

MARION COUNTY PLANNING COMMISSION/BOARD OF ZONING APPEALS

RECORD OF PROCEEDINGS

October 28, 2004

Chairman Eileen Sieger called the meeting to order at 7:30 p.m., with a quorum present for both the planning commission and the Board of Zoning Appeals.

Roll Call was answered by Sieger, Bob Maxwell, Glen Unrau, David Mueller, Willis - Ensz, Ervin Ediger, and Marquetta Eilerts. Mary Avery was absent. Zoning Administrator David Brazil was present.

Sieger asked for additions to the agenda, or off agenda items. There were none.

Sieger asked for corrections, or additions, to the Record of Proceedings of the September 23, 2004, meeting of the Marion County Planning Commission/Board of Zoning Appeals, and the Record of Proceedings for the Marion County Planning Commission Public Hearing for Proposed Zoning and Subdivision Regulations, from the same date. Mueller made a motion to approve the Record of Proceedings for the public hearing as written, and Ensz seconded the motion. In favor: 7; Opposed: 0; Motion carried. Unrau made a motion to accept the Record of Proceedings for the regular meeting as written, and Ediger seconded the motion. In favor: 7; Opposed: 0; Motion carried.

Item 4: An application for Terry Graber/Derold Becker, requesting an acreage variance from 40 acres to 36.6 acres, for property located in East Branch Township. This application was published in the October 6, 2004, issues of the *Marion County Record*, *Hillsboro Star Journal* and *Peabody Gazette Bulletin*. Derold Becker was present to speak about the application. He introduced his wife, Cynthia, in the audience. Becker explained they want to build a home for a single-family residence. He said the land is hilly and sloping, and not suitable for farming. He said it has not sold as ag land. Becker said he has talked with neighbors on the two-plus adjoining acres, and they do not object to his plans. He said the land is too small for cattle grazing. Becker had pictures with notes of what he intends to build. He said the land would increase in tax value, with a home on it. We live in an ag community, now, and have for 18-some years, Becker told members. We realize what ag life is like, and pesticides, and cattle, and have no problems with that, Becker said. Sieger reminded members they are acting as the Board of Zoning Appeals for this application, so all members vote, except Eilerts. Sieger explained that only seven members are on the Board of Zoning Appeals, and Avery is absent, but we still have a quorum. Mueller asked about the layout of the property. Brazil showed Mueller on a map where the neighbor's house is, and where they plan to build. Sieger asked, and Brazil explained, that Graber purchased 76 acres in 1993, so the only thing he didn't own was the homestead. Essentially, he owned 80 minus the neighbor's, then sold off the east 40 of the 80, Brazil said. Then, in July, 2001, is when we saw the first variance application for this property, Brazil added. Brazil continued to explain the application in 2001 was requesting a Conditional Use Permits (CUP) for a

shooting range, and a variance from 40 acres, down to 36 acres. Because of opposition, the applicant withdrew the CUP request, and then the Board of Zoning Appeals denied the variance request, Brazil said. It was the same owner, but different proposed buyers, Brazil added. Maxwell asked and Becker said we have a contract on the property, contingent on getting a zoning change approval. The home site was split out previous to zoning, Brazil said. When Graber's first purchased this property, it was compliant, then in 2000 the east 40 acres was sold off to Buller, Brazil said. It's a different scenario when a sale creates a shortage, instead of when something like a highway causes a shortage, for construction, Sieger said. Mueller asked and Becker said there is just one residence, nearby, and a couple on down. Mueller asked if the property is on a gravel road, and Becker said yes, right on the Marion/Harvey County line. Sieger asked and Becker said yes, the Harvey County Water District is nearby and we've been told the line is adequate to hook up to. Are there any other questions?, Sieger asked. Is there anything else you'd like to say, or add?, Sieger asked Becker. Does anyone from the public wish to speak?, Sieger asked. Sieger closed the public hearing for this application.

Sieger drew member's attention to the staff report for this application, and pointed out the paragraph on yard variance and condition number one, that has to be met to grant a variance. Mueller asked if members could look at it that a new owner would not have control over, or have caused the split. Would that make it a different situation?, Mueller asked. Not in my mind, it wouldn't, Maxwell said. I would have to agree, Brazil said. Normally, you're talking about one residence per 40 acres, and you already have that, Maxwell said. What about the new zoning regs?, Mueller asked. There's still only a net density of one per 40, Brazil said. All these years we have not approved variances for residences in ag districts, Brazil said. We've approved variances for other buildings, but we've held the line on residences, he said. It's unfortunate this property is in this situation, but when the owner purchased it, it was in compliance, Brazil said. And, that's what bothers me, Ediger said. I went out and looked at it, yesterday, and I can see possibilities with it, Ediger said. I've actually received phone calls on this for a few years, and my best recommendation is to look for two, to three acres to purchase with it, from adjoining lands, Brazil said. But, that's not realistic, Ediger said. We have different people here, but the same set of regs, Sieger said. We're looking at the facts, and that's what we have to go by, Maxwell said. We don't make decisions on people, Sieger said. The adjacent 40 that's next to it, if they would give up two, or three acres, then they would not be eligible, Mueller said. That would offset another 40, but the home site there was already split out, so you've already done that, Brazil said. That was the existing?, Sieger asked and Brazil said yes. It would be non-compliant ag, Sieger said. As staff looking at this, if this is approved, why shouldn't the next one be approved?, Brazil asked. The 40 acres has been in place for a long time, Siege said. I'm just bothered by it, Ediger said. I see potential in it, and just because it's a couple acres short..., but we've got to be consistent, Ediger said. Sieger reviewed the Record of Proceedings from the previous application on this property. There isn't any one of these that is a full quarter in this section, Sieger said. I agree with you it would be a good home site and it's not highly productive ground, but if you allow this I don't know how you'd deny anyone else, Brazil said. And, it's not fair to people from the past, Ediger added. And, if you go down to 36, do you go down to 30, or where's the benchmark?, Sieger asked. 40 acres is

the benchmark, Maxwell said. When he owned all of it, he sold off that 40 in 2000, Brazil said. I don't think we have any option, because we have the regs, Unrau said. Maxwell made a motion to deny this application for a variance, as it does not meet criteria of Marion County zoning. Sieger seconded the motion.

In favor: 5; Opposed: 0; Abstained: 1; Motion carried.

Becker asked about the new zoning regulations. Brazil explained the new zoning regulations are to be in place by December 6, 2004. Brazil explained there would be five-acre parcels, if you meet the conditions. Sieger explained you still have to own 40 acres in order to get approval for five acres. Maxwell asked about land to the west of this property possibly being available.

Item 5: An application for Raymond Brandt/Lyle Leppke, requesting a rezone from agriculture to rural residential for property located in Risley Township. This application was published in the October 6, 2004, issues of the *Marion County Record*, *Hillsboro Star Journal* and *Peabody Gazette Bulletin*. Sieger reminded members they are acting as the planning commission, so that involves everyone. Leppke gave members handouts of information on this application. Leppke introduced himself, and Brandt. Leppke said this property is located four miles north of Hillsboro, from the Alco store, and a half-mile west. Leppke explained what land Brandt owns. Maxwell asked and Leppke said it is between 112 and 115 acres. Leppke explained what land is pasture and what land is farmland. Leppke said he included pictures of buildings on the property. He said they are using the previous survey, as a reference. He said there is 26.44 acres of this property for sale. Leppke showed members where the home sits, and how they would move the property line back to the west in order to comply for set backs and to straighten the property line. Leppke said there is a jog in the property line. Maxwell asked what it would be with the additional property, and Leppke said probably 27, or 28 acres. We will have a 10-acre description for zoning and we intend to sell the remaining acres for farmland, Leppke said. There's a natural fence line along the pasture, and that's why the jog is there in the property line, Leppke explained. Leppke showed members how they will move the property line, north and south, to get 10 acres. Sieger asked what the total acreage is, and Leppke said about 115 acres. Sieger asked and Leppke said they understand the remaining acres would be non-compliant for building. Leppke said Brandt has had a renter in the home for a while. Leppke said this property is on rural water and also has a well, and a lagoon. The prospective buyer has taken some initiative on his own, Leppke said. It has a new fence, and it's a pretty good kind of property for someone to take over, he said. I don't know how to make this application better for you, Leppke said. And, I think this fits in with what we'll do down the road, he added. Does anyone from the public wish to speak?, Sieger asked. Lloyd Klassen said he owns the adjoining property, and he has Klassen Dairy. He showed members where the dairy is located on a map. We all know things don't smell too good a lot of the time on a dairy, he said. I've talked with Mr. Brandt, and I've talked with Mr. Meier, Klassen said. I will not oppose this sale, or zoning of this property, but I have some comments and concerns, Klassen said. Persons in a zoned residential area probably have a right to complain about odors, occasionally, Klassen said. I feel like I'm up against a solid wall that I can't do anything about, Klassen said. But, I want to make my feelings known, he added. I have 810 animal units and a legal permit to dispose of waste through a center pivot, which

occasionally can cause an odor problem, Klassen said. Mr. Meier said if it's not zoned residential, he can't get the loan he wants, and I won't do that to him, and if I say I don't want it zoned residential I ruin any future relationship with Mr. Brandt, so I'm up against a wall, Klassen said. My question is, why does this need to be changed from agriculture, and Mr. Meier said so he can get a better loan, Klassen said. I feel if there ever is a pollution problem, ag will lose, because it's zoned residential, Klassen said. For a little over 10 years, we've had a permit from KDHE (Kansas Department of Health and Environment) requiring us to remove wastewater from our lagoon, when it comes to four feet from overflow, Klassen said. The center of the pivot is on the half-mile mark and Mr. Brandt rented us additional land so the center pivot went around full circle, and - comes 40 to 80 feet from Meier's house, Klassen said. I told Mr. Meier that, and he wasn't crazy about it, Klassen said. You wouldn't let a feedlot move in a mile, or two, from Hillsboro, but we have to let a residence move in next to us, Klassen said. Maxwell questioned the pivot location, and Klassen showed members on a map. Ediger said there are two pivots. Ediger showed Sieger the pivot locations on a map. This application is a good example, because the conflict between true rural residential and ag operations is obvious, Brazil said. In the future, land will remain ag, and there will be a requirement for lot splits to have a clause on the deed to accept ag situations, so it'll be an improvement, Brazil said. Brazil suggested putting a covenant on the deed, for this application. Each subsequent owner would have the covenant, too, Brazil said. So, it would remain with the property?, Klassen asked and Brazil said yes. Unfortunately, the new zoning regs aren't in place for this application, Leppke said. We will no longer have rural residential, Sieger said. We will no longer create new rural residential properties, Brazil said. Mueller asked if the applicant would be willing to proceed with a covenant? Leppke said no problem. Brandt said we don't know about Mr. Meier. I tried to get Mr. Meier to come, tonight, Klassen said. If you're dealing with KDHE, you're pretty used to working with people who can be pretty cantankerous, so if you can deal with that..., Maxwell told Klassen. They won't let me expand, Klassen said. That's what the law is, and I have to accept it, Klassen said. My conversation with Mr. Meier was that, yes, he will go along with whatever the law is, Klassen said. His opinion was, if I keep it on my side, it's okay, he said. But, he did not say I could bring it near his house, he added. I would think he'd go along with that, because it does not allow me to go near his house, Klassen said. There's no doubt who will come out on top, it's the rural residential, Brazil said. Even with the covenant?, Maxwell asked. If the covenant is necessary for this, why isn't it for other operations?, Leppke asked. The set back is 50 feet, Leppke added. Mr. Klassen has to be 1,320 feet away from the nearest residence, Brazil said. This is unique in that we haven't had something this close to an ag operation, before, Brazil said. If I were Mr. Brandt, I'd do the same thing, Klassen said. I don't blame Mr. Brandt, he added. Please don't mix ag and residential, unless you want to discourage livestock in the county, Klassen told members. If there are several house, together, call it residential, Klassen said. But, if there's just one home why call it residential?, he asked members. Does anyone else from the public wish to speak?, Sieger asked. Are there any other questions, or information?, Sieger asked. If the set backs are an issue, then set backs should be 100 feet, instead of 500 feet, Leppke said. Mr. Brandt and I would like you to address this application as presented, Leppke told members. We've established what is the set back, and we've fallen into those guidelines, Leppke said. So, you don't want the

covenant?, Sieger asked. No, if it's not required in other's, then why is it for this application?, Leppke asked. Maybe Mr. Meier will buy the other acreage, I don't know, Leppke said. Sieger closed the public hearing for this application, and opened the floor for discussion.

Sieger reminded members to look at the factors listed on the staff report for this application. There's no question it meets the requirements for the rezone, the only question is whether or not to attach the covenant, Mueller said. There's a notice of ag operations sheet that we have referred to, Sieger said, and showed members the sheet. We could use it as a reference, Sieger said, and read the sheet. Maxwell reviewed the sheet. We provide that, Brazil said. It's just a 'for your information' type of sheet, Sieger said. I still think there's potential for greater problems to arise, Brazil said. No one lives, forever, and this one has a greater risk than any of the other applications we've had, Brazil said. Do you feel like the covenant would be advantageous?, Sieger asked. Yes, I believe it would, Brazil said. It's acceptable to add conditions to a rezone, Brazil said. The county commission could approve it, or not?, Sieger asked and Brazil said yes. If you start doing something like this, you may have to start doing it for all of them, Maxwell said. We could even use this language, Brazil said. One thing I see is, you've had residences on this property, before, and they were renting, which is different than someone owning the property, but ag operations were going on, Maxwell said. There may have been someone living there when the pivot was going near the home, Ensz said. We can find that out, if we need to, Sieger said. If the covenant were attached, what problems do you think this would bring to the person living there, except he couldn't bring suit?, Sieger asked. If a person buys the property and says this is not going to bother me, but then it does?..., Maxwell said. Brazil asked, what if we added the word, "existing?" So, what's existing could not be contested, Sieger said. I think anything could be challenged, Maxwell said. Sieger asked if the attorney mentioned any similar cases he has worked on. He didn't say, but he was comfortable with this, Brazil said. The house is only 50 feet from the property line, which is what's required, Brazil said. We have several times moved the (proposed location for the) house to the center of the property, Brazil said. Are they planning on using the existing residence?, Maxwell asked and Leppke said yes. I wish it was ideal to center it, but we'd take too much ag land away to center it, Leppke said. As far as boundaries, I think the applicant has done a good job trying to maintain as much farm ground as possible, Mueller said. We've done this before, and it gives protection for all involved, Eilerts said. We've done covenants, before?, Brazil asked. We've attached something, Sieger said. We're trying to impose a covenant on two parties, Maxwell said. It would stay with the land, Sieger said. What we had was actually filed with the deed, Eilerts said. I do recall that, too, Unrau said. I look at it from the position that it makes it much cleaner, Unrau said. I like it, he added. I do, too, Eilerts said. I can agree with that, Ediger said. But, when we're talking about a covenant, you have to have it on both sides, Ediger added. I would like to withdraw the covenant, Klassen said. Well, it's not your place to withdraw it, Sieger explained. If I wish to disagree with something..., Klassen said. But, you had a chance, Sieger said. Can we have another public hearing?, Klassen asked. Not unless we postpone this another month, or if members wish to reopen the public hearing, Sieger said. I'm just thinking we're setting ourselves up as judgment and jury, down the line, Maxwell said.

If you recommend this covenant, and it's not put in place, the rezone also would not be approved, Brazil told members. The advantage is, it would protect the existing farm operation, Mueller said. The key word is "existing," Sieger said. I would question what I would have if the covenant is put in place and something happens with negligence, or something obvious, would the owner still be able to file suit?, Mueller asked. So, they're not giving up all their options?, Mueller asked. Would it be a concern to new owners, or subsequent owners, if they were still covered?, Mueller asked. That would be a change, because that's not currently happening, Sieger said. Ediger made a motion to reopen the public hearing for a onetime statement from Mr. Klassen and Mr. Brandt, but that's all. Maxwell seconded the motion. In favor: 6; Opposed: 1; Motion carried.

Sieger reopened the public hearing. Mr. Brandt said they won't have problems because he will not sell the land in between, because it's going to his children, and he will not rent to Mr. Klassen for the pivot, as long as he has control of the land. Mr. Klassen said he withdraws the covenant and he does not have to put the pivot on the land. Even if I wanted to do it, again, I would have to get permission from Mr. Brandt and KDHE, and they may not give me permission, so I shouldn't have said anything, Klassen said. Is this something you've done on other applications?, Brandt asked. We think we have, but we can't remember specific applications, Sieger said. Sieger closed the public hearing.

Keep in mind, it is our option to suggest the covenant, or not, and remember to keep the land use in mind and not the current owner, because, just because it's in the family doesn't mean things can't change, Sieger told members. Are there any other comments?, Sieger asked. Sieger reminded members they are acting as the planning commission for this recommendation, which will go to the county commission. Ediger made a motion to approve a recommendation to rezone 10 acres from agriculture to rural residential for application number ZPO4.061, and Maxwell seconded the motion. In favor: 6; Opposed: 1; Motion carried.

Brazil explained the timeline and that he would need a description of the property by the second Friday in November.

Item 6: Zoning regulation discussion and approval. Brazil told members the next time he goes to the county commission he will take the resolution with him. He said they voted last time to go ahead, and not make any changes. Members discussed Wind Energy Conversion Systems (WECS), and brought up an initiative by the governor. It's not very specific, as they broke it down into option A and option B, one being for, and the other being against, Brazil said. The overlay district is on an untilled fragments area, Brazil said. I think we're ahead of the curve with the state, and the county commission agreed, he said. Let's assume if they do sign the resolution on the second Monday in November, then our next meeting is on November 18, Sieger said. Remember it (the next meeting) does come early, Sieger told members. I recommend that it become effective on December 6, 2004, Brazil said. And, we don't meet in December, and that will provide the moratorium, and will make for a smooth transition, Brazil said. Is there anything about changing the tax structure on the windmills?, Ediger asked. I believe they've been extended, Sieger said. I think they're in place, she added. But for how long?, Ediger asked. Is there anything else?, Sieger asked. Ediger made a motion to adjourn and Ensz

seconded the motion. In favor: 7; Opposed: 0; Motion carried and the meeting was adjourned at 9:35 p.m.

MARION COUNTY PLANNING COMMISSION/BOARD OF ZONING APPEALS



Eileen Sieger,
Chairman