual drawing but we will not get into that because we understand that you do not want additional evidence. In summary, as it exists, it is a logical expansion. It complies with the comprehensive plan. We understand there other interests. This is controlled and has hours of operation. It is going to have a different elevation than the surrounding property, and he has already agreed to make additional buffer enhancements. We are simply asking that the court overrule that because it is in conformity. It is a benefit to the community as a whole. It helps accommodate a vast number of the goals and objectives of the comprehensive plan. It aids the county financially. It is not going to overburden residents or roadways. It is already there with another shopping center. It is simply time."

Judge Mattingly asked Mr. Noffsinger if all zonings meet all elements of the comprehensive plan or does he often run into conflict?

Mr. Noffsinger replied, "Many times we do run into conflicts. There are times when all criteria is met, and there are no objections or concerns from area residents. Those are the easy ones we deal with. But there are times when they are not so easy and you do not meet all the criteria, and you do have neighbors that have concerns and issues."

Judge Mattingly asked if Steve Lambert would like to say a few words.

Mr. Lambert thanked the court and stated, "I think this is a matter of progress, jobs, capital improvement, and tax dollars. This community needs that. One of the things that we are really proud of, in regards to what we are trying to do, is what this does for the community." He gave background information on the tenants of the current retail business on Hwy 54, and their impact on the community. He feels strongly about his commitment to this community and wants to invest and help young entrepreneurs. Mr. Lambert asked the court to overturn and allow him to move forward - to hire local people. Several of which are here today."

Mr. Brancato, on behalf of Judge Jeff Taylor, gave a brief lesson on the process of the court of appeals and referenced the Kennedy versus the Commonwealth decision of 1975. He stated, "The record is complete at planning and zoning. It is inappropriate to try to introduce new rationale and reason for why you should change what planning and zoning did, and what the professional staff at planning and zoning did. OMPC receives applications. Those applications are supposed to be chocked full of information and relevant data so planning and zoning can make a recommendation to the zoning board. The reason the zoning board has hearings is

because planning and zoning does not have all the information when they make a recommendation. They can only recommend based upon what is given to them." Mr. Brancato referenced Mr. Noffsinger's statement on pages 86-89. He stated, "They struggled with this application. He acknowledged that and describes the reasons why he acknowledged that. The applicant alluded to the fact that he was entitled to this rezoning because he was qualified. And that is not the case. What the case is is that if you meet all of the requirements you could qualify as a logical extension. It is not an entitlement. It does not mean that you get it. There has to be a hearing and other things have to be considered. Now, one of the other things that are considered in the comprehensive plan is that section that due consideration must be given to concerns of neighbors. Well, neighbors came and they talked about their concerns. And the planning and zoning commission headed that. As Mr. Noffsinger pointed out and as the rules point out, all of the recommendations of staff are done in advance of public hearings. So, unless some neighbors have the wherewithal or the recognition to contact planning and zoning before hearings, they do not really know what the neighbors think until they get to a hearing. Now, they cannot come at the planning and zoning hearing and then all of the sudden Mr. Noffsinger say "Oh, I have changed my mind now that we have all of this". All he can say is he can point out what the evidence is..."

Judge Mattingly interjected by stating, "Wouldn't you say that some due consideration was given or would be given to neighbors and not specifically to this case, but anytime, by some of the conditions that are applied by the planning staff? And the conditions that would be applied by the planning commission, such as screening and those type of things, alignment of entrance, and exit?"

Mr. Brancato stated, "Absolutely, that is part of the reason for rules and regulations under planning and zoning." He referenced an e-mail received from Mr. Lambert at Mr. Brancato's request, within that e-mail was an e-mail from Mr. Taylor who noted he was on the board of the Home Owners Association and stands with their general opposition to this. He stated, "So, I would ask that you don't take another can of worms. That you take those that were fed to the planning and zoning commission – those transcripts that were from the two hearings and the documents that were introduced at those hearings, and that the findings justify the decision of planning and zoning in that the ruling by planning and zoning and denying the application be upheld by this court."

Mr. Kamuf, representing Christie Hayden, Matt Hayden, and Tommy Thompson stated, "We are asking that you approve the recommendation of the OMPC board for denial. The vote was 10-0. That is a big hurdle. The board members, which you appoint are well-to-do people in the community, as far as community involvement. They know the issues, spend a great deal of time hearing a lot of evidence, much of it irrelevant. We are asking you to deny the rezoning and follow the recommendation of OMPC. We are here to support the OMPC findings. My job today is to show, from the record, that the record supports these findings. I disagree entirely with what opposing council said as far as these findings. Number one, the board denied the rezoning for three reasons. One, they said it was not a logical expansion, and therefore did not meet criteria of a logical expansion. The second reason for denial is the traffic problems and

safety problems that would have a negative effect on the rezoning. Also why a traffic study was not presented. The board specifically found that there were incompatible uses if you zone the property in a mixed area - B-4. Now let's look at the other side of the coin. What do you have to do to do what opposing council says?"

Judge Mattingly interrupted, "Say that again. What I wanted to do was hear what you said prior. That it was incompatible..."

Mr. Kamuf stated, "In other words, they specifically found in the motion that was made by Kazlauskas that there were incompatible uses as far as a B-4 rezoning."

Judge Mattingly stated, "Based on what? Did he use..."

Mr. Kamuf stated, "I am going to hit it. Goals and objectives - in other words that goals and objectives of the opposing council stated, had nothing to do with my argument as far as incompatibility. But they are in the record and I will get to those in just a second."

Judge Mattingly stated, "I guess what I am trying to get by is that very first question that I had regarding located in an urban residential plan area, which this is where general business uses, which is a B-4, are appropriate in very limited locations."

Mr. Kamuf stated, "All that Mr. Lambert did was meet the criteria to file an application. He did not meet any other requirement. One, can I file it? Look at the land use map - very limited location. You can file it and we will let the board decide it. Now here is where you are, if fiscal court does not follow the recommendation of OMPC, it shall make its own findings. The court will review the record and determine from the evidence facts that are different from those found by OMPC."

Judge Mattingly stated, "But it seems to me that he not only met the requirement to file, he met the requirements necessary to have staff make a favorable recommendation. How do we get by that? The implication is that he only did one thing. Well, if he only did one thing, I do not think the staff would have given a favorable recommendation. So, he must have gone beyond just that one issue."

Mr. Kamuf stated, "Not in my opinion. You went over those conditions that the planning and zoning commission could place, if it was zoned to help that compatibility issue. There are several things that they asked for. They asked for a development plan - in two hearings. And never heard anything. What did Mr. Noffsinger say? It would help if we had a development plan. So, we will know where the location of the access points are. We will know the location of the building. But, in addition, as far as the development plan, they ask for an 8-foot high decorative wall on the south and east side. They asked for a pylon sign, not to exceed 8-foot, and agree on a location of a dumpster. You all would have to get into all of that if you changed the OMPC recommendation."

Judge Mattingly stated, "But those conditions, I am going to assume were agreed to by the applicant."

Mr. Kamuf replied, "No, none of them."

Judge Mattingly asked, "The conditions that were part of the planning staff's recommendation – he did not agree to them?"

Mr. Howard stated, "The applicant agreed to three of the four conditions. He had a concern about item four and that we discussed at length at the meeting. Some of the conditions that Mr. Kamuf is speaking to were presented as additional conditions or alternative conditions during the meeting. Those were not agreed to or addressed."

Judge Mattingly stated, "Were they placed on the floor for him to agree too and he refused to agree to them?"

Mr. Kamuf replied, "Yes".

Judge Mattingly asked, "Such as?"

Mr. Kamuf stated, "An 8-foot high decorative wall on the south and east sides of the property. A pylon sign not to exceed 8-foot, and agree on a location of a dumpster. That the building would not exceed 18-foot. That the exterior building materials be of brick or decorative block. Those were additional things. But do not let me run out of time..." He further stated, "Let's talk about finding of fact. The police chief knew what he was doing. He made as good of finding of fact as you will ever see before a planning and zoning board." (Reading from the transcript) Mr. Kamuf stated, "Kazlauskas: Are you ready for a motion? Number one, you have been asking about logical expansion, that the proposal is not a logical expansion. The B-4 is to the east side of Hwy 54. There are three or four lanes. Mr. Noffsinger: Kazlauskas, a five-lane road – you have to cross the highway to go over right in the middle of agricultural land and residential land and you are asking for that portion of the property to be rezoned right in the middle of residential and agricultural land?" He said, "so I am telling you it is not logical. Number one, that is all you have to do to meet the application, if you have the facts there..."

Judge Mattingly interrupted, "What did he base that fact on though? My question is that at the beginning we talked about expansion across intervening streets. Now, somebody might argue, well it is a highway, not a street. But it is the same thing. It is a minor arterial street. And it says that in central residential, urban residential, future urban and professional service areas that expansion of an existing general business zone across an intervening street the qualification is that you should have 1.5-acres to do it, but it should not occur if it would significantly increase the extent of the zone in the vicinity. And while you are looking at Highway 54, a major expansion corridor, where you have got commercial and professional up and down the street a 1.5-acre parcel does not significantly... In my opinion it does not."

Mr. Kamuf stated, "It might not overextend on the one, but the first thing that is going to happen and the reason it is not logical is that when you have a zoning case on that side of the street, what is going to happen? The M-1 is going to turn to commercial. All the adjoining property to the west is going to turn commercial. So, it doesn't meet the criteria for logical expansion."

Mr. Kamuf began reading the second finding of fact by Kazlauskas, regarding the safety and questioned why a traffic study was not provided. Mr. Kamuf stated, "This is number 2. It does not meet the spacing criteria on Highway 54 of 500-feet. All you have to do is say it does not meet spacing requirements of Highway 54, and that is in the record by our expert, Mr. Hayes. That is a safety requirement. That is a traffic problem and they never addressed it."

Commissioner Wathen asked, "Is that 481 feet from Woodland Trace?"

Commissioner Castlen asked Mr. Noffsinger, "Is this something the planning staff would routinely deny if it doesn't meet or overlook the spacing requirement?"

Mr. Noffsinger, "The guidelines for access spacing, street intersections in this community are dictated to us by the Access Management Manual. That is a document that is adopted by the Transportation Policy Committee in this community, and is prepared by the staff at the Green River Area Development District. We use the Access Management Manual as a guideline in terms of evaluating access to developments within this community. There had been numerous times where access to properties has been granted, has been recommended by staff and by planning commission and approved by this fiscal court that did not meet the specific spacing criteria in the Access Management Manual. Simply because they could not meet specific spacing standard in the Access Management Manual. However, there are other areas that you look at in the manual that directs us in terms of when access may be approved or when not. For example, if there is an access point across the intervening street, where access points would align, that is a situation where the access could be granted. There have been exceptions granted on Highway 54. These are guidelines, not requirements you must meet."

Commissioner Wathen asked Mr. Noffsinger, "Does that mean the property to the east, the little triangular property adjacent to Woodlands Trace, that means there is no way they can ever have access. Is that correct?"

Mr. Noffsinger stated, "That is a very good question. And to show you how the Access Management Manual works in that particular case, the subject property cannot meet the 500-foot spacing standard in the Access Management Manual, in this particular case, they do have a side street where the Access Management Manual would say access shall be restricted to the side street."

Commissioner Wathen asked, "If that is true, why is it a requirement of staff that Mr. Lambert would give access through his property to that triangular piece of property if it has access on the side street?"

Mr. Noffsinger stated, "Because we believe sound planning principles would guide you to connect developments. And the area in this zoning change, that the staff struggled with, was access to Highway 54 as well as connections to adjoining properties that will likely develop in the future and will likely develop non-residential in character. They may develop residential, but they may not. We also believe that it is important for adjoining properties to connect to this development should they develop in a non-residential manner, because you want these centers to connect so that you don't have to go out on to Highway 54 to reach the next center. This prevents overburdening the highways."

Commissioner Wathen, "Is it correct that he would be running off the back of these properties?" He said that he does not understand the ingress/egress requirement.

Gary Noffsinger, "We did not make that a requirement. That was just something he was speaking to. You know, there are frontage roads for example in Bowling Green they use a lot of frontage roads. We do not believe those work well because it congests traffic right at the major intersection. We try and get those connections back as far as possible so you do not congest that intersection with the main street. I am not sure where Mr. Hays was going with those comments. What we were trying to do was to structure conditions where that if the zoning change were recommended for approval, and we did not have that development plan, that we would have some direction in terms of those connections to adjoining properties or going to be made at some point on the property."

Judge Mattingly asked Mr. Noffsinger, "The Access Management Manual is a local guide. What does the state do?"

Gary Noffsinger, "In the past, their guidelines for access had been very minimal. In fact, they really only looked at site distance and that was about it. The state is moving toward an access management standard. We work closely with the state and they are supportive of what we have at the local level. The state highway district engineer serves on the policy committee and has a hand in approving. Typically, the case has been that they leave it up to local authorities. However, they are the ones that have the requirement for a traffic study. And before a driveway could be installed for commercial purposes on this property, they would evaluate the need, which I think would require that a traffic study be done."

Judge Mattingly stated, "And as a result of that traffic study, do you ever take into consideration, since it does not meet that 500-foot spacing, the requirement for a right-turn lane? Or something else that would make it safer?"

Gary Noffsinger replied, "Yes, and that is one of the reasons why the staff recommended a right-turn be a deceleration lane and constructed at this property at some point in time because of the spacing issue. They have to meet the need before you install a turn lane. We do not have a definite plan of the development density or how adjoining properties will develop, but we do

know access to Highway 54 will be controlled and limited to as few driveways or street intersections as possible to serve that area.”

Judge Mattingly noted that Mr. Hayes, the Transportation expert, did not do a traffic study.

Mr. Kamuf stated, “The third issue is that several residents have invested in the property. Due consideration should be given to the concerns of the neighboring residents, with respect to their established life patterns in their neighborhood. After the motion of 10-0, the board sent you a finding. The staff now has to support the board, so the staff prepared a finding of fact on all three issues.” He went on to say, “Planning Commissioner Kazlauskas found that it was not a logic expansion of B-4. The reasons, Judge, is that you have to cross the highway. You can say that it met the application. Just because it meets the application is no sign that it meets good zoning or good planning . You have to cross the highway to go right over in the middle of agricultural land and residential lanes. Your asking for that portion of the property to be rezoned right in the middle of residential and agricultural land. That is the only finding you need on logical expansion.” Mr. Kamuf stated, “His second finding he laid it out. He was concerned and everybody was concerned because of the curvature in the road and I think it is the most travelled road or there is more activity on Highway 54 than any other road in the state of Kentucky. They also mention about that intersection. The third reason, due consideration should be given to the concerns of the neighboring residents. Now, this could have all been won if they had filed a development plan.”

(There was a short break in the recording of this meeting.)

Judge Mattingly stated, “... responds not completely. Mr. Reeves reiterates “Is it possible to get in and out of that development as proposed safely in your professional opinion as a traffic engineer?” To which Mr. Hays says, “I have not analyzed it from an engineering stand point, in other words I have not looked at the stoppage site distance. My understanding is The Kentucky Transportation Cabinet has granted a permit. I have to assume they have reviewed those issues, but I have not conducted an engineering study.””

Judge Mattingly summarized by stating, “In a response to a direct question, this traffic engineer, Mr. Hays, could not respond that it was not unsafe. And that was a question posed by Mr. Reeves.”

Mr. Kamuf stated, “That is just one area that he answered.”

Judge Mattingly stated, “I understand, but that is the one area that we are specifically addressing as a reason to deny is the safety. That was a finding of fact made by one of the planning commissioners that it was unsafe and I am trying to figure out just what did he base his...”

Mr. Kamuf interjected, “But don’t you think a police chief could use his expertise? I mean, that is why you have different people on the planning board.”

Judge Mattingly replied, "But he is not a transportation engineer. The logical next step would be to have a transportation study where you could look at it and backup the fact that it is safe or unsafe."

Mr. Kamuf responded by stating, "In this case, I hired the expert transportation. They never filed a development plan. They never made a study. They never had a traffic engineer. I took that on myself."

Mr. Kamuf went on to state, "The definition of logical expansion leaves a lot of discretion. It is up to the OMPC board and this court to decide whether this is a logical expansion that would not significantly increase the B-4 zoning. You did a little rezoning with a small lot and you have big problems because the next thing that is going to happen is that you are going to have all of the multi-family coming in and they are going to want B-4. All of the property to the south will want B-4. So what happens is you get a domino effect." He believes this decision will lead to zoning without limitation.

Judge Mattingly stated, "I keep hearing you say that I cannot pick out a little bitty section or part yet we keep talking in terms of expanding B-4 in terms of a very small parcel of property along the entire Highway 54 corridor from the bypass to Thurston Dermont/Miller Mill Road. If you looked at that entire area, the 1.5-acres would be insignificant in the amount of property that had been zoned B-4."

Mr. Kamuf stated, "It would be insignificant, but it would not be insignificant if you zoned it B-4 because everything around it would want to be zoned B-4."

Judge Mattingly stated, "That is already happening. That is the point I am making."

Mr. Kamuf, reading from the transcript, quoted Gary Noffsinger as saying "A few observations, one, Mr. Lambert has alluded to the staff stating that this is a natural and normal thing. No, Mr. Lambert, it is not. The planning staff has struggled with this zoning change. We have great difficulty when we have small lots coming in for rezoning in areas such as this. Mr. Lambert alluded to this small retail, but unfortunately that small retail has big implications for a major corridor in this community. The comprehensive plan on one side says that if you have at least one 1.5 acres of land crossing an intervening street you could qualify for a logical expansion of commercial." Mr. Kamuf stated, "That does not mean you are entitled to the rezoning. On the other hand, there is a section in there that says due consideration should be given to the concerns of the neighbors. We need to look at the bigger picture when we are making critical decisions for the community. Incompatible uses – before you can have a planning and zoning board, you have to have a public hearing before the planning and zoning board and they recommend to you all the goals and objectives. You all adopt the goals and objectives but you cannot adopt the subdivision regulations or anything. Here is what the goals and objectives say. The goals and objectives of the comprehensive plan protect the neighbors against incompatible use. One, they avoid the introduction of urban activities that would have a detrimental effect on

residential activity, but would allow some mixture of appropriate non-residential use. Surround established residential area with compatible residential activity properly buffered. The fourth, I talked about on the goals and objectives talked about the safety. Situations and situate non-residential uses within a residential neighborhood area in a manner that enhances safety and neighborhood character. If we had a development plan, we would know about that. The last one, assure that non-residential uses in the neighborhood - professional business, industrial etc. have adequate space for future expansion and are designed so that traffic, parking, noise, and odor, do not conflict with residential usage."

Commissioner Castlen asked Mr. Kamuf, "In the transcript, you make references, "First of all, I believe the planning practices require small lots such as this to be developed jointly. The problem with this case is small lots create major problems. Please explain how this one will cause problems if this property is rezoned."

Commissioner Castlen paraphrased Mr. Kamuf's response as there are too many unanswered questions to go forward and Mr. Kamuf agreed.

Commissioner Castlen noted that there is a comment in the transcript by which Mr. Stevenson said that from the bypass all the way to Fairview Drive is zoned commercial. I just want the record to reflect that that is not a true statement. Second, with the exception of Cheetah Car Wash, everything on the east side through to Thruston Dermont is zoned residential with exception of that corner development. I know there is construction on Highway 54 near Cheetah Car Wash, is that commercial?"

Gary Noffsinger stated he is unaware of commercial zoning in the construction space.

The court took a very brief break.

Mrs. O'Bryan, Woodlands homeowner, spoke briefly concerning the problematic traffic on Highway 54, particularly coming in and going out of the subdivision. She also addressed the elevation differences, and the views the residences would see looking down at the back of the property.

Matt Hayden, Woodlands homeowner, asked, "How much time/money is spent on attorney fees, traffic studies, and experts in order to protect the neighborhood from what I would call illogical expansion of zoning of B-4? Under the goals and objectives, it spells out that existing neighborhoods should be protected, and all of our neighbors who are sitting here tonight they are away from their work, we have hired experts to be sitting here, and it sounds like we are going to have to hire more experts. At what point, which governing body is going to look out for existing neighborhoods that have been there over 25 years? I don't see how this is logical or more importantly how it protects the existing neighborhoods in the community." Mr. Hayden pointed to the trees on the property that do not shield as a buffer for future development. He also stated, "Whenever you do B-4 zoning, it was mentioned that the restriction would be on

hours of operation. There are no restrictions of hours of operation under B-4. So, you can have anything that is open 24-hours and there are some things that are more attractive that can go in B-4, but there is a longer list of things that can go in B-4 that you would not want in your neighborhoods. Regarding the spacing, it does not meet this. This is a fast growing area. According to the Department of Transportation the fastest growing corridor in Owensboro. With the already numerous traffic accidents along 54, do we really want to make access points that don't meet the minimum traffic requirements? They are put there for traffic safety concerns. I don't see how this would make way for the chance to start changing those things that have been set in motion. We just don't want to see it in front of our neighborhood."

Judge Mattingly asked Mr. Hayden, "You have three parcels of property there. How do you develop that property?"

Mr. Hayden stated, "I do think there should be something done with this property. I would hope to see it more in a use that is more compatible to residential."

Mr. Overstreet stated, "There have been a lot of allegations about traffic studies and development plans. He was not required to submit those. One of the conditions of approval was that he submit the development plan. He has that ready and is prepared to submit that assuming that the zoning is permitted by this court. The traffic study has been completed. As far as the 4 conditions of planning and zoning and the staff report had placed, the only condition Mr. Lambert had issue with, was the potential for perpetual obligation to put in a right-turn lane at any time in the future. As far as the shielding is concerned, under the comprehensive plan, and under the zoning requirements, there are certain things that have to take place. These are things such as 6-foot fencing and planting. If they want to double the number of plantings on that side to help the neighbors to be more fully blocked, Mr. Lambert is fine with that. He will increase those."

Judge Mattingly interrupted, "Let's not go there."

Mr. Overstreet continued, "As far as the existing neighborhoods being protected – we are not placing this proposed site in the neighborhood we are proposing a retail center site on Hwy 54. We are not trying to disrupt the neighborhood. It is not being placed in the middle of a neighborhood. This is nothing to the scale or impact of Wal-Mart or Menards. He is simply proposing a small retail center that will be available up to at most, four tenants based on the numbers. We are not submitting to the court that just because he met all of the comprehensive plan requirements that this is mandatory. Obviously, we know that this is not. However, the finding of facts that Mr. Kamuf had you to believe they are simply not in the record. Chief Kazlauskas cannot say that we have all driven on Highway 54 and you all know how bad the traffic is. You all have been out there. You cannot rely on personal information or knowledge. Judge, you questioned extensively about the basis of those opinions. It is because they are not there. The expert did not testify to it. They did not present a traffic study. No traffic study was required. It has since been done. But to say that a finding of fact is that it is not a logical expansion when that is 180 degrees contrary to the testimony from Mr. Howard in the April

hearing. I am not sure how they can get to the point of saying that is substantial evidence. There is nothing else in the record, other than what Commissioner Kazlauskas said he quote "always thought". That cannot be substituted for the actual evidence and the testimony of Mr. Howard. We simply ask that you all review it. We believe that there is absolutely no basis, anywhere within the record, for any of the finding of fact. And they definitely cannot support the decision they reached and ask the decision be overturned."

Judge Mattingly addressed the requirement of the right-turn deceleration lane. He stated, "I did not read that as being a requirement. It said that if it was warranted by the traffic study that it could be required."

Gary Noffsinger stated, "That is the biggest difficulty the staff faced with this zoning change – how to address roadway capacity, future or current roadway improvements because we did not have the traffic study. We did not know how the property was going to be developed or the uses. The questions comes – who pays? Who should pay today or tomorrow? We don't know what properties are going to be connected to this property or should be connected to this property because if the adjoining properties develop residentially, likely you would not want this property to have vehicular connections to the adjoining properties. But it depends on how they develop. We were trying to move forward with this to address the future roadway improvements. We ask for the condition that, in the future, if warrants are met, and that could mean that the adjoining property as it developed generated the warrant, and the warrants were then met coupled with this property that the applicants responsible for the right-turn deceleration and storage lane.

Judge Mattingly stated, "All the way past his property..."

Gary Noffsinger stated, "In the right-of-way."

Judge Mattingly stated, "So you would come off of 54 in that south lane into a deceleration lane that would be on his property – you would dedicate part of his property to a right-of-way for that deceleration lane."

Gary Noffsinger stated, "The deceleration lane would be in front of someone else's property."

Judge Mattingly stated, "But would he have to complete that all the way to the end of that property?"

Mr. Noffsinger replied, "That is the way that condition is written."

Judge Mattingly asked, "Would he have to complete that all the way to the entrance of the Woodlands?"

Mr. Noffsinger replied, "No, this would be a right turn deceleration and storage lane to his access point that is located 480-feet or so from the intersection of Woodlands Drive. It will be in someone else's property, but in the right-of-way."

Commissioner Castlen noted that the condition is very broad.

Mr. Noffsinger stated, "We don't know how the adjoining properties are going to develop. You could end up with a situation where the adjoining larger tract is a residential development. Then you have this small piece – very insignificant piece in terms of size and impact at this location."

Judge Mattingly asked, "East of Lake Forest, isn't that a commercial and professional development with some residential in there?"

Mr. Noffsinger stated, "Which is a picture of how if you are going to develop property using sound planning principles, that is how you would do it."

Judge Mattingly stated, "But is that B-4 and professional further out that way?"

Mr. Noffsinger stated, "There is B-4."

Judge Mattingly announced the second reading will be held Tuesday, July 30, 2013, at 10:00 a.m.

Judge Mattingly noted, at the July 30 meeting a motion will be made to uphold or overturn the planning commission's denial. It is probable that no comments will be received at this meeting.

Judge Mattingly announced that Commissioner Lambert recused himself from this hearing as Mr. Steve Lambert is his nephew, and he will not be here for the next meeting. Furthermore, in the spirit of disclosure, Judge Mattingly recognized that Mr. Hayden is a second cousin of his by marriage, which is not basis to recuse himself.

**Without objection, Judge/Executive Mattingly adjourned the meeting.
SO ORDERED THAT COURT STAND ADJOURNED.**

Al Mattingly
Daviess County Judge/Executive