

Request for City Council Action

Date: October 22, 2013

Agenda Section: Consent Agenda No. 5	Originating Department: City Clerk's Office
Item: Acceptance of Minutes of Boards, Commissions and Committees No. 5.4	Approved:

Background:

Attached for Council review and acceptance are minutes from the meetings of City boards, commissions and committees which have recently been sent to the City Clerk's Office.

Recommended Action:

The Council is requested to accept the following sets of minutes and place them on file:

Board of Fire and Police Commissioners – June 17, 2013

Zoning Board of Appeals – December 5, 2012 and June 5, 2013

Engineering Approval Obtained	Finance Approval Obtained	Legal Approval Obtained	Approval Obtained	Manager's Approval Obtained
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Council Action: Motion by _____ 2nd by _____ to _____



BOARD OF FIRE AND POLICE COMMISSIONERS
JUNE 17, 2013

The City of Carbondale's Board of Fire and Police Commissioners held a meeting on June 17, 2013 in Room 103 of the Civic Center, 200 S. Illinois Avenue. Chairman Harvey Welch called the meeting to order at 8:40 a.m., with the following-named members of the Board present/absent:

1. Roll Call

Present: Commissioners Luanne Brown, Kerry Braswell and Jack Whitlock
Chairman Harvey Welch

Absent: Commissioner Pat Justice

Also present was Deputy City Clerk Alicia Burtley, Administrative Services Director Deborah McCoy, Deputy Chief of Police Jeff Grubbs (Entered at 9:13 a.m.) and Fire Chief John Michalesko

2. Approval of Minutes

Commissioner Whitlock moved, Commissioner Braswell seconded, to approve Minutes from the May 16 and 17, 2013 meetings. There was no discussion. VOTE: All voted Aye. Motion declared carried.

3. Discussion Regarding Questions used in Interviews of Entry-Level Police Officers and Firefighters

Commissioner Whitlock moved, Commissioner Braswell seconded, to adopt the interview questions submitted by Commissioner Brown for the Police Officer and Firefighter Entry-Level Interview Questions as Amended. DISCUSSION: Commissioner Whitlock relayed that questions two and three on the Interview Questionnaire for the Entry-Level Police Officers are redundant. Commissioner Braswell suggested that questions one and nine on the Entry-Level Police Officers Interview Questionnaire be combined, as well as questions seven and ten. Fire Chief Michalesko shared that there was a question that did not pertain to the firefighters, and requested the substitution of that question with question number ten of the original Entry-Level Firefighters interview questions. VOTE: All voted Aye. Motion declared carried.

4. Discussion Regarding Scheduling Interviews Concurrently with the Entry-Level Police Officer and Firefighter Exams

Discussion occurred with regard to the scheduling of the oral interviews either the day of the written exams or the day after, to make it more convenient for the Police or Firefighter applicants. Administrative Services Director Deborah McCoy relayed that the physical exam, written exam and oral interviews could be a long process. It is a matter of how the Board would like to handle the interviews. Deputy Chief Jeff Grubbs relayed their department takes care of the scheduling for the physical exams and described how the Police Department utilizes the Entry-Level Police Officer process as it pertains to the oral interviews. Commissioner Whitlock agreed with the need for the interviews to be scheduled

consecutively with the physical and written exams, in order to make it easier for the candidates who are traveling long distances. Commissioner Brown suggested that the candidates' interviews be scheduled over the weekend, if that is more convenient for everyone. Commissioner Welch asked Deborah McCoy to research other cities as to how the scheduling of Police Officer and Firefighter Entry-Level Exams and Oral Interviews are organized. No formal action was taken.

Discussion occurred in reference to adding an application fee for the police and firefighter applicants in order to counteract the expenses incurred for ordered written exams, for candidates who do not show up.

5. General Discussion about the Exams Administered to the Firefighters and Entry-Level Police Officers

Commissioner Whitlock moved, Commissioner Brown seconded, to approve the Pass/Fail Assessment System for the Entry-Level Police Officer and Firefighter Interviews. DISCUSSION: Commissioner Brown suggested that the Board adopt the Pass/Fail System for the interview process of Entry-Level Police Officers and Firefighters for reasons of simplifying the procedure of selecting qualified candidates. Each Board member would render a pass or fail response as to whether the candidate would be a good choice to move forward in the hiring process. If the responses resulted in a tie, the candidate would automatically pass. The current grading system would be important if the potential firefighters and police officers were ranked by their interview score. Commissioner Whitlock not only agreed with the Pass/Fail grading system, but expressed that he would like to receive any input from the Police Chief or the Fire Chief with regard to their response to any given interview. Director McCoy relayed that there is a checks and balance system between the Commissioners' interview and the Chief of Police Interview. It would defeat the purpose if the Chiefs are allowed to give their opinion at the time the Commissioners are deliberating. Fire Chief Michalesko stated that the Board has provided qualified candidates and would like to remain present during the Commissioners' interviews. Deputy Chief Grubbs stated the interviewing officers at the Carbondale Police Department approve of the candidates selected by the Board. It saves a lot of time by observing the Board interviews; however, in case of tie breakers the officers have used the scores to select an individual. Chairman Welch conveyed if this type of system goes through, it would take more time after each interview, to complete the selection process. VOTE: All voted Aye. Motion declared carried.

Discussion occurred pertaining to Fire Chief John Michalesko's concern with the firefighter exams being administered every two years, and how to incorporate or average the scores for each year, while at the same time, the eligibility range or median changes each year.

6. Adjournment

Commissioner Whitlock moved, Commissioner Braswell seconded, to adjourn at 10:15 a.m. Vote: All voted Aye. Motion declared carried.

Alicia Burtley
Deputy City Clerk

Approved by the Board on: _____

MINUTES

Carbondale Zoning Board of Appeals

**December 5, 2012
City Hall / Civic Center
200 South Illinois Avenue
7:00 p.m.**

MEMBERS PRESENT: Barke, Brazley, Grant, Harvey, Hunsaker, Kang, Love, McClurg

MEMBERS ABSENT: Lilly

STAFF PRESENT: Wallace, Henry

APPROVAL OF MINUTES:

Mr. Kang made a motion, seconded by Mr. Hunsaker, to approve the minutes of the February 15, 2012, meeting. The minutes were unanimously approved by a voice vote.

PUBLIC HEARINGS:

- A. ZBA 13-01**, 7:00 p.m. – Egon Kamarasy is requesting a variance to reduce the minimum front yard setback requirement in the RR, Rural Residential districts for lots 5 and 6 in the Bittersweet Subdivision.

Roll call was completed and the determination of a quorum was made.

Mr. Barke opened the Public Hearing at 7:00 p.m. and asked Mr. Wallace to read the legal notice.

Mr. Wallace read the legal notice.

Mr. Barke asked Ms. Henry to present the staff report.

Ms. Henry read Part A of the staff report.

Mr. Barke asked if there were any questions of staff.

Mr. Grant asked if the setback is measured from the center of the roadway.

Ms. Henry responded that the setback is measured from the edge of the right of way and the road is a fifty-foot right of way.

Mr. Barke asked for clarification.

Ms. Henry responded that the road is twenty five feet wide and it lies in the center of the fifty foot right of way, so the setback line starts at the edge of the fifty feet.

Mr. Barke asked if the other lots meet the sixty foot setback.

Ms. Henry responded that they meet or exceed the sixty feet required setback.

Mr. Barke asked if there were any further questions of staff.

Mr. Kang asked about the phone call that had been received by staff.

Ms. Henry responded that the call was received from the owner of Lot 7, and voiced concern over the variance.

Mr. Barke asked if there were any further questions of staff.

There were none.

Mr. Barke asked if the applicant was present and wished to speak.

Mr. Egon Kamarasy came forward and stated that he has attempted to sell the property, but that the purchasers and the architects believe it would be too expensive to build a house on these two lots, and that the entire neighborhood would be bothered by the dirt moving and pollution it would cause if fill were brought in. He said if the setback line is reduced, houses can be built without bringing in fill.

Mr. Barke asked if the land has changed since Mr. Kamarasy platted the subdivision.

Mr. Kamarasy responded no, but a mistake was made in the plans to be able to put in sixty feet setbacks.

Mr. Barke asked if the sixty feet setback was an incentive for those who have already purchased other lots in the subdivision.

Mr. Kamarasy responded no, there were no big slopes there or any other problems.

Mr. Barke asked Mr. Kamarasy if he thought the other purchasers bought lots thinking they were not going to have any houses close to the road. He stated that the twenty five foot variance he is asking for is smaller than what Carbondale requires for its City lots, and asked Mr. Kamarasy if he doesn't think the houses built with the variance would look out of place with the rest of the subdivision.

Mr. Kamarasy responded that he has sold five lots, and four houses have been built that meet the sixty foot setback because there were no slopes where they were built. He said that it is in the best interest of everyone to have the rest of the houses built.

Mr. Barke asked what is the farthest back a house could feasibly be built on Lots 5 and 6, and how big the back yards would be.

Mr. Kamarasy stated that the back yards would be very big because the lots are two and a half acres.

Mr. Barke asked how far back the level area goes.

The contour maps were shown at this time.

Ms. Henry explained that each of the lines on the map represented a two foot change in elevation and the closer the lines, the steeper the grade. She said that a walk-out basement would be appropriate on these lots.

Mr. Brazley asked if the architect has given anyone any drawings to show where the house would be situated.

Mr. Kamarasy responded no.

Ms. Harvey asked if the lot is two and a half acres, can't the house be built somewhere else on the lot.

Mr. Kamarasy stated that the house could be built down in the valley, but a road would have to be built to reach the house.

Mr. Grant asked if the course in the valley is in a floodway or floodplain.

Mr. Wallace responded that there is a small, insignificant creek that runs down there, although it is not part of a floodplain.

Mr. Brazley asked if one or two buyers are interested in Lots 5 and 6.

Mr. Kamarasy responded that one person was interested in three lots for three houses. Mr. Grant asked if the person interested in these lots wants a single level house, and if that is why the variance is being requested.

Mr. Kamarasy stated he does not know, but he assumed it would include a walk-out basement.

Mr. Grant stated that he does not understand why the slope is causing a problem if a walk-out basement is desired.

Mr. Kamarasy stated that the construction would be too close to the ten inch water line.

Mr. Barke asked if there were any further questions for the applicant.

There were none.

Mr. Barke asked if there was anyone who wished to make a statement in favor of the application for the variance.

There was no one.

Mr. Barke asked if there was anyone who wished to speak in opposition to the application.

Mr. William Kilquist came forward, was sworn in, and stated that he has worked in law enforcement of some sort for forty two years. He said Mr. Kamarasy plotted the lots for the subdivision, that he and his wife were the second to buy one in 2008, and since then four more have been sold. He stated that he learned what the regulations were and what was set out as far as where to place their house, and that Planning staff was a wonderful help to them. He said everyone who bought lots knew there was a sixty foot setback, then when the economy went south, the lots failed to sell and now Mr. Kamarasy wants to change the rules. He said he would not recommend anyone build a house on either of the lots Mr. Kamarasy is asking for a variance on, and would certainly not build a house in the valley, as it get filled with mud when it rains. He said the outlook of the entire subdivision will be changed and will devalue his house if the variance is granted, and that Mr. Kamarasy is only interested in his own well being since he knew the layout of the subdivision when he plotted it from the beginning. He thanked everyone for their time and service, and offered to answer any questions.

Mr. Brazley asked Mr. Kilquist about the flooding issue at the bottom of Lots 5 and 6.

Mr. Kilquist said it completely floods there when it rains, and that the only way to get to the bottom of those lots would be through his property, adding that he has not granted any easements to Mr. Kamarasy.

Mr. Grant asked Mr. Kilquist what the minimum square footage is for houses in the subdivision.

Mr. Kilquist said it is 2500 square feet, by covenant.

Mr. Barke asked if there were any further questions for Mr. Kilquist.

There were none.

Mr. Barke asked if anyone else wished to speak in opposition.

Peter Filip came forward, was sworn in, stated that he is the owner of Lot 9, and that he and his wife are concerned about changing the look of the subdivision if houses are allowed that close to the road. He stated that it will lose its symmetry.

Mr. Barke asked if anyone else wished to speak in opposition.

There was no one.

Mr. Barke asked Ms. Henry to present the remainder of the staff report.

Ms. Henry finished the staff report, with a recommendation to approve the application.

Mr. Barke asked if there were any questions of staff from the board. He asked Ms. Henry about the indication that the applicant was constrained by the twenty foot water main, and whether the line would not have run into the natural barrier of the lake if the applicant would have placed the cul-de-sac and the roadway to the north. He said that Lot 8 would have been eliminated if it had been construed this way.

Ms. Henry responded that is correct.

Mr. Barke stated that by placing the water line on the south side, he is losing Lots 5 and 6, but either way, the applicant was going to lose the ability to build on some lots.

Ms. Henry responded yes, unless Lot 8 could have been filled or reclaimed in some way.

Mr. Barke stated that he doesn't think there is anything peculiar with the land, because it has not changed since the applicant plotted the subdivision, so he did not understand how it would be depriving him of any rights.

Ms. Henry replied that it would not be possible, without considerable added expense, to build on those lots.

Mr. Barke stated that it is possible to build, it's just going to be more expensive, so he is not being deprived, and other land owners may have had to pay extra to fill slopes as well.

Mr. Grant agreed that the land is buildable the way it is, and the setbacks should be met to prevent changing the entire look of the subdivision.

Mr. Kang asked about Part B.b where it says the granting of the variance would be in harmony and not injurious to the neighborhood, stating that from the reaction of the neighbors, apparently it would be. He asked Ms. Henry how she came to the conclusion that it would not be injurious.

Ms. Henry responded that, at the time of the report, she had received one phone call with concern, however no one had stepped forward to state that they thought their property values would suffer or that it would adversely affect them.

Mr. McClurg asked about Part B-2, where it states that there would be no environmental disturbance and disruption of the scenic properties of the lots.

Ms. Henry responded that Mr. Kamarasy mentioned that if he had to construct a road down to the valley and build the houses there, it would disturb the environment, so she based this opinion on the applicant's brief.

Mr. McClurg asked why building in the valley would cause more of a disturbance than building close to the road.

Ms. Henry responded that the applicant could probably answer that better, but it was presented to her that the disturbance would be greater to build a road at the bottom of the hill. She said that a new entrance to the subdivision would also be required.

Mr. Wallace stated that building on a slope will always cause more disturbance than building on flat land.

Mr. Barke asked Mr. Kilquist if setback requirements are included in the covenants for the subdivision.

Mr. Kilquist responded no, he doesn't think so.

Mr. Barke asked Mr. Kilquist if he knows what Lots 5 and 6 are being offered for.

Mr. Kilquist responded he believes they are asking high forties or low fifties, and added that the person who owns Lot 1 had asked him to relay his opposition to the application.

Mr. Barke asked if there were any further questions from anyone to anyone.

Mr. Grant asked Mr. Wallace about all the criteria that have to be met.

Mr. Wallace responded that, unlike a Special Use, where all criteria must be met in order to approve, a variance can be granted if even one criteria is met and the Board votes to approve it.

Mr. Barke asked if there were any further questions from anyone to anyone.

There were none.

Mr. Barke read the criteria for meeting jurisdiction.

Mr. Kang moved, seconded by Mr. Brazley, that the Board has jurisdiction.

The motion was approved by a unanimous voice vote.

Mr. Barke asked for a motion as to the applicant's standing.

Mr. Kang moved, seconded by Mr. McClurg, that the applicant has the authority to make this application.

The motion was approved by a unanimous voice vote.

Mr. Barke asked for a motion as to the findings of fact.

Mr. Kang moved, seconded by Mr. Hunsaker, that the applicant was present and made a statement, that two people spoke in opposition, and to accept Parts A and B of the staff report.

The motion was approved by a unanimous voice vote.

Mr. Barke asked for a motion on A(1).

Ms. Harvey moved, seconded by Mr. Kang, that special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other structures or buildings in the same district.

Mr. Hunsaker stated that, in his 34 years of building, he has learned that you can build a house anywhere, it just takes money.

Roll Call Vote:

Yes - 0

No - 8 (Barke, Brazley, Grant, Harvey, Hunsaker, Kang, Love, McClurg)

Mr. Barke asked for a motion with respect to Item 2a.

Ms. Harvey moved, seconded by Mr. Grant, that the literal interpretation and provision of this article would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of the article.

Roll Call Vote:

Yes - 0

No – 8 (Barke, Brazley, Grant, Harvey, Hunsaker, Kang, Love, McClurg)

Mr. Barke asked for a motion with respect to Item 3a.

Mr. Kang moved, seconded by Mr. McClurg, that the special conditions and circumstances do not result from the actions of the applicant.

Roll Call Vote:

Yes - 0

No – 8 (Barke, Brazley, Grant, Harvey, Hunsaker, Kang, Love, McClurg)

Mr. Barke asked for a motion with respect to Item 4a.

Mr. McClurg moved, seconded by Mr. Brazley, that granting of the variance request will not confer on the applicant any special privilege that is denied by this Chapter to other lands, structures, or buildings in the same district.

Roll Call Vote:

Yes - 0

No – 8 (Barke, Brazley, Grant, Harvey, Hunsaker, Kang, Love, McClurg)

Mr. Barke asked for a motion with respect to Item 4b.

Mr. Brazley moved, seconded by Mr. McClurg, that the granting of the variance will be in harmony with the general purpose and intent of this Chapter and will not be injurious to the neighborhood or detrimental to the public welfare. A variance shall not be granted merely to serve as a convenience to the applicant, but only if it is necessary to alleviate some demonstrable hardship or difficulty. Under no circumstances shall the Board grant a variance to allow a use not expressly permissible under the terms under this article in the district involved.

Roll Call Vote:

Yes - 0

No – 8 (Barke, Brazley, Grant, Harvey, Hunsaker, Kang, Love, McClurg)

Mr. Barke asked for a motion for the final vote on the application.

Mr. Kang moved, seconded by Ms. Harvey to approve the request in ZBA 13-01 in granting a variance to the applicant based upon demonstrable hardship.

Roll Call Vote:

Yes - 0

No – 8 (Barke, Brazley, Grant, Harvey, Hunsaker, Kang, Love, McClurg)

Mr. Barke stated that the Board has denied the variance request, and that within two weeks it is their obligation to furnish a written statement specifically indicating the decision of the Board.

Old Business:

Mr. Barke stated there was no Old Business to conduct.

New Business:

Mr. Barke stated there was no New Business to conduct.

Adjournment:

Mr. Grant moved, seconded by Mr. Kang, to adjourn.

Mr. Barke adjourned the meeting at 8:02 p.m.

MINUTES

Carbondale Zoning Board of Appeals

June 5, 2013
City Hall / Civic Center
200 South Illinois Avenue
7:00 p.m.

MEMBERS PRESENT: Barke, Grant, Hunsaker, Kang, Love, Lilly, McClurg, Anz

MEMBERS ABSENT: None

STAFF PRESENT: Wallace, Price

HEARING:

- A. ZBA 14-01**, 7:00 p.m. – Lindsey Fisher is appealing an administrative ruling that the auto repair and maintenance facility located on the premises of 413 North Oakland Avenue is in violation of the zoning code and the business is ordered to cease operations.

Roll call was completed and the determination of a quorum was made.

Mr. Grant opened the Public Hearing at 7:00 p.m. and asked Mr. Wallace to read the legal notice.

Mr. Wallace read the legal notice.

Mr. Grant asked Mr. Wallace to present the staff report.

Mr. Wallace read a Memorandum that gave a chronological history of the permits, letters, correspondence, and rescission of the zoning certificate allowing the auto repair shop.

Mr. Grant asked if the applicant was present and wished to speak.

Mr. Scott Hendricks, legal representative for Ms. Fisher, came forward and asked if the Memorandum that Mr. Wallace just read had been included in the packets that had been sent out by staff.

Mr. Wallace responded no, it was not.

Mr. Hendricks said that he wanted it to be made part of the record that he had not received a copy of the Memorandum that Mr. Wallace had just presented. He then asked that Mr. Kang recuse himself, or that the Board recuse him, because he is believed to have a biased opinion of this case based on comments he made at the City Council meeting on March 19, 2013. He said that Mr. Kang had asked Council to enforce the rescinded permit for the auto repair shop, so he appears to be unable to render a fair and impartial decision on this matter.

Mr. Kang responded that he has opposed the permit from the moment it was issued, but that he had not spoken in an official manner, that he is here with an open mind, and will look at the evidence and vote that way.

Mr. Grant asked that Mr. Kimmel, the City Attorney, weigh in on this situation.

Mr. Kimmel stated that the City's position is based on a conflict of interest ordinance which specifically requires a financial interest, and Mr. Kang has stated he has no financial interest in this matter prior to the meeting. He said that, therefore, the City has no grounds for his recusal.

Mr. Barke asked Mr. Kimmel if Mr. Kang should abstain from the entire proceeding rather than just abstain from voting.

Mr. Kimmel responded that Mr. Kang could participate in the hearing and discussion if he wished, and then abstain from voting if that is what he wanted to do.

Mr. Hendricks stated that he is making a request that Mr. Kang recuse himself on the basis of bias, and that his failure to do so will deny Ms. Fisher her due process in this matter. He stated that his request is different from the conflict of interest ordinance.

Mr. Grant asked Mr. Kang what he wished to do.

Mr. Kang stated that he stands his ground as far as opposing the permit as a citizen of Carbondale, but that he can be impartial at this hearing and will not recuse himself.

Mr. Grant told Mr. Hendricks that there are seven Board members here, and that he does not believe that one person is going to deny his client this hearing. He then asked if Mr. Hendricks had anything else to present.

Mr. Kimmel stated that there are joint exhibits one, two, and three which are the certificate dated August 24, 2011, the notice dated April 30, 2013, and the letter of appeal from Ms. Fisher dated May 6, 2013. He said both attorneys have agreed that these materials are to be evidence in this hearing.

Mr. Hendricks stated that he is asking the Board to reverse the cease and desist order that was written on April 30, 2013, for the auto repair shop. He said this is based on the

zoning certificate, which provides that the use was approved as a legal non-conforming commercial warehouse automotive repair service and office. He said that this shows the City knew when the certificate was issued on August 24, 2011, that this was a legal, non-conforming use, so the appellant in this case lawfully established the auto repair shop. He said he is asking for a reversal because the City Council amended the City ordinances for zoning on April 2, 2013, some 28 days prior to the issuance of the cease and desist order. In the amended ordinance, under 7.1.2, subparagraph C states that any lot, structure, use, sign or a combination thereof which was lawfully established after the adoption of the Carbondale Zoning Ordinance of 1974, but which does not conform with any aspects of this ordinance as adopted in 2013 shall remain a lawful, non-conforming lot, structure, use, sign or combination thereof. He said that, because the City Council recognizes legal, non-conforming use such as this, and the City obviously acknowledged it in the issued zoning certificate, it was established after 1974, but is now being impacted by the cease and desist order issued to the tenant and the appellant. He stated that their position is that, under the new zoning code, the repair shop fits into the category that it “shall remain as a legal, non-conforming use” and on that basis, the Board must reverse the cease and desist order because of the Ordinance adopted by City Council on April 2nd, 2013. He asked that the Board reverse the decision of the City Manager on the issuance of the cease and desist order.

Mr. Grant asked if there were any questions for Mr. Hendricks.

Mr. Barke stated that, according to his knowledge of the City code with regards to the Zoning Board, once the appeal is filed it puts a hold on any enforcement of the cease and desist, and asked if the auto shop is still in operation today.

Mr. Hendricks responded no, it is not, because the City scared him off.

Mr. Barke asked if any business was operating there.

Mr. Hendricks responded no, but with the ninety-day window, he could come back.

Mr. Grant asked if there were any further questions for the applicant’s representative.

There were none.

Mr. Grant asked Mr. Kimmel if he would like to make a rebuttal statement.

Mr. Kimmel stated that the ordinance, which was amended, as it relates to R-1 zoning, was not changed. He said the numbers were changed, but the actual zoning was not. He said on November 18, very shortly after the certificate was issued, the City presented to Ms. Fisher a notice that the use was not a non-conforming use and that has been the case under the old and the new statute. He said his Exhibit 1 specifically sets a one-year time frame and says that a new certificate shall be applied for after that time, which has not been done. He said that shortly afterwards, the owner was notified that the certificate was

improperly granted, but allowed for one year of tenancy. Consequently, the City's position is there never has been an appropriate non-conforming use and clearly adopting the new ordinance did not create a non-conforming use. He then asked the Board to uphold the City's action and deny the appeal.

Mr. Grant asked if there were any questions of Mr. Kimmel and/or staff.

Mr. Barke asked Mr. Kimmel if the zoning certificate was issued on the belief that there was a legally non-conforming use that had been established.

Mr. Kimmel responded yes.

Mr. Barke asked if there is any provision in the code that allows the City to rescind whenever, or are there regulations for rescindsion.

Mr. Kimmel responded that the notice in November 2011 and this appeal process was in place at that point, when Ms. Fisher had the option of appealing the decision by the City.

Mr. Barke asked if there is any law that indicates the process to rescind a Special Use Permit after it has been granted.

Mr. Kimmel responded that this one, by its own terms, would terminate after one year, so in August of 2012 there should have been a second application made, which was never done. He said that the City maintains that it was inappropriate.

Mr. Barke asked if there were reported problems, such as noise, police reports, are any other complaints that would have shown a disruption to the neighborhood.

Mr. Kimmel stated that he is unaware of any police reports, but knows that the neighbors have discussed it extensively. He said one of the neighbors has also filed a lawsuit.

Mr. Kang asked Mr. Kimmel about item number seven on the conditions of approval on the zoning certificate, which states that it is good for one year. He asked why, when the permit ran out in August of 2012, did the City not process the cease and desist option at that time.

Mr. Kimmel responded that he does not know, but that it is not really relevant to tonight's hearing.

Mr. McClurg asked why, in the three weeks between the issuance of the original zoning certificate to the letter, did the City change its mind.

Mr. Kimmel stated that he was asked to look at this and determine what constituted a non-conforming use and the facts as they were understood. He said there may have been other facts known to other people, but in November of 2011 after the situation was

reviewed by then City Manager Gill, he determined that this does not constitute a proper non-conforming use.

Mr. McClurg asked if there was any provision for a special use for the applicant to apply for as an automotive business.

Mr. Kimmel stated that they could have applied for a variance or they could have asserted that it was a continuous non-conforming use and would have then been required to establish facts to support that.

Mr. McClurg asked what took so long to send the cease and desist letter, adding that it seems unfair for everyone concerned, including the neighbors, the owner and the tenant.

Mr. Kimmel stated that the City was trying very hard to be fair, and the owner had the expectation of one year's use, but received much longer than that. He said that they have known, however, since November of 2011 that the City decided it was improper and that they have a right to challenge that, which they did not choose to do. He said the City does not try to beat up businesses or citizens of Carbondale.

Mr. McClurg stated that the City created a climate in which the owner can expect that nothing is going to happen to them if they continue to operate, since the first letter was sent in November of 2011, but no cease and desist letter was sent until April of 2013.

Mr. Kimmel stated that some people drive more than 70 miles per hour on the interstate, and may pass a police officer and not get a ticket. This does not mean that they get to continue to drive at 75 and never get one.

Mr. Barke said if a property is established as a legal, non-conforming, they carry that until they no longer continue to use that property in a legal, non-conforming way. He then asked how is it the City's position that this property was a legal, non-conforming, yet there was a one-year reapply requirement put on the certificate.

Mr. Kimmel responded that if it actually is and was in August 2011, and in November 2011 and was in August 2012 a non-conforming use, it would still be there. He said that is why we have this appeal process, to show that it in fact has been used for the repair of automobiles since prior to 1974 continuously without a ninety day break, and that the burden of proof is on the appellant.

Mr. Barke responded that, since the City changed their mind but had granted the certificate, doesn't that make the burden of proof on the City. He said that merely stating in a letter that you have researched, and neither Mr. Gill nor Mr. Baity are here to explain what their research discovered, so now we've changed our minds.

Mr. Kimmel stated that in November of 2011, the ordinance had the same language as it does today, which states that if there is any action or decision made by the City, then a

citizen aggrieved has the right to appeal that decision to the Zoning Board of Appeals who has the right to overturn that decision. He said that the appellant has had the right to come to the Board since November of 2011, and ultimately chose to do that in Exhibit three. He noted that a majority vote of five can reverse or uphold the City's position.

Mr. Grant asked Mr. Hendricks if he had any further comments.

Mr. Hendricks stated that the letter was issued on November 18, 2011 to Lindsey Fisher, and he does not know if the tenant received the same letter or not. He said that the City agreed that this was a legal non-conforming use by giving her a Zoning Certificate. Then all of a sudden, after tens of thousands of dollars were spent to restore and redo the building for the auto repair business, it was expected by his client and the tenant, Mr. Tran, that the certificate would be renewed. He said the one year was in place just in case there were problems, but that his client and the tenant did conform to all requirements set forth in the certificate. He said there was clearly communication between the parties the entire time, which is made evident in the City Council Minutes of at least April 2 and March 19, 2013, but the City took no action for twenty months because they agreed it was a legal non-conforming use. He stated that he thinks there is no mechanism to rescind a zoning certificate, and in his opinion, it carries no weight. He said that Ms. Fisher was not aggrieved and did not come the Zoning Board of Appeals sooner because the City was not going to do anything about the shop since they saw it as a legal, non-conforming use with a proper zoning certificate. He said the agreement between Ms. Fisher and the City was made when the zoning certificate was issued. On the subject of fairness, he said the tenant put his life savings into the auto repair shop and look where he is today.

Mr. Hunsaker asked Mr. Kimmel if all the proper channels were followed to make this a legitimate situation.

Mr. Kimmel responded that the City's position since November of 2011 has been that it was not correct. Whether it is legitimate, does any member of the City staff have the authority to change the zoning code, the answer is no.

Mr. Hunsaker asked Mr. Kimmel if he was saying that Mr. Baity overstepped the line by granting this certificate.

Mr. Kimmel responded that the facts were looked at incorrectly before, or that the facts were received subsequently.

Mr. Hunsaker asked if all the right steps were taken by the City to make this legal. Mr. Kimmel stated he does not know all the facts of all the steps that were taken prior to it being issued.

Mr. Grant asked Mr. Hendricks if he knows when exactly Mr. Tran started his business at this location.

Mr. Hendricks responded that it was around the first of November of 2011.

Mr. Grant asked why the appeal was not brought to the Board earlier.

Mr. Hendricks stated there was no issue to appeal until the cease and desist letter was issued, so clearly the City was in agreement that they could operate there.

Mr. Kang asked Mr. Hendricks about the one year validity of the zoning certificate, which would end on August 24, 2012, and whose burden it would be to reapply after the year had passed, to renew the certificate.

Mr. Hendricks responded that he believes it would be the applicant's responsibility.

Mr. Kang asked if it had been done, and whether Mr. Hendricks had a copy of the document.

Mr. Hendricks stated that he did not have a written application, but that his client had been in touch via the phone.

Mr. Kang stated that the City does not do business without the paperwork.

Mr. Hendricks stated that, unfortunately, the City does do business without written documentation on many occasions.

Mr. Kang asked if his applicant or the shop owner made application subsequent to the year being up.

Mr. Hendricks responded no, not written application, but that he does believe there were conversations in which they made application.

Mr. Kang pointed out that the letter dated November 18, 2011, issued by Kevin Baity, states that "this action means that the auto repair business planned for operation there must find an alternate location." He asked if Ms. Fisher or the shop owner looked for an alternate location.

Mr. Hendricks responded that he would say not, because they were told not to worry about that letter.

Mr. McClurg asked if the Board were to accept the idea that the City made a mistake in originally issuing the certificate, then decided they shouldn't have done it, what is the argument that you should be able to continue to do that.

Mr. Hendricks responded that they had been told it was okay.

Mr. McClurg asked why the cease and desist order be overturned, given that the City gave them a long time to operate while letting them know that it needed to stop.

Mr. Hendricks responded that they were told that they could continue under that zoning certificate.

Mr. McClurg asked if, as a lawyer, would he advise someone to continue to operate under those circumstances.

Mr. Hendricks responded that, based on the assurances they were given, he thinks they were right, but preferred they had been given both written and verbal assurances.

Mr. Grant asked Mr. Hendricks if he knew who was telling them not to worry about the letter.

Mr. Hendricks responded that he thinks it was the City Manager, but that he has no personal knowledge of who it was.

Mr. Barke asked what the building permits were issued for.

Mr. Hendricks responded that they were for gas lines, new electrical boxes and lines, and that he has an inspection report by Mr. Lenzini of the City.

Mr. Barke asked if those permits were issued prior to the rescission letter of November 18, 2011.

Mr. Hendricks responded that the building permit was issued on August 25, 2011, and the final inspection was done on November 15, 2011, then three days later was when the City issued the rescission letter.

Mr. Barke asked Mr. Wallace to explain why a zoning certificate is necessary.

Mr. Wallace responded that, for the legally non-conforming use, when a new client moves in they often want assurance that a use is permitted in that district, but zoning certificates are issued for a number of reasons. It could be a new structure, an addition to a structure, or the change of use for a structure. He said they are also issued at the time of a real estate transfer, and the potential purchaser wants to ensure that the use they are proposing is allowed in that district.

Mr. Barke asked if this is necessary.

Mr. Wallace responded that it is not necessary, unless the use changes. He said if a dry cleaner sells his building to another dry cleaner who continues to operate the dry cleaning business, there is no requirement for a zoning certificate, but one would be issued if the person requests one.

Mr. Barke asked if it is common for conditions to be placed on a zoning certificate, because it seems more like what a special use permit would need.

Mr. Wallace responded that conditions are placed on zoning certificates, depending on what the use is. He explained that if it were for a new house, there would be conditions on it for the driveway, the setbacks, the surfacing, and other things.

Mr. Barke asked if there ever is a certificate that is issued that says this is good for one year and you must come back and get it reissued every year.

Mr. Wallace responded that he cannot think of another time when that has been done unless it was part of a special use approval.

Mr. Barke stated that is what bothers him about this, because we don't know why since there was no public hearing. He said that this was a condition put on this by Development Services that issued a zoning certificate that is contrary to what a general zoning certificate is. He stated that he understands what the City has done and what Mr. Hendricks' client did as well. He equated it to allowing someone to live in a house for a year, but telling them they had to come back in a year to see if they could still live in it, which does not make a lot of sense.

Mr. Kang asked Mr. Hendricks if he could show any evidence of the assurances he was given by the City, or if it is all hear say.

Mr. Hendricks responded that he thinks there is probably evidence, but he has none with him.

Mr. Kang stated that it must be all hear say, then.

Mr. Hendricks responded yes, as much as that letter is hear say.

Mr. Grant asked if there were any further questions for Mr. Hendricks, Mr. Kimmel, or City staff.

Mr. Barke stated that he wished to know who should be sought out for a legal opinion on some issues that we have as far as legal questions, since neither of the participating attorneys would be appropriate, and he has further legal questions. He said that he'd like to know, once a zoning certificate is issued, what are the legal possibilities of rescinding it and can the stipulation of come back here in a year be put on a zoning certificate. He said those questions make this case go one way or another and that, being quasi judicial, he does not want to make that decision based on the conflicting aspects of both parties.

Mr. Wallace asked if that is something Mr. Barke would like a legal opinion on.

Mr. Barke responded that he thought it is necessary in order to make a proper ruling and that case law needs to be cited to get this right.

Mr. Grant stated that there is an option to continue the hearing in order to seek a legal opinion.

Mr. Barke made a motion, seconded by Ms. Lilly, to continue this matter until a legal opinion can be gained from an uninvolved attorney on whether the one year stipulation can be put on a zoning certificate and whether or not a zoning certificate, once issued by proper authority and proper procedure, can be rescinded by letter from the City, and whose burden is it once the certificate is issued.

Mr. Grant asked if there was any discussion regarding the motion.

Mr. Kang asked who should give the unbiased legal opinion.

Mr. Kimmel stated that in some cases it is allowed for a private attorney to be hired for the Zoning Board of Appeals, and that a legal opinion can come from a third party attorney who would represent the Board.

Mr. Grant stated that both attorneys would have to agree on the third party attorney.

Mr. Grant asked for a Roll Call Vote.

Roll Call Vote:

Yes – 8 (Barke, Grant, McClurg, Anz, Hunsaker, Kang, Lilly, Love)

No – 0

Mr. McClurg asked whether the money for hiring the attorney would need to be approved by the City Council, or if there was money budgeted for this kind of thing.

Mr. Kimmel stated that his earlier statement was to say that it has been done before in other situations, but that he doesn't know about the funding as he does not write checks.

Mr. Grant stated that is why we need to meet a lot about these kinds of things. He stated that the motion passed and the hearing will be continued until a legal opinion is rendered.

Mr. Wallace stated that a letter will go out with the new date and information regarding the next meeting to continue this hearing.

Old Business:

Mr. Grant stated there was no Old Business to conduct.

New Business:

Mr. Grant stated there was no New Business to conduct.

Adjournment:

Mr. Grant adjourned the meeting for continuation of the hearing at 8:12 p.m.

