

MINUTES
HARVEY COUNTY REGIONAL PLANNING COMMISSION
HARVEY COUNTY BOARD OF ZONING APPEALS
Harvey County Courthouse
Community Room
March 4, 2014
7:00pm

Members Present: Clifford Kirk, Larry Goering, Dorothy Thiessen, Bonnie Wendling, Wayne Alison, Philip Kimerer, Jack Bender, Duane Miles, Harlan Foraker, Teresa Thach, Lynne Vigil, Dr. William Wilson and John Reed

Members Absent: None

Staff Present: Gina Bell, Michelle Botkin

Others Present: Robert Kaplan, Steve Darnell, Ann Sperry, Rita Sperry, John Sperry, K. Robert Watchous, Gregory Nye, Tom Adrian, Dave Stucky, Brenda Schmidt and Van Schmidt

At 7:00pm, Chairman Clifford Kirk called the meeting to order.

Cliff Kirk moved to approve the December 3, 2013 minutes. The board voted unanimously to approve the minutes and the motion was carried.

Cliff Kirk opened discussion on Case #CUP 14-01 concerning a request by K. Robert Watchous requesting a Conditional Use Permit to operate an Oil Business and Warehouse on property located in the A-1 Agricultural zoning district. The property use has been in existence for a long time, but with the expanded use, it is being brought before the board. Gina Bell read the staff report and Cliff opened questions for the Director. There were no questions.

The floor was opened for questions to the applicant. Robert Kaplan, Attorney for applicant, spoke on Mr. Watchous' behalf. He reaffirmed what Gina read in her staff report and stated that he has been working with another attorney, Dave Stucky. Jack Bender asked what the building is going to be used for. Mr. Kaplan stated it will be used for an Oil Business. Larry Goering asked what kind of building is it. Steve Darnell, the builder, stated that it is made of concrete and metal. Charles Kirk asked if there

were any more questions and closed the case. Jack Bender made a motion to approve based on the conditions stated in the staff report. Harlan Foraker seconded the motion, and the board voted unanimously to approve. Motion carried. Gina stated that she would notify Robert Kaplan on March 25th after the Board of County Commissioners met on the issue March 24, 2013.

Cliff Kirk recessed the Planning Commission and opened the Board of Zoning Appeals to hear the second agenda item, Case #VP 14-0.

Gina Bell read the staff report where Ann & John Sperry are requesting a variance from the minimum lot requirement regulations in the A-1 Agricultural Zoning District. Specifically, the applicant is asking to construct a new home on an acreage less than a quarter/quarter. There are five conditions for granting the variance and they were read from the staff report. The Board must agree to all five of the conditions when making their decision. Included with the staff report is a signed Lease Agreement between the parties and it states that Ann & John Sperry will be building a home on 3 acres with the remaining acreage remaining in production. Gina stated she has sent Ann back four or five times to negotiate for more acres and that had been unsuccessful. Gina pulled up a map, as well as the Original Parcel map to further explain. In addition, a copy of a protest letter from Jerol Schmidt was provided.

Cliff Kirk asked if there were any questions for the Director. Lynne Vigil asked if the house that was originally on the map was on less than a quarter/quarter and Gina stated, "No". Jack Bender asked about whether it was a caretaker/ECHO home and Gina stated, "No". Gina read the definition of an ECHO home. There was clarification on the location of Rita Sperry's existing home.

Cliff Kirk called for the applicant or their agent to present their proposal to the Board. Tom Adrian (assisted by Dave Stucky), attorney's for the applicant, spoke. Tom gave background on the application. Ann and John Sperry's grandmother died (preceded in death by her husband), left in her will, everything to Ann & John. We think, she thought she owned the whole thing because she was getting all the income off of it. What we found, however, when her husband died, he died intestate (without a will). Which means that his children (Rita Sperry being one of those children), inherited an undivided one half of roughly 120 acres. Ann & John wanted to build a home on roughly 40 acres, so we attempted to negotiate that with the other interest holders, but it was quite fractionated because one of the son's (Rita's brother) died leaving his stake to five heirs. What we did was contact them all and everybody (save one) was in agreement that we could parcel out some of this land and give Ann & John the 40 acres, so the house could be built. The one who would not agree to that was Delome Schmidt

(Jerol's wife). She lived on that other 40, the southeast 40. The only thing left to do was to file a 'partition action'. It's a lawsuit. What you are asking the court to do is to divide the ground. The way the court does that is he/she appoints 3 commissioners to view the ground and try to divide it fairly. I've been practicing law for 40 years and I've seen a lot of partition actions and I've never seen one that could divide the land equitably in parcels. It's never happened. In this case, the 3 commissioners agreed that Ann and John should have the parcel. It was enough of a threat to the other side that the settlement was that we take the 37.5 acres. We went into the office to see if we could get a building permit and were told that we could get the permit and would not need to get a variance on June 14, 2013. At some point later, it was discovered that we would need a variance and so we're here. We've seen Jerol Schmidt's letter and we understand there is some opposition to that. I want to explain the nature of this settlement. Jerol's son, Van Schmidt, is an auctioneer and farmer. He was not an owner, but he was originally named in the lawsuit because we thought he had a tenancy arrangement, but he did not, but he was aware of the lawsuit. Van signed the lease that had that portion in it that said we were going to take up to 3 acres that was going to be taken out of production and build a house on it, and he signed the lease (It's a 20 year lease). Their attorney was Arlin Miller from Hutchinson. We have plenty of emails back and forth that we can distribute to you that show that there was awareness that this was going to happen. We needed to stake out where the 3 acres were going to be. This does get a little more complicated. Jerol, incidentally bought the north 80 acres. There's an easement that runs along the hedgerow on the west side for them to run farm machinery up and down. What came up for negotiations was that they realized the easement may not be wide enough if the 3 acres went right up next to it, so what they wanted to do was run the easement to the east side of the small 3 acre tract. I'm pointing that out because this was not a surprise that there was going to be a house build there. It was known. We obviously couldn't let the ground go to auction if we had any hope of maintaining control of the 40 acres. Ann and John would not have a chance if it went to auction because they didn't have the money for the other half, so the partition action was their only hope. It was only because those 3 commissioners saw fit to suggest that they should have the ground and their dream was realized. I understand Jerol has objected, which strikes me as disingenuous, after he signed the lease. Ann and John are really defenseless throughout this whole thing. Ann is not a complete caregiver for John and neither is Rita, so we don't fit under any of the other provisions. I'm open to questions. Ann, John and Rita are here.

Jack Bender asked for clarification of what Jerol owned and what Ann and John owned. He asked who signed the lease agreement. Tom Adrian stated that Van Schmidt signed the lease agreement (as the lessee or tenant). There's a copy of the lease provided. Tom further clarified the lease agreement and that the house would be built

on the 3 acres. The 3 acres have been staked out to the west side. Phil Kimerer and Tom Adrian discussed the ingress easement to the north 80 and that the ownership of the easement is John and Ann.

Cliff Kirk announced the proponents John, Ann and Rita Sperry. Ann Sperry talked about how her grandma had left her and John the property. She didn't realize it was an undivided interest. Grandma and I had talked about me building a house my whole life on the property. For me to leave and go to town or build somewhere else is not something she would like to do in her life. This is her only family. Thank you.

Cliff Kirk asked if there were any other questions and there were none.

Cliff Kirk announced for those opposed to speak.

Van Schmidt, from Schmidt Auctions, then spoke and read the letter from his father, Jerol Schmidt. Van then read a letter he wrote in response to Variance Request, Case #VP 14-0. The future land use plan and policies were written to address agricultural and rural preservation in Harvey County. Section 9.03(2) and 9.05 A(1) (of the Unified Development Code) requires 40 acres to be eligible for a single family residence. On the tract of land in question this would be the 3rd residence. One residence is occupied by Rita and John Sperry and the 2nd residence is occupied by Ann Sperry. Ann inherited the 2nd home from her grandmother, Susan Schmidt. I just would like to point out that I have no problem with her taking down take down the old home and building a new one, if their argument is to take care of John. Why would you want to go as far away from John to the hedge line and build a home there. This land is prime farm land. I encourage you to uphold the public policy and protect the natural resources. The tract in question contains high quality soil considered to be prime tillable. "Gina, you gave me public notice where both Ann and John Sperry made application for the new home, correct?" "Correct", replied Gina. So both their names are on the application and I can almost guarantee you that John will not be living in that new home with Ann. I've got 3 copies of this. I did not realize how many people would be involved (passes them out). Attached are the police reports. Ann Sperry objected to the police reports (for the past 5 years). The only reason I'm bringing this up is that both the application is in both their names and they both signed it. I realize that this is a zoning hearing, but I bring these up to address concerns about their ability to live together peacefully. One of the attached police reports will provide information on John Sperry. The attached police reports will also provide information on physical altercations between John and Ann Sperry. Law Enforcement Officers are familiar with the Sperry family. I would also ask that you take into consideration that Jerol Schmidt and myself own the land on all sides of this tract in question and that we oppose the building permit being granted for John

and Ann Sperry or for Ann Sperry, as a single applicant. I've tried to keep it brief, concise and honest. What I've just listened to from Tom (Adrian) is not true. When they started that whole process and he said something to the effect, 'all they got was 37.5 acres', then that is false. Tom and David drew up that 40 acres way before any of this even began. You've made your bed and we did not oppose any of it. Actually they only own that 37.5 acres together (not individually). They will not live together. There's been way too much going on between those family members. I think that's why Ann has decided to get as far away as she can from the situation. They're trying to play that card that Ann needs to care for John and Rita. The home that Ann inherited from grandma is a Koehn built home and it's a well-built home. She does not need to build a new home. She has a home. She would not need to leave the community and Rita has her own home. There are 2 houses on that 2 acre plot already. Tom or David (Stucky) mentioned earlier that 'this is a short quarter'. We've got farmers in here. I see Larry sitting at the end of the table. I've auctioned a lot of tracts of ground and I've yet to see a quarter (unless it's on the correction line) that's going to be over/at least 160 acres. To state that this quarter is shorter than all these quarters around it is an untruth. I guess I don't know what else there is to say. I brought along that clipping from *The Kansan*. One of the quotes was, 'a residence can be built on one place per quarter section where the soil meets the poor soils requirement'. This would not meet the poor soils requirement. This is good tillable ground.

Van stated that he would open it up for questions. Jack Bender asked about the document that he brought up earlier. Van stated that the only thing he signed off on was if they take out those 3 acres, then I don't have to pay rent on those 3 acres. I'm not an attorney. I did not grant permission to build on those 3 acres.

Cliff Kirk asked if there were any more questions from the Commission.

Phil Kimerer, stated "that you're generally correct, but precisely wrong". You recognize that and if they take out that property to build a home, then you don't need to pay for rent. Van Schmidt stated that he never gave permission to build a home and understood that they wanted to build. Phil stated the lease discusses the construction of a home and then read that portion of the lease verbatim. Van stated he did not give permission for them to build. Phil stated the lease doesn't address the opposition. Van stated further that he did not have an attorney present and didn't bring one tonight.

Cliff Kirk asked if there were any more questions from the Commission.

Jack Bender asked if there were any other paragraphs that ought to be considered before we move on.

The only other thing I know is that I want to say is Tom Adrian stated that Ann and John Sperry are defenseless. They are not defenseless. They have 2 attorney's here. I don't know why we can't come in here and state the facts. This is not a 40 acre deal. It's pretty cut and dry.

Phil Kimerer asked to clarify who had the north 80 acres up there. Van stated that Jerol has the north 80. Phil asked hypothetically, if you (Van) have 40 acres out there, and you want to build a machine shed and that takes up 3 acres, the same 3 acres out of production that the home is taking. Van stated that comparison makes no sense. Phil stated that he didn't want to get into an argument with Van.

Cliff Kirk asked if there were any more questions.

Harlan Foraker asked for clarification on the 2 acre parcel in the southeast corner (outside the 37.5 acres) and whether there were 2 houses there. Van stated there are 2 houses there. Gina stated that the Appraiser's office has it listed as one (that they've been joined). This property is separate. Rita's property is separate. Van stated that there are already 2 houses and that this would be the 3rd. Jack Bender asked about whether the houses were joined. Van stated that Rita should have a tax statement and grandma had a tax statement. Now Ann and Rita should each have a tax statement. Van stated they built them together. Jack asked about the other house located (by the north 80). Van stated it was a residence, but he passed away. Van stated if we're going to start cutting this deal up, then I think these laws ought to be changed and rewritten. If you're going to start selling out 3 and 5 acre lots, then I think we ought to open it up and forget about a variance. Right now we've got 40 acres and you guys were looking at a 40 acre limit. Phil Kimerer stated there is not a requirement for 40 acres. It's a quarter of a quarter. They had to educate me, but there is a difference. Van agreed. The hardship as far as 37.5 acres, then we've got a quarter of quarter, basically. Dr. Wilson asked about the legality of the lease itself as far as you farming it. I don't know why the lease was brought up, stated Van. Phil Kimerer stated it's a legal document that hasn't been tested in court. Van stated that's my personal document and you folks are all involved with my lease agreement and personally I don't like it. You guys probably shouldn't have seen it. Jack Bender asserted that since it deals with the subject matter that we have a right to see it. Van stated don't you think that it should have been brought to my attention before it was copied 15 times and handed out to a lot of you folks who know me, but I do not know you. Jack said that his answer to that is that the other party was a party to the transaction and there's nothing in here where it says it will be held in private. There's nothing like that here.

Cliff Kirk indicated that we are re-hashing things over again, so I will say, "thank you".

Van said, "thank you".

Cliff Kirk stated that we need to take a 5 minute break.

Cliff Kirk said that this brings us to a time of rebuttal.

Tom Adrian said that he would like to apologize for the brief outburst. It sort of emphasized the need for Ann to get out of the house. She recognizes that and this is a solution to that problem. John's here. He's experienced his difficulties throughout his adult life. They want to deal with it the best that they can and this was a solution to that. With regards to the lease being public, it is public, if you'll notice it has a file stamp on it. It was filed with the court, so anybody can read it. It's not a private document. I want to address the 37.5 acres and how we arrived at that. We had a surveyor come in and parcel this out. (We asked him to keep the 80 acres to the north), but it is 118 acres. It's not 120 acres, so that left less than 40 acres. We reached the point where we couldn't get the line moved to the north. I want to go back to the 5 points. You have to agree with all 5. These were reviewed with the commission. The application had to be made jointly (by John and Ann Sperry) because they are both listed as owners. We got as many acres we could in a very difficult situation.

Jack Bender asked the question about the variance arising from a condition which is unique to the property in question. It's subject to interpretation. I take it to mean the condition of the soil.

The uniqueness is in the property and that it arose out of controversy.

Ann Sperry apologized for her outburst. She explained her current living situation and the situation she grew up in. Gina gave a preliminary verbal ok that Ann could build and the Schmidt's went to the County Commission and got the permit denied.

Van discussed how the land division happened. He denied that he had any responsibility in how the land division happened. He complained that he can not farm the 60 ft wide easement. The property got survey stakes after it was sown to wheat. That was they came into the County Commission to get this stopped.

Dorothy explained that this kind of situation happened to her own family.

Jack said that he knows of a situation where a family owned 80 acres, since the parents house was on one 40 then they could only allow one of their 2 children build on the other 40 acres. It became an issue of who got there first got to build there.

Approved 7-1-2014

Harlan asked about being able to plat the property. If they can meet the zoning could they plat it.

Bill Wilson has concerns that he bought a small property that he needed to clean up. Phillip made the motion to approve this variance. In accordance with the staff report provided. Motion passed 7 in Favor / 6 Opposed.

BZA hearing closed.

Old Business – Gina Bell brought up the size of the Board and asked how is it represented better by 15 than it would be at 7? This issue is going to take time and there will be ongoing discussion as there was no consensus and much disagreement.

Clifford Kirk adjourned the meeting at 9:45pm.