

Board of Adjustment
Tuesday, January 24, 2017
7 PM Midland Town Hall
4293-B Hwy. 24/27 E
Midland, NC 28107

Continuation Attendance: Commissioners: Chair Darrell Page; Commissioners Pam Carter, Pam Barger, Michael Aldridge, Steve Clark; Planning and Zoning Clerk to the Board Hilda Keeney; Planning & Zoning Administrator Kassie Watts; Town Manager Doug Paris; Engineer Richard McMillan

Others: Councilman Rich Wise; Vagn Hansen; Anthony Fox; Robert B. Blythe; James E. Scarbrough; Harry Grimmer

Chair Page called the recessed meeting from December 15, 2016 to order at 7 PM for Notice of Violation for the Town of Midland MDO for road maintenance in the Tucker Chase neighborhood dated October 14, 2016. Does any member of the Board have a conflict of interest, an opinion on this case that is not susceptible to change or any relevant evidence or any ex-parte conversation that needs to be shared?

We can proceed. Do we need a summary of what took place last time or is everybody good to go ahead?

Anthony Fox – I think we don't. I think where we left it they had rested their case it was the Town's opportunity to proceed with this evidence.

Chair – that was correct.

Jim Scarbrough – Mr. Chairman, is this working, I would like to have one more witness. It won't take that long he was not hear at the last hearing and it is in your discretion to do that.

Chair – Mr. Fox do you have any objection?

Anthony Fox – I would object to it your Honor.

Chair – you would?

Anthony Fox – Because we have had, the hearing was properly noticed, they had ample opportunity to present evidence, and they've had the opportunity quite frankly to revisit their evidence then develop additional defenses as a result of the recess for several weeks. That would be a little bit unfair to the Town.

Jim Scarbrough – the Board of Adjustment is all about fairness and the rules are not strictly adhered to at a Board of Adjustment. I did not know about this witness, I could not have had him here the last time and in all fairness I believe the Board should hear this witness. He has very important information for the Board and it is not something we should just take lightly.

Anthony Fox – this is the very purpose for the rules. This is the element of surprise that is frowned upon by the courts. At one point, I heard Mr. Scarbrough indicate the witness was not available at the last time. Now here he just discovered the witness and the ability to have this

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witness come and testify.

Jim Scarbrough – to me that is the same thing. He wasn't available to me. I did not know about him but this surprise element, we don't have to disclose witnesses at these Board of Adjustment's hearings. How does he know who my witnesses are going to be? He does not tell me, I don't tell him. So the rules are relaxed here and the courts say that.

Anthony Fox – your honor, I would like to just add one point. It has literally been four or five weeks since the last hearing. The parties have had the opportunity to benefit of the testimony that has occurred and to revisit the testimony and this is an effort merely to improve the testimony that was a presentation of their case prior to them resting.

Jim Scarbrough – no, actually this is new. This is new evidence. You did not hear this the last time.

Anthony Fox – even more reason why it is not necessary.....

Jim Scarbrough – the Town attorney wants to stop us from presenting an important witness when all fairness the Board should hear important witnesses. It is Richard Flowe, your former Planning Director.

Chair – Hold on.

Bob Blythe – want me to meet with these attorneys to find out what evidence is going to be. I can do it back there.

Chair – that is fine.

Bob Blythe – Why don't the attorneys meet with me and let me hear what your evidence is going to be?

Chair – we are going to short recess.

Recessed from 7:03 PM to 7:10 PM.

Bob Blythe – my suggestion to them which Anthony does not necessarily agree with, allow him to introduce to bring in this new witness for purposes of certain factual testimony and not opinion because he could qualify as an expert and this is for factual purposes. That is up to the Board.

Chair – What Bob just said was they discussed it with the attorneys and we could allow him to testify for factual purposes only not as an opinion. What is the will of the Board?

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Anthony Fox – I would note that I still objected.

Chair – Mr. Fox still, in the minutes should have, has an objection to that. Do I have a motion to allow this witness as to provide some facts? I need a motion. No motion. Sorry Mr. Scarbrough, we cannot allow that.

Jim Scarbrough – I need to get his evidence into the record anyway for an exceptional appeal.

Anthony Fox – we can do that outside the hearing of the Board to allow the facts be heard.

Chair – that will be fine Mr. Scarbrough.

Jim Scarbrough – I can offer the same thing on rebuttal after we get through at the end.

Anthony Fox – that is an indication that the witness is not necessary.

Jim Scarbrough – no. It is an indication I'm going to have to do this all over again.

Chair – OK. Let's move along. Mr. Fox.

Anthony Fox – at this point I would like to call Kassie Watts to the stand. Do we have an exhibit book for the witness?

Anthony Fox – Kassie good evening and could you state your name for the record?

Kassie Watts – Kassie Watts.

Anthony Fox – your mike does work. Where are you employed and in what capacity?

Kassie Watts – I am employed by Benchmark and I am a contract employee for the Town of Midland as their Planning, Zoning and Subdivision Administrator.

Anthony Fox – how long have you held the position of Planning, Zoning and Subdivision Administrator?

Kassie Watts – since July 1st of last year.

Anthony Fox – tell the Board about any prior experience you have had in the area of planning, zoning and subdivision.

Kassie Watts – I have approximately 14 years of experience in planning and zoning. I worked at Cabarrus County almost 10 years then went to Kannapolis and worked up there as the Assistant Planning Director through Benchmark and since then I have been in several other jurisdictions

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and now I'm here in Midland.

Anthony Fox – tell us about your education background, beginning with college.

Kassie Watts – I have a Bachelor of Science degree in Urban and Regional Planning.

Anthony Fox – from where?

Kassie Watts – from East Carolina University.

Anthony Fox – do you have any professional certifications?

Kassie Watts – yes. I have my AICP (American Institute of Certified Planners) and my CZO (Certified Zoning Official).

Anthony Fox – you talked about 14 years of experience. In those 14 years have you had to administer and enforce zoning and subdivision ordinances?

Kassie Watts – yes sir.

Anthony Fox – tell the Board about your current role with the Town of Midland.

Kassie Watts – currently, I act as the Planning, Zoning and Subdivision Administrator so we oversee all the subdivision reviews, site plan review, issue zoning permits, field questions from citizens and Board meetings.

Anthony Fox – are you familiar with the Midland Development Ordinance?

Kassie Watts – yes sir.

Anthony Fox – Do you have a role in or tasked with administrating or enforcing the Midland Development Ordinance?

Kassie Watts – yes sir.

Anthony Fox – I ask you to turn to tab 1 of the Town's exhibit book and asked you what is the first page of tab 1?

Kassie Watts – it is the Town Clerk's Certification of the Ordinance Authenticity.

Anthony Fox – does it certify this is the Town of Midland's Development Ordinance that was adopted on September 13, 2011 and took effect on September 13, 2011?

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Kassie Watts – yes sir.

Anthony Fox – is this the current Town of Midland's MDO?

Kassie Watts – yes sir.

Anthony Fox – does the MDO contain or identify or state its purpose on page 2 of tab I?

Kassie Watts – yes sir.

Anthony Fox – what does it indicate as its purpose?

Kassie Watts – to promote the health, safety and the general welfare of the residents of the Town of Midland and its extraterritorial jurisdiction through the stated regulations of this Ordinance which include provisions to regulate zoning, cluster development, planned unit developments, manufactured housing, development of subdivisions, signs, off-street parking and loading, planting yards, watershed protection, and flood damage prevention.

Anthony Fox – could you now turn to page 4 of - and for the Board's purposes the number pages I am referencing are located in the lower right hand corner – page 4 and tell the Board what Section 1.8-1 of the MDO provide?

Kassie Watts – its states the relation of this Ordinance to other regulations. We are talking about 1.8-1, is that right?

Anthony Fox – yes.

Kassie Watts – This Ordinance is not intended to abrogate any other law, ordinance, or regulation. However, where conditions, standards, or requirements imposed by any provision of this Ordinance are either more restrictive or less restrictive than standards imposed by any other law, ordinance or regulation, the provisions which are more restrictive or which impose higher standards or requirements shall govern. In cases where reference is made to the North Carolina General Statutes, or any provision thereof, said reference shall be to the current language of said statute or provision. Whenever a process is prescribed by this Ordinance, and said process contains requirements in addition to those prescribed by state law, the process prescribed in this Ordinance shall be deemed supplemental; state law shall control.

Anthony Fox – now if you can turn to page 5 which is Section 1.11-2 does this section address the relationship with the Ordinance with any pending action.

Kassie Watts – yes sir.

Anthony Fox – what does this section provide?

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Kassie Watts – The adoption of this Ordinance shall not affect any action, suit, Notice of Violation, citation, or proceeding that may be pending at the date this Ordinance becomes effective. All rights and liabilities that have been received or created and any violation that has occurred under any previous provisions of the Code of Ordinances of the Town of Midland that have been superseded by this Ordinance are still valid and may be preserved and enforced.

Anthony Fox – under this section, do you interpret this as if the prior Ordinance had a pending violation that the adoption of this Ordinance would continue this violation?

Kassie Watts – yes.

Jim Scarbrough – objection. He is asking for an interpretation of the Ordinance by this witness that is the Board's job.

Anthony Fox – no. She is the Subdivision Administrator that issued the Notice of Violation based upon a continuing violation and she is educating the Board as to the bases of her Notice of Violation.

Jim Scarbrough – then remember that when I ask Richard Flowe to do the same thing.

Anthony Fox – don't think Richard is the current Zoning Administrator for the Town. We'll move on. If we can now turn to page 26 of tab 1.

Chair – make sure your objection is noted, Mr. Scarbrough's objection.

Anthony Fox – can you tell the Board of page 26, does page 26 actually set out the administration and enforcement of the Town's MDO?

Kassie Watts – yes sir.

Anthony Fox – does it include certain duties and responsibilities of the Planning and Subdivision Administrator for the Town?

Kassie Watts – yes sir.

Anthony Fox – so those are your duties and responsibilities, is that correct?

Kassie Watts – yes sir.

Anthony Fox – without reading through all of them, I think the key ones are the duties and responsibilities, could you tell the Board what the duties and responsibilities are as from Section G through L of that section?

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Kassie Watts – yes sir.

- (G) cause to be investigated violations of this Ordinance;
- (H) enforce the provisions of this Ordinance;
- (I) issue notice of corrective action(s) when required;
- (J) use the remedies provided in this Ordinance to gain compliance;
- (K) be authorized to gather evidence in support of said activities; and
- (L) receive appeals and forward cases to the appropriate body.

Anthony Fox – does the MDO govern/regulate their approval and construction of their subdivisions within the Town of Midland?

Kassie Watts – yes sir.

Anthony Fox – if you can turn to page 8 of tab 1 – that is the purpose you’ve read earlier dealing with the subdivision of land by the Town of Midland, is that correct?

Kassie Watts – yes sir.

Anthony Fox – could you describe briefly, what is the process for receiving approval to construct a subdivision in the Town of Midland?

Kassie Watts – a developer would come in and submit a sketch plan, we would do a preliminary review of that, they would submit a preliminary plat which would be reviewed by our Technical Review Committee, the plat would be once all the comments have been addressed, the plat would be approved administratively and then the applicant would proceed with final platting when they were ready to start recording lots and putting infrastructure in the ground.

Anthony Fox – upon final plat, is the developer required to install all improvements at the time of final plat approval?

Kassie Watts – if there are improvements that are not installed, they are required to post a performance guarantee.

Jim Scarbrough – your honor, may I please. I don’t know what point in time we are talking about. This is the current Ordinance. This does not apply to a subdivision that was built over 10 years ago.

Anthony Fox – that is an opinion. If I’m allowed to develop my case, I think I will show that this is a continuing violation. It started in 2005 and this Ordinance that Kassie has just read to the Board the nature of pending violations that were in existence at the time of adoption of this Ordinance are violations that are still enforceable under this Ordinance.

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Jim Scarbrough – I thought she was getting ready to testify about what the process is for getting a subdivision approved and the standards and this Ordinance was not in existence. It did not exist.

Anthony Fox – if I'm allowed to develop my case, I would appreciate the opportunity to do so.

Chair – you are allowed to continue.

Anthony Fox – this Ordinance does provide for bond and guarantees, is that correct?

Kassie Watts – yes sir.

Anthony Fox – if you could turn to tab 1 page 16, does it address construction of improvements and guarantees in lieu of construction?

Kassie Watts – yes sir.

Anthony Fox – does it indeed provide for performance guarantees of a certain percentage of the estimate cost of installation?

Kassie Watts – yes sir.

Anthony Fox – does it also provide that the guarantee shall secure of the completion of the construction improvements?

Kassie Watts – yes sir.

Anthony Fox – now in Section B of that section isn't it true that this provision provides that performance guarantees shall remain in full force and effect until such time as construction of improvements and installation of utilities are completed and accepted by the Town of Midland?

Kassie Watts – yes sir.

Anthony Fox – is there a requirement of the developer to continue to maintain the bonds or the instruments under this section?

Kassie Watts – yes.

Anthony Fox – what is that requirement?

Kassie Watts – it requires the performance guarantee to be automatically renewed unless all parties agree not to renew it at least 60 days prior to scheduled expiration date and failure to maintain the required performance guarantees shall result in the revocation of the approval of

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preliminary plat and any permits issued as a result of the preliminary plat approval.

Anthony Fox – are you familiar with the Tucker Chase subdivision plat?

Kassie Watts – yes sir.

Anthony Fox – who was the developer of the Tucker Chase subdivision under those plats?

Kassie Watts – Tucker Chase LLC.

Anthony Fox – if you can turn to tab 2. Tell the Board what is contained in tab 2.

Kassie Watts – these are documents filed with the Secretary of State outlining the Tucker Chase LLC.

Anthony Fox – for your review of the documents isn't it true that Tucker Chase LLC is still the entity that still recognized under the Secretary of State?

Kassie Watts – yes sir.

Anthony Fox – the registered agent for the Tucker Chase LLC is listed as Harry Grimmer, is that correct?

Kassie Watts – yes sir.

Anthony Fox – in fact the company official is listed as Harry Grimmer, Manager of Tucker Chase LLC, is that correct?

Kassie Watts – yes sir.

Anthony Fox – now if we can is the Tucker Chase subdivision, where is it located?

Kassie Watts – its located north of Hwy. 24/27 right here on 601.

Anthony Fox – is that location within the corporate limits and in the jurisdiction of the Town of Midland?

Kassie Watts – yes sir.

Anthony Fox – therefore, does the Midland MDO apply to the Tucker Chase subdivision?

Kassie Watts – yes sir.

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Anthony Fox – if you can turn to tab 3 and I'll ask you what is tab 3?

Kassie Watts – it is Tucker Chase map 1 final plat.

Anthony Fox – does map 1 indicate that it was recorded?

Kassie Watts – yes sir.

Anthony Fox – is recorded in the Cabarrus County Register of Deeds office?

Kassie Watts – yes sir.

Anthony Fox – how many final subdivision plats or maps are there with regards to Tucker Chase?

Kassie Watts – there are currently six final plat maps.

Anthony Fox – this is map 1. Does this map 1 show the entrance to Tucker Chase subdivision?

Kassie Watts – yes sir.

Anthony Fox – when was map 1 recorded?

Kassie Watts – October 18, 2005.

Anthony Fox – does this map 1 indicate any intention of the developer to dedicate streets and roads that are shown on map 1?

Kassie Watts – yes.

Anthony Fox – who is the developer of map 1?

Kassie Watts – Tucker Chase LLC.

Anthony Fox – the offer to dedicate the road and streets, who made the offer?

Kassie Watts – Tucker Chase LLC.

Anthony Fox – who signed on behalf of Tucker Chase LLC?

Kassie Watts – Charles Stevens.

Anthony Fox – to your knowledge has the Town of Midland accepted the streets as shown on

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map 1 for maintenance?

Kassie Watts – no sir.

Anthony Fox – is it your understanding that prior to acceptance by the Town the streets are required to be constructed and maintained in accordance to the NC DOT standards?

Kassie Watts – yes sir.

Anthony Fox – is that requirement found in the MDO on page 12 of tab 1?

Kassie Watts – yes sir.

Anthony Fox – what does Section 16-1-8 of the MDO provide (tab 1 page 12)?

Kassie Watts – dedication and acceptance of public areas. (A) Rights-of-way and easements. The approval of a final plat constitutes dedication but does not constitute acceptance by the Town of Midland or the public of the right-of-way of each public street and easement shown on the plat. The approval of a plat does not constitute acceptance for maintenance of other improvements in the right-of-way such as street paving, utility lines, drainage facilities or sidewalks. When located within the corporate limits of the Town of Midland, such dedications may be accepted only by resolution of the Midland Town Council or by their designee following inspection and approval to ensure compliance with specifications established by the Town or by the Town exercising control over and maintaining these areas. Until the offer of dedication is accepted by the Town in either of these manners, the developer shall be responsible for maintenance of those areas.

Anthony Fox – turning back to tab 3, are you familiar with the streets shown on map 1 of the Tucker Chase subdivision?

Kassie Watts – yes sir.

Anthony Fox – how are you familiar with those streets?

Kassie Watts – I have from my personal knowledge of visiting the site and from the public records and documents here in the office and on file with the Register of Deeds.

Anthony Fox – what have you learned from those visits and those public records as to the streets within map 1 of Tucker Chase subdivision.

Jim Scarbrough – object to the opinion.

Chair – what was the question?

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Anthony Fox – the question is what has she learned from simply reviewing the records on file within the Town. She is just telling what she has read and learned.

Chair – that is acceptable.

Jim Scarbrough – the records speak for themselves. Objection.

Chair – objection noted.

Anthony Fox – you can testify.

Kassie Watts – I learned that the roads are in disrepair.

Jim Scarbrough – objection. That is hearsay if she got it from a record.

Kassie Watts – and visits to the site.

Jim Scarbrough – that is not responsive to the question.

Anthony Fox – it is responsive to the question. I think she can testify she said the roads were in disrepair. Based on the records she looked at.

Chair – I'm not sure disrepair really describes what she is talking about.

Anthony Fox – what else have you learned from the official records of the Town that you have reviewed as it relates to the Tucker Chase subdivision?

Kassie Watts – that there have been ongoing complaints about the condition and construction of the roads going back for many years. I've been out to the site, I have read through some of the engineering reports, I've seen it with my own eyes, so I learned that the roads out there are not constructed to NCDOT standards.

Jim Scarbrough – objection. Your Honor, now she is testifying, she is not an engineer...

Chair – I agree. Sustained.

Anthony Fox – we'll move on. I'll ask you now to turn to tab 4 and could you tell me what is contained in tab 4?

Kassie Watts – Tucker Chase final plat map 2.

Anthony Fox – has this map been recorded?

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Kassie Watts – yes sir.

Anthony Fox – what was the date this map was recorded?

Kassie Watts – January 31, 2006.

Anthony Fox – does this map contain a Certificate of Road Maintenance?

Kassie Watts – yes sir.

Anthony Fox – tell the Board what that Certificate of Road Maintenance of road maintenance contained in exhibit #4 states?

Kassie Watts – I (we) hereby certify that I (we) will maintain the roads to the standards set forth by the North Carolina Department of Transportation until the respective governmental agency takes over the responsibility. (This does not include removal of snow or ice.)

Anthony Fox – is that certification signed?

Kassie Watts – yes sir.

Anthony Fox – who is it signed by?

Kassie Watts – Tucker Chace LLC.

Anthony Fox – who signed on behalf of Tucker Chace LLC?

Kassie Watts – C A Stevens.

Anthony Fox – direct your attention to exhibit #5 and ask you if you recognize it?

Kassie Watts – yes sir.

Anthony Fox – what is exhibit #5?

Kassie Watts – Tucker Chace map 3 final plat.

Anthony Fox – has this map 3 been recorded?

Kassie Watts – yes sir.

Anthony Fox – where was it recorded?

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Kassie Watts – March 10, 2008.

Anthony Fox – was that recorded in the Cabarrus County Office of the Register of Deeds?

Kassie Watts – yes sir.

Anthony Fox – does map 3 of the Tucker Chase subdivision contain a Certificate of Road Maintenance?

Kassie Watts – yes sir.

Anthony Fox – does that Certificate of Road Maintenance contain similar language you referred to previously as to map 2?

Kassie Watts – yes sir.

Anthony Fox – does that Certificate of Road Maintenance was that Certificate of Road Maintenance signed?

Kassie Watts – yes sir.

Anthony Fox – who signed on behalf of – how was it signed and who signed it?

Kassie Watts – Tucker Chase LLC, Harry Grimmer, Manager.

Anthony Fox – does this exhibit map #3 exhibit #5 also contain and offer a dedication by the developer to the Town?

Kassie Watts – yes sir. It has a certificate of ownership and dedication.

Anthony Fox – was that similarly signed by Tucker Chase LLC and by Harry Grimmer, Manager of Tucker Chase LLC?

Kassie Watts – yes sir.

Anthony Fox – if we can move to exhibit tab #6 and ask you if you recognize it?

Kassie Watts – yes sir.

Anthony Fox – what is it?

Kassie Watts – it is the final plat map for Tucker Chase map 4.

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Anthony Fox – was this map recorded?

Kassie Watts – yes sir.

Anthony Fox – where was it recorded?

Kassie Watts – in the Cabarrus County Register of Deeds.

Anthony Fox – what was the date it was recorded?

Kassie Watts – August 5, 2008.

Anthony Fox – does this exhibit #5 contain a certificate of maintenance of the streets that are shown with this exhibit?

Kassie Watts – yes sir.

Anthony Fox – does that...could you read to the Board that language?

Kassie Watts – from the Certificate of Road Maintenance?

Anthony Fox – yes.

Kassie Watts – I hereby certify that I will maintain the roads to the standards set for by the North Carolina Department of Transportation until the respective governmental agency takes over the responsibility. (This does not include removal of snow or ice.)

Anthony Fox – was it signed?

Kassie Watts – yes sir.

Anthony Fox – who signed it?

Kassie Watts – Tucker Chase LLC, Harry Grimmer, Manager.

Anthony Fox – turn to exhibit 7 and tell the Board what is behind exhibit #7?

Kassie Watts – Tucker Chase final plat map 5.

Anthony Fox – was this Tucker Chase final map 5 recorded?

Kassie Watts – yes sir.

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Anthony Fox – do you show the date it was recorded?

Kassie Watts – July 17, 2013.

Anthony Fox – where was it recorded?

Kassie Watts – Cabarrus County Register of Deeds.

Anthony Fox – does this exhibit also contain a Certificate of Road Maintenance?

Kassie Watts – yes sir.

Anthony Fox – tell the Board the language that is stated in that Certificate of Road Maintenance.

Kassie Watts – I (we) hereby certify that I (we) will maintain the roads to the standards set for by the North Carolina Department of Transportation until the respective governmental agency takes over the responsibility.

Anthony Fox – who signed that certificate?

Kassie Watts – Tucker Chase LLC, Harry Grimmer, Manager.

Anthony Fox – tell the Board about exhibit #8. What is it?

Kassie Watts – Tucker Chase final plat map 6.

Anthony Fox – has this final map 6 been recorded?

Kassie Watts – yes sir.

Anthony Fox – where was it recorded and when?

Kassie Watts – Cabarrus County Register of Deeds on April 19, 2016.

Anthony Fox – does this map and plat contain a Certificate of Road Maintenance?

Kassie Watts – yes sir.

Anthony Fox – is the language in this Certificate of Road Maintenance the same you read to the Board previously as to other plats in the Tucker Chase subdivision?

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Kassie Watts – yes sir.

Anthony Fox – does this Certificate of Road Maintenance was it signed by anyone?

Kassie Watts – yes sir.

Anthony Fox – who signed it?

Kassie Watts – Jo M Best.

Anthony Fox – does Mr. Best indicate who he signed on behalf of?

Kassie Watts – it says Manager.

Anthony Fox – does it indicate a different LLC for purposes of this property?

Kassie Watts – in the title block under owner, it is listed as Jupiter Land LLC.

Anthony Fox – so is it true that as to map 6 our exhibit #8 that this relates to a subdivision plat that relates to another LLC?

Kassie Watts – yes sir.

Anthony Fox – that LLC is Jupiter Land?

Kassie Watts – yes sir. Jupiter Land LLC.

Anthony Fox – to your knowledge, has the Town accepted any of the streets in maps 1, 2, 3, 4, 5 and 6?

Kassie Watts – no sir.

Anthony Fox – let's turn to the MDO and has the Town made any determination that as to whether the developer has constructed or maintained the streets in the Tucker Chase plats 1-6 in compliance with the certification.

Jim Scarbrough – objection. He is asking if the Town has made a determination. The Town is not here. There is a witness here.

Anthony Fox – the administrator for the Town, she is administrating the Ordinance of the Town.

Jim Scarbrough – it would be, if you have made a determination, not the Town.

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Anthony Fox – I think it is the Town she is making on behalf of.

Chair – I think as the question is asked as the administrator of the Town.

Anthony Fox – as administrator for the Town, have you made a determination as to whether or not the streets in plats 1-6 have been maintained in accordance to the certificate of maintenance shown on plats 1-6?

Kassie Watts – yes.

Anthony Fox – what was that determination?

Kassie Watts – that the streets do not meet our standards.

Anthony Fox – is that standard the standard that is set out in 16.1-8 of the MDO?

Kassie Watts – yes.

Jim Scarbrough – could you tell us where she is reading?

Anthony Fox – it is on page 12 of tab 1 that she previously testified to regarding dedication of public streets. Does the MDO provide or speak to the enforcement of any violation?

Kassie Watts – yes sir.

Anthony Fox – can you turn to tab 1 page 27? Section 23.3-3 address violations of the Ordinance?

Kassie Watts – yes sir.

Anthony Fox – what does Section 23.3-3 provide for violations by act or omission?

Kassie Watts – to violate, by act or omission, any term, variance or waiver, condition, or qualification placed by the Town Council or its agent boards upon any required permit, certificate, or other form of authorization for the use, development, or other activity upon land or improvements thereon.

Anthony Fox – let me call your attention to tab 1 page 22. Section 16.2-6 and 16.2-7. Could you tell the Board what those provisions are?

Kassie Watts – 16.2-6 is the street and utilities. Basically it states that all streets and utilities must comply with the requirements of all other applicable plans and manuals adopted by the Town of Midland, including, but not limited to, the Town of Midland Technical Standards and

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Specifications Manual and 16.2-7 addresses the street design. The design of all public streets and roads within the Town of Midland shall conform to standards set forth in the Town's Technical Standards and Specifications Manual.

Anthony Fox – if I can direct your attention to tab 9 of the exhibit book and I'll ask you if you recognize tab 9?

Kassie Watts – yes sir.

Anthony Fox – is that a Certificate of Authenticity from the Clerk certifying that tab 9 is the Town of Midland's subdivision Ordinance from adopted on February 13, 2001 and taken effect on February 13, 2001 until the adoption of the current Midland Development Ordinance on September 13, 2011?

Kassie Watts – yes.

Anthony Fox – turn to page 46 of exhibit #9. Does page 46 under Section 12 which deals with public and private roads under D address the maintenance by the developer of roads constructed within subdivisions?

Kassie Watts – yes sir.

Anthony Fox – can you tell the Board or read to the Board what that section provides?

Kassie Watts – Roads that are classified and designated as public shall be subject to the following conditions. Designation of a road as public shall be conclusively presumed to be an offer of dedication to the public and permit public use. These roads shall be maintained by the developer/owner, or the lot purchasers through a recorded maintenance agreement until the respective governmental agency assumes responsibility for the maintenance.

Anthony Fox – so based on the Ordinance that predated the current Midland Development Ordinance, there was a requirement under this section that roads that are constructed be maintained until such time as they are accepted.

Jim Scarbrough – objection. It is leading and it's an opinion and the Ordinance speaks for itself.

Anthony Fox – I'm just clarifying the testimony that she just testified to.

Bob Blythe – how was your question phrased again.

Anthony Fox – I was asking based upon that section, is it true that the roads must be maintained until such time as respective governmental agency assumes responsibility for the maintenance which is reading from the section of the Ordinance. Her confirming that. I believe

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we have been asking leading questions.

Chair – Yes, kinda like it is written. Whatever it says, it says.

Anthony Fox – let's talk a little bit now if you can turn to tab #10. Tell the Board what is contained behind tab #10. Just a summary of what that is just to orient them as to what is in there.

Kassie Watts – tab 10 contains email correspondence between previous planning staff and residents in the Tucker Chase subdivision and primarily addresses complaints about the roads, the condition of the roads and general discussion from residents wanting to know when the roads are going to be repaired.

Jim Scarbrough – I object to all that. That is all hearsay being offered to show what the road condition was.

Anthony Fox – I think there is an exception to the hearsay rule for notice. I think it is putting the Town on notice of the conditions of the roads. Also, this is a government record is an exception to the hearsay exception as a business record exception as an official public document.

Jim Scarbrough – should not be used for the truthfulness of the statement in it. She did not name Richard Flowe, she just said staff. Why don't you just name Richard Flowe?

Kassie Watts – because there is more than one person on the planning staff, Mr. Scarbrough. That is why.

Jim Scarbrough – from Richard Flowe, from Richard Flowe, from Richard Flowe.

Kassie Watts – Jana, Jana was also one of his employees.

Anthony Fox – you may want to get a ruling on that because I think they are public records, I mean they are official records. They are public records quite frankly any member of this Board can go look at each one.

Chair – they are public records. Any email from a Town/agent representative is a public record.

Jim Scarbrough – there is no certification that this is a record. Her name is not on it. She can't, she has no firsthand knowledge of this and there is no certification as a Town record.

Anthony Fox – if you want me to go through each one of these with her, I'm willing to do that if you've got the time.

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Jim Scarbrough – what is it being offered for?

Bob Blythe – it is still a public record.

Anthony Fox – I think it is a public record for the ongoing violations. I'm not getting into the details of them it is part of the exhibit book before you and I was just orienting you to what is before you.

Jim Scarbrough – that is being used to show violations so I still object.

Chair – objection noted. I believe these are public records. I know they are not certified but it is a public record.

Anthony Fox – Ms. Watts if we can now can turn to exhibit 11 and tell the Board what is behind exhibit #11.

Kassie Watts – yes sir. This is a letter received from Mr. Grimmer to Mr. Flowe in regards to street repair in the Tucker Chase subdivision and it was outlining a schedule for repairs.

Anthony Fox – What does the third paragraph of that letter, exhibit #11 state?

Kassie Watts – the remainder of the streets will be maintained as needed for repairs until the final phase of the subdivision infrastructure is installed. At which time all of the streets will be brought up to the standards for the Town of Midland acceptance for future maintenance. Depending upon economic condition, house sales, etc. We project the construction for the final phase to be completed sometime in the spring of 2016.

Anthony Fox – do you know whether final phase has been completed?

Kassie Watts – it has not.

Anthony Fox – turn to exhibit #12. Tell the Board what is behind exhibit #12.

Kassie Watts – This is a correspondence to Harry Grimmer from Richard Flowe on October 7, 2014.

Anthony Fox – was this in response to the letter that he just referenced as exhibit #11?

Kassie Watts – yes sir.

Jim Scarbrough – I object. How does she know all this?

Kassie Watts – it is in the first line of the letter.

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Jim Scarbrough – you have to have personal knowledge of what you are testifying to. Mr. Flowe is here if we want to have him testify.

Anthony Fox – you have reviewed the records of the Town of Midland, have you not?

Kassie Watts – yes sir.

Anthony Fox – was this record, exhibit #12, a part of the records that you reviewed?

Kassie Watts – yes sir.

Anthony Fox – as to exhibit #12, can you tell the Board what the Town’s response to Mr. Grimmer’s letter was?

Kassie Watts – I’m sorry. Can you repeat that?

Anthony Fox – isn’t it true that in the October 7th letter from the Town in response to the September 29th letter from Mr. Grimmer, that the Town through Mr. Flowe stated that the September 29, 2014 letter failed to adequately insure that interim maintenance repairs would be made prior to Certificates of Occupancy in the second phase, as we have discussed, therefore, enforcement action may be commenced unless all repairs to all streets are made so as to 1) insure safety from road hazards and 2) to avoid damage to personal property caused by deteriorating conditions which include settlement within the roadway. Is that true?

Kassie Watts – yes sir.

Jim Scarbrough – I object to that being used for the truthfulness of the facts. This is a letter that is fine. How do we know the statements in the letter are true? That has to have factual testimony. I’m OK saying this is a document in the Town’s file. Of course it is.

Anthony Fox – I think the Board can....

Jim Scarbrough – That is like saying everything in the Board’s file from the Board is true. That is not evidence.

Bob Blythe – I think it is up to the Board to determine or give weight as to whether or not it is actual evidence of anything other than being a letter that is in the file.

Jim Scarbrough – I also object because it is not a certified record of the Town.

Anthony Fox – turn to exhibit #13 and I ask you if you recognize exhibit 13?

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Kassie Watts – yes sir.

Anthony Fox – what is exhibit 13?

Kassie Watts – it is a section of the February 18, 2014 Midland Town Council minutes.

Anthony Fox – indeed it is actually excerpts from the minutes of the Town from various dates, is that correct?

Kassie Watts – yes sir. June, July, October, and then December of 2014 and then March of 2016 and November 2016.

Anthony Fox – do these documents provide notice to the Town of the conditions of the Tucker Chase streets?

Jim Scarbrough – objection. Again, it is not certified and can't be used for the truthfulness of the statements in the minutes.

Bob Blythe – objection noted.

Anthony Fox – maybe my evidence is different than yours but I heard if you give....I understand if they're merely to provide notice that they are sufficient as an exception to the hearsay rule.

Kassie Watts – what was the question?

Anthony Fox – the Board has to rule.

Chair – objection noted.

Anthony Fox – the question is do the exhibits under tab 13 do they provide notice of the conditions of the streets in Tucker Chase on the respective dates shown in the official minutes of the Town?

Kassie Watts – yes sir.

Anthony Fox – turn to tab 14 and can you indicate what is contained under tab 14?

Kassie Watts – this is a petition that was submitted to the Town by a Mr. Brian Rieland. He was a resident in Tucker Chase.

Anthony Fox – was this petition an official part of the official minutes of the Town of Midland?

Kassie Watts – yes sir. It was received at Town Council meeting in October 14, 2014.

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Anthony Fox – what was the purpose of the petition?

Kassie Watts – per the petition the signatures listed below are residents of Tucker Chase that would like to see the Town of Midland enforce the standards listed within the development standards for the Town of Midland. Effective November 1, 2015 all potholes should be repaired and remain so throughout the period between November 1, 2015 and the time that the streets within Tucker Chase are under warranty with the Town of Midland.

Jim Scarbrough – I object, Mr. Chairman. It is hearsay, it is highly prejudicial and it is not certified. The witness has no personal knowledge.

Anthony Fox – was the petition part of the official minutes of the Town...are the official records of the Town of Midland? Tab 14 found in your records?

Kassie Watts – yes sir.

Jim Scarbrough – that does not make it true. It is not certified.

Anthony Fox – do you know if it is the function of the Town to keep minutes as a part of its function and part of your records?

Kassie Watts – yes sir.

Anthony Fox – was the record or report address the issues of Tucker Chase at or around the time the report was generated?

Kassie Watts – I'm sorry. Can you repeat that?

Anthony Fox – let me ask a different question. Does the date of exhibit #14 address the Tucker Chase issues at around the time that the Town was dealing with the Tucker Chase violations, October 14, 2014?

Jim Scarbrough – objection. There is no evidence she has any knowledge of October 2014. She wasn't here.

Kassie Watts – the minutes refer to that.

Anthony Fox – is it common for the Town to keep reports and records, does the Town keep copies of petitions that are presented to it by citizens?

Kassie Watts – yes sir.

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Anthony Fox – is the record that is shown in exhibit #14 kept as a regular course of the Town's business in keeping petitions that are submitted to it?

Kassie Watts – yes sir.

Jim Scarbrough – was she saying this was kept in the regular course of the Town's business, tab #14?

Chair – yes. She is saying it is kept with the minutes of the Town Council meetings.

Jim Scarbrough – how would she know? She's a planner.

Chair – I'm sure she found it, where was it filed?

Kassie Watts – I asked the Town Clerk and the Town Clerk pulled it from the file.

Jim Scarbrough – she didn't even pull it from the file. Somebody else did. I'm sorry. I'm gonna be strict to. If he didn't let me have my witness, I want my witness.

Anthony Fox – I'm gonna take my ball and go home as well.

Chair – your objection is noted, Mr. Scarbrough.

Jim Scarbrough – thank you.

Chair – I understand.

Jim Scarbrough – Thank you.

Anthony Fox – there is also a concept of judicial notice that you guys have the ability to go and look at public records if you want to. If you want to take the time we can do that. If I can now direct your attention exhibit #15 and ask if you recognize that?

Kassie Watts – yes sir.

Anthony Fox – what is that?

Kassie Watts – it is correspondence from Chad Easter, Town Engineer to Mr. Harry Grimmer, Tucker Chase LLC.

Anthony Fox – what does exhibit #15 indicate?

Kassie Watts – appears to be a letter from Chad Easter. He was following up on a conversation

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with Mr. Craig Grimmer regarding the recent street work performed in Tucker Chase. A site visit was made during this visit multiple sections of concrete curb work was noted as being damaged. He enclosed a copy of a preliminary punch list of items that had been generated by Town staff under Mr. Flowe's direction or guidance or employment. Those punch list items were included with this letter to Mr. Grimmer.

Anthony Fox – I ask you to turn to exhibit #16 and ask you if you recognize it?

Kassie Watts – yes sir.

Anthony Fox – what is exhibit #16?

Kassie Watts – it is a letter to Mr. Grimmer from myself in regards to street maintenance and the subdivision amenities site.

Anthony Fox – this letter was addressed to Mr. Grimmer, did you attach to it the documents that also are contained in exhibit #16 as part of the letter?

Kassie Watts – yes sir. I referred to several of these documents. I included copies of them when I sent the letter out to Mr. Grimmer.

Anthony Fox – the letter addressed the amenities center. Could you tell the Board why the amenities center was addressed in the September 1, 2016 letter?

Kassie Watts – yes. We were working with the developer's engineer. They had proposed some amendments to the amenity area to possibly get additional lots out of that and they were actually given two additional lots on the plan but not in the amenity area. We were trying to work through the parking calculation requirements for the type of pool and gazebo that Mr. Grimmer was proposing.

Anthony Fox – Ms. Watts turn to the second page of exhibit #16, addresses street maintenance. What did you communicate to Mr. Grimmer in regards to street maintenance in exhibit #16?

Kassie Watts – the Town is concerned about the condition of the streets in Tucker Chase and the lack of progressive repairs. The Town acknowledges the repairs made to Mud Drive and a portion of Granite Street but there is much more to complete and little more has been done. It goes back and references the October 7, 2014 letter that Mr. Flowe sent to Mr. Grimmer. It also refers to the letter that refers to October 7, 2014 letter in which it talks about street maintenance repairs in Tucker Chase were to be completed prior to issuance of CO's in phase two and as the date of this letter which was September 1, 2016 only a portion of the repairs to the streets have been completed. Enforcement action may commence unless repairs to all streets are made. It goes on to state the Town is going to request that the Cabarrus County Construction Standards withhold CO's on any outstanding permits under construction in the Tucker Chase project

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being that you have not followed through on your responsibilities in regards to street maintenance. The Town of Midland has consistently informed you of the street repairs needed, as included in the last correspondence dated June 28, 2016 and October 7, 2014. Previous additional correspondence is attached hereto for your information. In addition, once you have developed a plan for repairs, please submit to the Town and a pre-construction meeting shall be held to review construction repair methods and standards so all repairs are completed satisfactorily and once completed, the Town may accept the streets for maintenance.

Anthony Fox – that letter you mentioned attached the October 7 letter which is the next page, page 120, correct?

Kassie Watts – yes sir.

Anthony Fox – they also attached the September 29th letter that was written by Mr. Grimmer to the Town on page 121, is that correct?

Kassie Watts – yes sir.

Anthony Fox – it also included the June 28, 2016 letter from Chad Easter, the Town Engineer, at the time, is that correct?

Kassie Watts – yes sir.

Anthony Fox – it includes also a report for memorandum from Chad Easter to Doug Paris. Who is Doug Paris?

Kassie Watts – he is the Town Manager.

Anthony Fox – that memorandum addresses the Tucker Chase subdivision, does it not?

Kassie Watts – yes sir.

Anthony Fox – what is behind that memorandum? Could you tell the Board what that handwritten document of some 15 pages or so is?

Kassie Watts – this is the preliminary punch list of items that needed to be repaired on the Tucker Chase streets.

Anthony Fox – who prepared that?

Kassie Watts – Jason Earliwine and Bill Coleman.

Anthony Fox – who is Bill Coleman?

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Kassie Watts – I believe he was the previous engineer that was on N-Focus staff.

Anthony Fox – was this document that you wrote on September 1, 2016 served or delivered to Mr. Grimmer?

Kassie Watts – yes sir.

Anthony Fox – is the last two pages of exhibit #16 indication of a USPS tracking number indicating that this document was delivered and the individual picked it up on September 7, 2016?

Kassie Watts – yes sir.

Anthony Fox – if you can turn to exhibit #17 and tell the Board what is exhibit #17?

Kassie Watts – this is a letter dated September 8, 2016 to Mr. Harry Grimmer the subject is amenities parking requirement and roadway repairs. It was in response to receipt of a fax that Mr. Grimmer had sent us on September 8, 2016 asking for further clarification of the parking requirements.

Anthony Fox – does this document also address the road repairs in Tucker Chase on page 140, page 2 of the document?

Kassie Watts – yes sir.

Anthony Fox – how does it address those road repairs?

Kassie Watts – The third paragraph from the bottom. On a different topic in response to your letter dated September 2, 2016, the Town would like to be clear in the fact that your proposed schedule for roadway repairs based on future building permits is not acceptable. There have been discussions concerning street deficiencies in Tucker Chase dating back more than six years.

The Town does not believe the developer has diligently pursued the repairs of the existing roads in the Tucker Chase development. The Town has an obligation to protect tax payers and residents of the Tucker Chase development and make sure the streets are repaired, construction completed and dedicated to the Town of maintenance.

Though there have been some repairs to two streets (Mud and Granite), there are other streets that are in need of significant repairs prior to acceptance. There are numerous areas of broken and settled curb, settled pavement, base failure, broken sidewalk, poor pavement quality, etc.

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Based on our meeting a couple of weeks ago, you stated that Tucker Chase LLC wanted to delay repairs in earlier phases until the final phase was nearing completion. The Town stated that was not acceptable.

In reviewing the files on this development, it also appears the Tucker Chase LLC has not maintained the required bond or irrevocable letter of credit as required by Article 16.1-9B guarantee in lieu of construction of improvements. Tucker Chase LLC is required to provide such a guarantee. Since a significant amount of time has passed, the estimate for the repairs and construction in Phases 1 and 2 need to be updated and approved by the Town.

The bond or letter of credit shall be written such that it is “auto-renewing” and only the Town of Midland may cancel the bond or letter of credit. As required in Article 16.1-9(B)(4), the amount required will be between 125% and 150% of the estimated amount.

The Town requested that Tucker Chase LLC provide a guarantee of completion and begin repairs to the roadway immediately. As we have discussed, a roadway repair plan needs to be provided to the Town addressing repair schedule and methods. The developer and Town must discuss and agree prior to any work proceeding.

Anthony Fox – under exhibit #18 on September 11th you sent to Mr. Grimmer indication of concern about the street maintenance and indicated that streets need to be repaired, you then pursuant to exhibit #17 sent this letter September 8 which you notify him of the pending problems with the street and you also notified Mr. Grimmer that the bonds and irrevocable letters of credit are required and asked that he address that issue. Did you hear anything from Mr. Grimmer in regards these two correspondence?

Kassie Watts – I do not believe I heard anything from him on the September 8th correspondence.

Anthony Fox – did this result in exhibit #18 being issued?

Kassie Watts – yes sir.

Anthony Fox – tell the Board what exhibit #18 is.

Kassie Watts – it is the Notice of Violation that was issued to Tucker Chase LLC on October 14, 2016. It was for violation being issued in accordance with Article 23 and the violation that was cited was Article 16, Sections 16.1 and 16.2 subsections 16.2-6 Streets and Utilities and 16.2-7 Street Design because the street conditions in the development do not comply with Midland’s public street design and public construction standards and regulations. Also, subsection 16.1-8A right-of-way and easements.

Anthony Fox – in your letter you asked that you be contacted by October 21, 2016 with a plan of action to remedy the inadequate street construction and adequate maintenance?

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Kassie Watts – yes sir.

Anthony Fox – what did you mean by plan of action?

Kassie Watts – essentially a timeline for repairs and indication as to what repairs were going to be made and what section. Essentially something that the Town could look to as a reasonable timeline and schedule for Tucker Chase LLC to make the repairs.

Anthony Fox – was this exhibit #18 October 14, 2016 letter served on Mr. Grimmer as for Tucker Chase LLC?

Kassie Watts – yes sir.

Anthony Fox – indeed it was received by Mr. Grimmer on October 18 of 2016, is that correct?

Kassie Watts – yes sir.

Anthony Fox – exhibit #19. What is exhibit #19?

Kassie Watts – this was a fax received from Mr. Grimmer on October 21, 2016.

Anthony Fox – does the fax identify a plan of action to remedy the inadequate street construction, inadequate maintenance that you requested in your October 14th letter?

Kassie Watts – no sir.

Anthony Fox – turning to exhibit #20, could you tell the Board what is behind exhibit #20?

Kassie Watts – yes. This is the Civil Citation that was issued. Page 148, October 25, 2016. Essentially, this is a letter that explains why the Civil Citation is being issued and what it was for and the Civil Citation is on page 150.

Anthony Fox – tell the Board how Civil Citations work for violations of the Town's Ordinance.

Kassie Watts – essentially when you send somebody a Notice of Violation, they have a certain amount of time to either rectify it or come talk to the administrator about it. If they choose not to do either of those the Town can start issuing a Civil Citation.

Anthony Fox – so despite two letters to Mr. Grimmer and Tucker Chase LLC, and despite the Civil Citations were there conditions that exist in the Tucker Chase subdivision remedied?

Kassie Watts – no sir.

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Anthony Fox – your citation and you determination of Notice of Violation, was that appealed by Tucker Chase LLC?

Kassie Watts – yes sir.

Anthony Fox – the appeal has the effect of staying any further enforcement, is that correct?

Kassie Watts – yes sir.

Anthony Fox – did you give notice or cause notice to be held to be given of the administrative appeal hearing that we were here in December and here tonight in accordance with?

Kassie Watts – yes sir.

Anthony Fox – is that notice contained in exhibit #22 of the record of our exhibit?

Kassie Watts – yes sir.

Anthony Fox – under exhibit #23 is that also, is that the published notice of the administrative hearing that we here today on?

Kassie Watts – yes sir.

Anthony Fox – exhibit #24 is that a posted notice on the property of this hearing today?

Kassie Watts – yes sir.

Anthony Fox – I have no further questions.

Chair – Mr. Scarbrough.

Jim Scarbrough – Ms. Watts you that you had asked Mr. Grimmer for a plan of action. Is that right?

Kassie Watts – yes sir.

Jim Scarbrough – isn't it true we offered to meet with staff and discuss a plan whereby we would escrow money from lot sales sufficient to do all this work?

Anthony Fox – objection.

Jim Scarbrough – she has testified she wanted a plan.

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Chair – you can answer that. Please answer that.

Kassie Watts – could you repeat the question?

Jim Scarbrough – isn't it true that we asked over and over to talk to staff about his plan to fix all these things by escrowing money so the Town could control the money from the lot sales and we would have money to fix all this if we had a budget to do that and the Town says no. We are not going meet with you. Isn't that true?

Kassie Watts – no.

Jim Scarbrough – what is not true about it?

Kassie Watts – we did meet with you.

Jim Scarbrough – when?

Kassie Watts – we met with you here at the office by conference call.

Jim Scarbrough – but we wanted to come here and sit down at a table and discuss an escrow agreement for the lot sales, isn't that correct?

Kassie Watts – yes you did. You wanted to discuss an agreement for escrowing money from the sale of lots in the final phase.

Jim Scarbrough – what was the Town's response?

Kassie Watts – I did not meet with you.

Jim Scarbrough – no. But you know what the Town's response was.

Kassie Watts – are you asking for me to speak for the Town?

Jim Scarbrough – you have been talking about the Town all night.

Kassie Watts – am I talking or am I talking...what's the question, I guess? Repeat it.

Jim Scarbrough – the Town refused to meet with the developer and with me to discuss the solution for escrowing money from lot sales, isn't that true?

Anthony Fox – objection. She said she was not the person that met with them.

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Jim Scarbrough – no. I'm asking....

Kassie Watts – I said I did not.

Jim Scarbrough – she has knowledge of it. I don't care whether she was the person that made the decision.

Anthony Fox – you asked her what the Town did. You did not ask her did she know....

Jim Scarbrough – she has been testifying what the Town is doing all night long.

Chair – rephrase your question to her directly, I guess.

Jim Scarbrough – Kassie.

Kassie Watts – what?

Jim Scarbrough – don't you know that the Town refused to meet with me and the developer to sit at a table and work out an escrow agreement that would put cash in an escrow account from lot sales?

Kassie Watts – I don't know if they refused to meet with you. I know that I did not meet with you and when we asked for a plan, it was for a plan to fix the roads not a plan to fund the final phase of the development for Mr. Grimmer.

Jim Scarbrough – not a plan, what does that mean? A plan to fund the final phase.

Kassie Watts – by allowing him to final plat the rest of the lots and put money from each lot into an escrow account.

Jim Scarbrough – the Town did not want that?

Kassie Watts – I don't know.

Jim Scarbrough – you never heard the Town Manager say anything about it?

Anthony Fox – I think she has been asked and answered that. I think she has testified that she was not part of it.

Chair – she has answered that, Mr. Scarbrough.

Jim Scarbrough – are you familiar with a letter dated October 28, 2016 from the Town's attorney to me regarding my request to talk with the Town?

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Kassie Watts – is this in the exhibit book?

Anthony Fox – I think we are getting into potential....

Jim Scarbrough – I think we are already there.

Anthony Fox – no, no, no, no, no.

Jim Scarbrough – we have been there for a long time.

Anthony Fox – you are talking about plan, now you are talking about conversations between the attorneys and representatives of the Town.

Jim Scarbrough – I'm talking about refusing to talk to us about a plan. She said she wanted a plan. Then they refused to talk to us. Why can't I ask that?

Chair – what exhibit is that, Mr. Scarbrough?

Jim Scarbrough – it is not an exhibit.

Chair – that is kind of a problem.

Jim Scarbrough – what's a problem?

Chair – it is not in what you have already presented to us. You can introduce it....do you have enough copies for everyone?

Jim Scarbrough – she was copied on the letter.

Kassie Watts – I just asked if you had a copy I could look at, Jim.

Anthony Fox – let me see it first.

Chair – we need to see that too if it is going to be admitted. Tell you what, we are going to take a 10 minute recess, we have been here about an hour and a half. Be back in about 10 minutes.

Recessed from 8:25 PM to 8:36 PM.

Chair – we are going to start back. Mr. Scarbrough, you are find because this was in your notebook under tab 17. So we are good.

Jim Scarbrough – I forgot what I did in December.

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Chair – you are good.

Jim Scarbrough – may I approach the witness with this letter?

Chair – yes sir.

Jim Scarbrough – if you take a look at that letter there. Look at the second page, it says you received a copy.

Kassie Watts – yes. I believe I did.

Jim Scarbrough – I want you to look at the second paragraph. Start reading right there where it says, “The Town...”.

Kassie Watts – The Town is not interested in any further in-person meetings, which would take up more of the Town’s time and resources, without first receiving a written plan or proposal documenting how your client intends to address the Ordinance violations. Such a proposal must be submitted to the Town by November 4, 2016, in order to be considered by the Town. Once received, the Town will review the plan/proposal and consider meeting with you and/or your client to discuss the plan/proposal further.

Jim Scarbrough – alright now. Isn’t it true that the developer and I wanted to meet with the Town to negotiate the terms of an escrow agreement? We weren’t interested in presenting a plan, we are talking about two different things. In other words, the Town wanted us to present a plan and we want to negotiate an agreement, a solution.

Kassie Watts – what’s the question.

Jim Scarbrough – isn’t that the choice? We were proposing a solution to get the money to do the improvements and the Town did not want to hear that. The Town just wanted to see a plan to do the improvements.

Kassie Watts – well no, that is not true. We did talk on a conference call – myself, you, Anthony, Doug and actually I believe you had forgotten about it and I emailed you to remind you, then you called in on the conference call. Do you remember that?

Jim Scarbrough – no.

Kassie Watts – OK. We had a conference call and we called you and when we did all get on the conference call we talked about your proposal for escrowing at that time. You offered to submit an affidavit from Mr. Grimmer’s accountant and I do recall saying that wasn’t going to be sufficient. When we were asking for plans for the roads, it was a plan to fix the roads not a

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financial proposal for the Town to essentially foot the bill for Mr. Grimmer to plat the remainder of his lots and escrow the funds.

Jim Scarbrough – the Town was not going to spend a penny. Why are you saying the Town would foot the bill?

Kassie Watts – because you were saying for us to throw the Ordinance out the window, not require him to post a bond or go through the process of final platting like anyone else. I told you we could not do that.

Jim Scarbrough – you were starting from the standpoint that Mr. Grimmer had the money to do all this? Is that correct?

Anthony Fox – objection to relevance.

Jim Scarbrough – you thought there was money to do that?

Kassie Watts – money to do?

Jim Scarbrough – the improvements.

Kassie Watts – when you are developing a project and selling lots, one would assume that yeah there would be money there to finish the development. Especially when you have already constructed 120 homes out there.

Jim Scarbrough – and gone through a recession.

Kassie Watts – in 2008. It is 2016, 2017...

Jim Scarbrough – that lasted five years. That recession lasted five years. You saw those plats you were identifying, they skipped from 2008 to 2013.

Anthony Fox – again I object. Even though this requires a plan, I mean getting into remedies is not what is before the Board. The Board is whether or not there is a violation. It is not whether it is a remedy for the violation and how you go about that, it is whether or not there is a violation of the Ordinance.

Chair – I agree.

Jim Scarbrough – who else was copied on that letter?

Kassie Watts – Anthony Fox and Doug Paris.

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Jim Scarbrough – those letters you sent to Mr. Grimmer, let's see, look at tab #17, it is the letter where you said you would ask the County not to issue COs and would not issue permits. When was that?

Kassie Watts – September 1st. That is tab 16.

Jim Scarbrough – who did you copy on that letter?

Kassie Watts – Mike Meadows, D R Horton.

Jim Scarbrough – you knew that D R Horton was buying lots from us, right?

Kassie Watts – yes.

Jim Scarbrough – you were interfering with the contract between the developer and a buyer.

Anthony Fox – objection.

Kassie Watts – is that a question?

Jim Scarbrough – I'm asking you if you agree with that statement.

Kassie Watts – no, I do not.

Jim Scarbrough – why did you send it to our buyer?

Kassie Watts – because I (let me think), D R Horton was pulling the permits. They had permits in the subdivision and we didn't want to blindside anybody with anything.

~~Jim Scarbrough – do you realize now that D R Horton has now pulled out of the subdivision because of this?~~

~~Anthony Fox – objection. Again objection.~~

~~Jim Scarbrough – you did that.~~

~~Anthony Fox – I don't know how this is relevant...~~

~~Kassie Watts – is there a question?~~

~~Jim Scarbrough – I just asked her if she knew if D R Horton has now pulled out of the subdivision.~~

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~~Anthony Fox – I move that you strike that from the record.~~

~~Jim Scarbrough – do you know that D R Horton has pulled out?~~

~~Kassie Watts – yes, I do.~~

~~Jim Scarbrough – OK.~~

Anthony Fox – I moved to strike. I think the Board has abstained the objection. Move to strike it from the record.

Chair – removed.

Jim Scarbrough – did we not tell you and the Town that if we don't have anybody to buy those lots, we are done? We are walking away and you can have the subdivision.

Anthony Fox – OK.

Jim Scarbrough – we told you that. Didn't we?

Anthony Fox – objection. We are really getting down the road that has....

Bob Blythe – the testimony from the attorney...

Chair – Mr. Scarbrough, please stick to the cross examination of the witness related to the violation.

Jim Scarbrough – the whole thing is how you get this work done. I wish y'all knew who the party is that has caused the work not to get done.

Anthony Fox – again, again, I object to it. There is a witness on the stand, cross examination should be asking questions within the scope of the direct examination.

Chair – I agree. Let's stick to the violations.

Jim Scarbrough – let's go back to tab 18 which is your Notice of Violation. Now if you testified that on page 2 where you referred to Article 16, those are the places in the Ordinance that you say, that is your statement that we violated. Those Ordinances right there?

Kassie Watts – that is what the letter says.

Jim Scarbrough – OK. That is the current Ordinance, is that right?

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Kassie Watts – yes.

Jim Scarbrough – it says street design. How can we violate a current street design ordinance when the roads are already there?

Kassie Watts – there were street design requirements in the previous Ordinance.

Jim Scarbrough – you did not cite the previous Ordinance.

Kassie Watts – I think we have already covered this.

Jim Scarbrough – I'm asking you to say Article 16.

Kassie Watts – what are you asking?

Jim Scarbrough – I'm asking you what is in your Notice of Violation. What are you charging us with?

Kassie Watts – 16.1 and 16.2, subsection 16.2-6, 16.2-7 Street Design and Streets Utilities and I read those into the record earlier when Anthony ask me about them.

Jim Scarbrough – but they are not in your Notice of Violation.

Kassie Watts – it references the sections of the Ordinance.

Jim Scarbrough – the current Ordinance?

Kassie Watts – the MDO.

Jim Scarbrough – the MDO. So you are not referencing the Ordinance that was in effect at the time the streets were built?

Kassie Watts – I'm referencing the MDO.

Jim Scarbrough – the current Ordinance?

Kassie Watts – yes.

Jim Scarbrough – that was adopted when, 2011?

Kassie Watts – September 13, 2011.

Jim Scarbrough – so you say here that we, it says here, because the street conditions in the

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development do not comply with Midland's public street design and construction standards and regulations. What do you mean by construction standards, the roads are already there?

Kassie Watts – are you asking me, what's your question?

Jim Scarbrough – if I construct a road in 2005, I construct it based on the construction standards in 2005, is that correct?

Kassie Watts – whatever your construction drawings were approved as I would assume.

Jim Scarbrough – that is correct. Now, how am I supposed to comply with an Ordinance that did not even exist when I built the road?

Kassie Watts – how did you comply with the Ordinance that did exist?

Jim Scarbrough – you did not charge me with that.

Kassie Watts – I know. I charged you with the MDO.

Jim Scarbrough – right. So that's the wrong Ordinance, isn't it?

Kassie Watts – no it's not.

Jim Scarbrough – lets go back and look at these plats. Tab 3 is the first one. Who is Jeff Moody?

Kassie Watts – he is an engineer.

Jim Scarbrough – for whom?

Kassie Watts – he works for Alley, Williams, Carmen and King.

Jim Scarbrough – who do they work for?

Kassie Watts – whoever is contracting them.

Jim Scarbrough – they work for Midland, is that correct?

Kassie Watts – I would assume they were contracted at that time, yes.

Jim Scarbrough – look at that certification in tab 3. There is one signed by Jeff Moody in 2005. Read that please.

Kassie Watts – Certificate of Streets, Water and Sewer System Approval and Other

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Improvements – I hereby certify that all streets, storm drainage systems, water and sewer systems and all other improvements have been designed manner and according to specifications and standards of Concord and installed, or their installation guaranteed, in an acceptable and the State of North Carolina in the Tucker Chase Subdivision.

Jim Scarbrough – he is certifying that those streets were designed and constructed according to the law at that time, is that correct?

Kassie Watts – he signed this certificate. I don't know what he was certifying.

Jim Scarbrough – what, is English your language?

Anthony Fox – objection.

Kassie Watts – look, there is no reason for you to be rude.

Chair – Mr. Scarbrough, please.

Jim Scarbrough – she is being so evasive, I have.....

Anthony Fox – you are asking her to get into the mind of the person that signed it. She can't do that.

Jim Scarbrough – she is being so evasive. I don't ordinarily question a witness like this but I'm tired of it. What does that certification mean?

Kassie Watts – I would suggest you call Jeff Moody and ask him.

Jim Scarbrough – so you don't know what it means, alright. That's fine. I've got it. Let's go to tab #4. I'm going through all these certifications.

Kassie Watts – that's fine.

Jim Scarbrough – you charged us with design violations and construction standards violations, is that correct?

Kassie Watts – yes.

Anthony Fox – I'll object to that. That's not the sole bases of the charges. If you look at the Notice of Violation....

Jim Scarbrough – my goodness, it is right there in the Notice of Violation.

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Anthony Fox – the Notice of Violation – the Board can make an interpretation of what was charged in the Notice of Violation.

Jim Scarbrough – I just asked her what she charged us with. Can I not do that?

Chair – yes you can.

Jim Scarbrough – thanks, I'm on tab 4 now. I apologize for ramping things up like this but it is very irritating to me. Tab #4, do you see a Jeff Moody certification there?

Kassie Watts – I see Jeff Moody signed. Yes, Certificate of Streets, Water and Sewer Approval and Other Improvements.

Jim Scarbrough – is it true to say that he is certifying the street design and construction standards were met?

Kassie Watts – he signed that certificate. I don't know what he is certifying.

Jim Scarbrough – I thought you were a planner.

Kassie Watts – I'm not a director of engineering. You just pointed that out a minute ago.

Chair – Mr. Scarbrough, I'm reading this and I see nothing about construction in the certificate statements. It just says design.

Jim Scarbrough – it says streets.

Chair – it says has been designed and guaranteed then installation guarantee. You keep saying construction, I just.....

Mike Aldridge – it does not mention construction from what I'm reading.

Jim Scarbrough – OK, design.

Mike Aldridge – design. I feel like common language is a significant difference between design and construction.

Jim Scarbrough – alright. Can I have a minute to talk to with....?

Chair – sure.

Jim Scarbrough – so, is it fair to say that Mr. Moody is certifying that the streets meet with the Town's design standards at the time?

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Kassie Watts – again, I don't know what Mr. Moody is certifying.

Jim Scarbrough – alright. So that is going to be your testimony regarding all these plats?

Kassie Watts – you are asking me about the director of engineering's certification. The more appropriate person to ask would be the Town engineer.

Jim Scarbrough – I'm asking you.

Kassie Watts – I'm telling you that I don't know.

Jim Scarbrough – let's let the record show she refuses to answer the question.

Kassie Watts – that is not what I said.

Anthony Fox – she answered the question. You may not like but that's the answer.

Chair – she is answering it, she does not know. That is an engineer that signed that. I'm not sure her background is in engineering.

Jim Scarbrough – she charged us with design violations.

Chair – according to what I'm reading in the violations, it is a violation of the Town Ordinance.

Jim Scarbrough – Mr. Moody is saying that the design was complied with the Town Ordinance.

Chair – He is saying design manner and according to specifications and standards of Concord is what it says there.

Jim Scarbrough – it says Concord.

Chair – yes. It says Concord.

Jim Scarbrough – that is water and sewer then.

Chair – probably.

Jim Scarbrough – the one I'm looking at includes the word streets.

Chair – it does.

Jim Scarbrough – now, tab #17. Did you testify this was your citation?

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Kassie Watts – no.

Jim Scarbrough – no. Look at page 3 of tab 17 where you refer to a bond. Your specifying to the contents of the bond the Town wants, is that right, auto-renewing?

Kassie Watts – that is what the Ordinance requires.

Jim Scarbrough – your requiring the amount be between 125 and 150%. Are you talking about repairing these streets, maintain the work to be done?

Kassie Watts – it is whatever the estimate is. You have to put up a contingency. So you have to put up 100% of the cost and then a 25% or 50% contingency. I'm not sure, Richard McMillan and I wrote this letter together.

Jim Scarbrough – that is what all this work you want done is to repair the streets or re-do them or whatever. What's it for, the bond? What work?

Kassie Watts – it is to cover the cost of the improvements to the roads.

Jim Scarbrough – OK, the road that is already there. In other words, to bring it up to where you want. I'm going to hand you a State Statute here, I'm sorry I've only got one copy. I'll show it to your attorney.

Anthony Fox – I know what it is.

Jim Scarbrough – he is familiar with it. This is General Statute 160A-372, Contents and Requirements of Ordinance. I'm going to show you the last provision there which is g#4 and ask you to read that.

Kassie Watts – the performance guarantee shall only be used for completion of required improvements and not for repairs or maintenance after completion.

Jim Scarbrough – are you familiar with that statute?

Kassie Watts – yes.

Jim Scarbrough – your bond is for repairs, is that correct?

Kassie Watts – it says performance guarantee shall only be used for completion of the required improvements, these required improvements have not been completed. The roads have not been completed. They don't have the final top coat of asphalt so they are not finished, they are not complete.

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Jim Scarbrough – but I thought you were talking about all the potholes and all the cracks in the curb and the checklist items.

Kassie Watts – there is a punch list items.

Jim Scarbrough – and your bond would have covered that?

Kassie Watts – the bond would have covered whatever the engineer went out there and said the estimate for the roads should cover. Then our engineer would either concur with that or come up with a different estimate and that is what the bond would be. Would be based on those two estimates between Mr. Grimmer’s engineer and the Town engineer.

Jim Scarbrough – it is your belief your bond requirement would not violate the statute? Is that your testimony?

Kassie Watts – the statute says the performance guarantee shall only be used for completion of the required improvements. The bond is posted for the required improvements. So how would that be a violation of State statute?

Jim Scarbrough – completion would be just the top coat.

Anthony Fox – that is argumentative.

Kassie Watts – required improvements.

Jim Scarbrough – I don’t know what you mean by required improvements.

Kassie Watts – I don’t know what you mean by how it doesn’t meet statute.

Jim Scarbrough – bottom of page 2 of this statute, g#3, read that first sentence.

Kassie Watts – the amount of the performance guarantee shall not exceed 125% of the reasonably estimated cost of completion at the time the performance guarantee is issued. Any extension of the performance guarantee necessary to complete required improvements shall not exceed 125% of the reasonably estimated cost of completion of the remaining incomplete improvements still outstanding at the time the extension is obtained.

Jim Scarbrough – so it cannot be 150% as stated in your letter, is that correct?

Anthony Fox – objection. For the Board to decide.

Jim Scarbrough – I’m just asking if her letter is correct.

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Kassie Watts – as I told you must a minute ago, Mr. Richard McMillan and I wrote this letter together so the 150 is not ringing a bell in my head but I'm sure it came from somewhere.

Jim Scarbrough – OK, so maybe you did not put it in there? Now at the time these streets were constructed, under the prior Ordinance, I'm talking about the Ordinances prior to the MDO, is it not the case that those Ordinances prohibited a top coat until a certain number of lots were sold?

Kassie Watts – do you have that language?

Jim Scarbrough – no. I'm asking you.

Kassie Watts – not aware of that in the old one but I'm trying to find that section. I'll look. I don't see anything that refers to that, Mr. Scarbrough.

Jim Scarbrough – so your answer would be you don't know?

Kassie Watts – I don't see anything in there.

Jim Scarbrough – Alright.

Kassie Watts – If you have that language that you would like to show me, I'd be happy to look at it if you are aware of it.

Jim Scarbrough – Mr. Flowe is.

Kassie Watts – OK. Does Mr. Flowe know where it is at?

Jim Scarbrough – yes.

Kassie Watts – if you could give me a page number I could look it up.

Chair – may I see a copy of the State statute you gave her, please sir?

Jim Scarbrough – let me ask you this. Do you want to continue looking for that?

Kassie Watts – I'm just trying to make sure I'm not overlooking it. I don't see it.

Jim Scarbrough – you have testified that Tucker Chase LLC was the owner and developer, is that correct?

Kassie Watts – they were, yes, the developer.

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Jim Scarbrough – was the owner and developer, Tucker Chase LLC.

Kassie Watts – yeah.

Jim Scarbrough – is it the case then that Tucker Chase LLC would be responsible for the roads?
Is that your conclusion?

Kassie Watts – yes.

Jim Scarbrough – OK. Your Notice of Violation has Tucker Chase LLC on there and you also say Mr. Harry Grimmer. Are you referring to him as manager of Tucker Chase LLC?

Kassie Watts – he is the manager of Tucker Chase LLC.

Recorder stopped recording.

Chair Page – we will recess this hearing until February 28, 2017 at 7 PM here at Town Hall.

Darrell Page, Chair Midland Board of Adjustment

Hilda Keeney, Planning & Zoning Clerk to the Board