

The Muscatine County Board of Adjustment met in the Board of Supervisors Office on Friday, November 13, 2015, with Vice Chairperson Bill Tharp and members, Carol Schlueter, Martha Peterson, and Mike Birkinbine present, Tom Harper was absent. Eric S. Furnas, Planning & Zoning Administrator and Dixie Seitz, Office Administrator was also in attendance.

Others present for this hearing: Mark Brown.

Bill Tharp: Well it's 9:30 a.m. on November 13, 2015, and this is the open meeting of the Muscatine County Board of Adjustment. The Zoning Board of Adjustment is a quasi-judicial board appointed by the Muscatine County Board of Supervisors. The Board's purpose is to interpret the Zoning Ordinance and to allow certain limited exceptions and variances where special conditions or hardships exist. We are an independent volunteer board of citizens and not part of the county administration. There are five members on the Board. State law requires three affirmative votes to approve any appeal under consideration, no matter how many members are present. So if fewer than five members are present, which for the record four members are present today, the appellant has the opportunity to have the appeal delayed until the next meeting. This request must be made prior to Board deliberation of that case. As a Board of the County, we welcome all testimony, although you seem to be the only person here. We make our decision based on the facts and evidence under county code, presented in open meeting. We ask that if you wish to speak, please come to the podium and give your name and address. So to begin we need to approve the minutes?

Dixie Seitz: Yes.

Bill Tharp: Okay, we have received the minutes of the last meeting. Has everyone had an opportunity to review the minutes of the last meeting? If so, is there a motion to approve the minutes as written or are there any amendments, deletions or modifications? Is there a motion to approve the minutes?

Carol Schlueter: I will make a motion to approve the minutes.

Mike Birkinbine: I'll second.

Bill Tharp: All in favor say Aye (4) Opposed (0) Absent (Harper). The motion carries and the minutes shall be of record and are adopted. Eric can you please read the request?

Eric Furnas: Case #15-11-01. An application has been filed by Brown Brothers LLC, Record Owners and Mark Brown, Proposed Builder. This property is located in Moscow Township, North of 122<sup>nd</sup> Street in the NE<sup>1</sup>/<sub>4</sub> of Sec. 14-T78N-R2W, containing approximately 74 acres. This request, if approved, would allow the Zoning Administrator to issue a Special Use Permit in order for Mark Brown to split off at least one acre and build a rural residence on this property after a Restrictive Covenant had been signed in April, 2015.

Bill Tharp: Okay, has there been any correspondence at all?

Eric Furnas: No.

Bill Tharp: Would the applicant like to state their name and tell the board about the request?

Mark Brown: Sure, my name is Mark Brown. What I was wanting to do is, I farm this farm, my parents gave it to us just this year. I have livestock and cattle and I'd like to build a home out there so that I can be around and close to them. When they are calving in the winter I would like to be close to them. This is a place in the pasture where there was a house within the last 20

years that was abandoned and they tore it down, but the foundation is still there. That is where I would like to build a home.

Bill Tharp: Is there any discussion among the board?

Mike Birkinbine: So there was a Restrictive Covenant just put on it in 2015?

Mark Brown: Yes.

Martha Peterson: Who put that on?

Eric Furnas: Mr. Brown's parents in 2015 wished to split off their existing house and gift the rest of the farm ground to him and his brother that formed an LLC. It is required by our ordinance in A-1 zoning district when an existing farm house is split off from the contiguous active farmland than a Restrictive Covenant is required on the rest of the property. That is kind of what creates this quagmire that I think is in front of you considering this Special Use Permit. The issues that I want to bring to your attention is that later today the Zoning Commission will actually be considering a possible amendment to that section of the ordinance that requires a restrictive use. Obviously I cannot predict how they would recommend that the ordinance be amended. But one of the considerations is actually removing the requirement for a Restrictive Covenant when one splits off an existing farm house. So we actually have two processes, one is a Special Use Permit like you are considering today and the other is a farm exemption of a person that is actually involved in the farming. Other than that there really isn't any other way for a person to build a house on A-1 zoning. They are going to be taking a look at that ordinance.

Bill Tharp: And so that we have it of record we only have four members of our board present and you need three positive votes in your favor to have it pass today. Would you like to go forward knowing that there are only four here instead of five or would you like to wait for the next meeting where there may be five members present? I can't guarantee that there will be five members of the board there at that time either.

Mark Brown: That's fine you can go ahead and vote now.

Carol Schlueter: So if it's a tie vote, it's a no vote, correct?

Bill Tharp: That's correct you will need three positive votes.

Mike Birkinbine: So what is the impact for a decision from us if it gets changed this afternoon?

Eric Furnas: That's a good question. I don't ...

Mike Birkinbine: Let me say it this way, if we denied this today and it was removed this afternoon, what's the impact for the person?

Eric Furnas: Well nothing would happen this afternoon. The Zoning Commission is just making a recommendation to the Board of Supervisors, if the board went along with the changes than it would become law after three readings. However, it is my understanding with researching the law that it doesn't necessarily release existing properties from Restrictive Covenants that have been signed and recorded. It would just be from this point forward if that's what they decide to do.

Bill Tharp: But it would be a factor in us making further determinations, just like if someone was convicted of a crime and they were sentenced for it and then

later on we had that person come up for parole and then changed it so it was no longer a crime, we would pretty quickly parole them.

Mike Birkinbine: So my point would be if we denied it and it was changed, they could come back again...

Bill Tharp: And we'd approve it.

Carol Schlueter: Would they have to come back again?

Martha Peterson: Yeah, why would they?

Bill Tharp: Well it sounds like it.

Eric Furnas: Well if you denied it, he would have to come back again. But you gave the authority to release it with conditions on a limited portion of the ground where he wishes to build a house under a Special Use Permit now, I don't believe that he would have to.

Martha Peterson: You muttered at the end of your statement and I didn't really hear that.

Eric Furnas: Sorry, I have a cold and if I quit taking cough drops I am going to be coughing all the way through this meeting.

Martha Peterson: Okay, so if he is in agricultural and there's no problem, if he's a farmer he can build?

Eric Furnas: From what I understand he has not applied for a farm exemption. He does appear to be a candidate for farm exemption, however, he is still up against a similar challenge of having to split off a parcel. He has to split off a parcel for financing purposes that is pretty typical. If he splits off that portion of the property, that property itself is not actively part of the farm. There is kind of a quandary there. I think there has been options in the past we've allowed splits that are simply for financing purposes, where we recognize that it is part of the farm. I think in my staff report where you see that the county attorney has recommended against the release of the covenant this quick, I think his concern was setting a precedent. That basically it is eroding the power and the authority of the Restrictive Covenant if we are turning them over this fast. However, at that time we hadn't had much discussion about this ordinance amendment that the Zoning Commission will be exploring. The Board of Adjustment has in the past released Restrictive Covenants for purposes of allowing an additional dwelling.

Martha Peterson: So this covenant is automatic?

Bill Tharp: Yeah, yeah it is.

Martha Peterson: It doesn't bring any considerations or if, ands and buts?

Bill Tharp: No. Some guy goes up there and they file for something to be done up at the zoning office, they require them to have that Restrictive Covenant every single time. It doesn't take into account anything else. It's every time that it has to be done, right?

Eric Furnas: Correct.

Carol Schlueter: Okay, what is the CSR of that ground where he wants to build?

Martha Peterson: It's 50.

Carol Schlueter: Okay, I didn't see that. And it's not in the flood plain either?

Eric Furnas: There is little portions that are possible in the flood plain, but we have worked with something like this that we actually have to approve the footprint and actual location.

Carol Schlueter: So why we are doing this is so that he can split off so that he can get financing for the house?

Eric Furnas: Well he has to have permission to build regardless of financing conditions.

Carol Schlueter: Okay.

Bill Tharp: How far away would the house be from the next nearest neighbor?

Eric Furnas: About 2,600 feet and that would be his parents. In looking over the application it appears that were the Restrictive Covenant not in place, this would be a perfectly good candidate for a rural residence and would normally be approved. There are not any of those issues that you normally wrestle with, such as separation distance, CSR rating, etc. It meets all of the recommended criteria for a rural residence. It's just this Restrictive Covenant issue that you have to wrestle with.

Bill Tharp: I am assuming that you are doing it just to protect yourself, along with the financing?

Mark Brown: As far as wanting to split it?

Bill Tharp: Yeah to split the two acres off.

Mark Brown: Well the corporation is me and my brother, so with my wife and me being married...

Bill Tharp: Is it going to be titled in your name or is it going to be titled in the LLC's name?

Mark Brown: Oh it will have to be titled in my name.

Bill Tharp: Okay.

Martha Peterson: And this is okay with your brother?

Mark Brown: Yes. It's like I said, it's just one acre and the cows run it but there is just an old foundation sitting there now, so there's really not much there.

Mike Birkinbine: But I think that's the point, if you weren't going to split if off, I am assuming ...

Eric Furnas: He would still have to come before you to ask that the Restrictive Covenant be dropped.

Carol Schlueter: So he would still have to come to ask for that?

Eric Furnas: Yeah, our code is a little unclear about who can ... who is the appropriate zoning authority. For some counties it is the Zoning Administrator. My personal opinion is that it should be brought before the Board of Adjustment. So even if he did not need to split off an acre and he would receive a farm exemption, there still is the Restrictive Covenant that he needs to deal with.

Carol Schlueter: Would it be to his advantage to table this until after the Zoning Commission meets?

Eric Furnas: Well I don't know.

Martha Peterson: Well you don't know how they are going to decide and you don't know how the Board of Supervisors will decide.

Mike Birkinbine: It would cost him extra money to come back before us.

Carol Schlueter: No, not if we table it.

Mike Birkinbine: No, I am saying if we make a decision today to deny it and then something changes and he wants to come back.

Carol Schlueter: Yes, than he would but not if we table it.

Mike Birkinbine: I understand.

Eric Furnas: Also if you deny it, he would have to wait six months to reapply.

Carol Schlueter: If we turn it down today.

Martha Peterson: But if the covenant weren't there, it is probably something that we would approve.

Bill Tharp: Yeah it sounds like.

Carol Schlueter: Yeah.

Bill Tharp: Yeah, it meets the CSR, the distances and everything. I think that it is unique because he is someone that is planning to farm the land adjoining the property. It's not as if it's someone else that is trying to come in and just build a house out in the middle of the country. I think that is unique. It makes it different from other Restrictive Covenants and what they are trying to prevent. They are trying to prevent people from just populating the country and not being on the land. I think being on the land is part of the idea of zoning. People need to be around their animals. I think I heard you testify that you have livestock that you'd like to be able to be around when it's calving season?

Mark Brown: Yeah.

Bill Tharp: Yeah, you know, I would find that these are special reasons. If he were just coming from the city and were trying to build a house out in the country just so that they could live out in the country, that would make it different for me. Would you like to table it or have us make a decision?

Eric Furnas: Just to throw another option out there, I think it would be within your authority to release the Restrictive Covenant and encourage him to apply for a farm exemption, if that parallels with your line of thinking Bill. Like I said, from what I gather I think he would be a candidate for farm exemption. And it would possibly not set a precedence of releasing for a Special Use Permit. It would not cost him anything the farm exemption application does not cost anything. He would just need to provide the information that he is farming the ground and he earns an income on this property. We review it. But that's just an option I wanted to throw out there.

Carol Schlueter: So you make that decision then?

Eric Furnas: The farm exemptions just come before me, yeah. Then if there is any denial of them or and they want to appeal, it would have to come before the Board of Adjustment.

Martha Peterson: What do you think about that Mark?

Mark Brown: It's whatever you guys think.

Bill Tharp: Well is there any other discussion or would you like to make a motion?

Carol Schlueter: I just... like I said, since it was just done in April, 2015, this Restrictive Covenant, I just don't know...

Mike Birkinbine: Well to me that doesn't matter. It just happens to be the time that his folks split that two acres off, right? You said that it automatically goes into a Restrictive Covenant.

Eric Furnas: Well it doesn't automatically... it is required in order to split off. Yeah, there is no choice. If you want to split off a dwelling, it is required by the county before it will allow the recording of that split.

Mike Birkinbine: Yeah, but I mean... it could have been in 1999 that it was done.

Eric Furnas: Correct.

Mike Birkinbine: It's timing on his folk's part probably for their sons to get the farm.

Carol Schlueter: They couldn't have done anything differently when they split it off originally?

Eric Furnas: No, not under the current ordinance.

Martha Peterson: And there was a house there before.

Dixie Seitz: How long have your parents lived there?

Mark Brown: Well they got married in 1978 and I think they've been there since then. I remember the house being there where I want to build. It was abandoned and no one lived there. So kids kept getting into it and they just burned it down and pushed it in. Just the foundation is sitting there still.

Carol Schlueter: Time wise about building a house, what are you thinking?

Mark Brown: I have no idea. I just wanted to jump through this first.

Carol Schlueter: So you may not build for five, six or seven years?

Mark Brown: Well I'd like to get it done within the next year, year and a half.

Bill Tharp: What would a motion look like that would be stated per what you discussed Mr. Furnas?

Eric Furnas: Well you have the option of approving the proposal subject to conditions. So someone could simply make the motion to release the Restrictive Covenants but deny the Special Use Permit and encourage the applicant to apply for farm exemption. Make it a matter of record that you understand that he would be illegible for farm exemption and the purpose would be to avoid a precedence of continually releasing Restrictive Covenants for Special Use Permits. Just divide the request in two parts and release the

covenant and deny the Special Use Permit given that he is likely eligible for farm exemption.

Bill Tharp: Is there any other discussion?

Carol Schlueter: So we can do that even though this was sent out as a Special Use Permit?

Eric Furnas: Yeah, you have the authority to give approval and make conditions. The Restrictive Covenant just has to be dropped by someone, whether it be this board or myself. I don't feel that I should, I think it is up to this board.

Carol Schlueter: And it's your call than?

Eric Furnas: Right, the farm exemption would be.

Mike Birkinbine: So assuming there are no conditions that you can put on it, like they can't sell the property off or anything like that, if the farming operation discontinues and people go their separation ways...

Bill Tharp: You can't do that.

Eric Furnas: You mean, can he still build a house?

Mike Birkinbine: Uh huh.

Eric Furnas: Well if it is split off on its own there is nothing that we can do to prevent the sale.

Dixie Seitz: So would the farm exemption being taken off of the entire farm or just this portion where he wanted to build?

Eric Furnas: Well I guess it would be my understanding that we'd be looking at the portion that he needs to build on. The rest of the contiguous farmland would be living under the Restrictive Covenant.

Carol Schlueter: So like you said, they could sell this house off?

Eric Furnas: Yeah, and that happens now. If the farmer builds under a farm exemption and he decides to sell it, he can.

Carol Schlueter: Yeah, I agree.

Eric Furnas: That's one of the parts that the Zoning Commission will be examining later today.

Carol Schlueter: So you farm with your brother, right?

Mark Brown: Yep.

Carol Schlueter: Just the one brother?

Mark Brown: Yep.

Carol Schlueter: Is it ever going to be down the road that he wants to build a house also on this ground?

Mark Brown: I wouldn't think so. He's not married or has any kids.

Carol Schlueter: Okay I have a comment about the county attorney that has advised against the release of the Restrictive Covenant. Why is that?

Eric Furnas: I think he was against setting the precedence of routinely releasing Restrictive Covenants in cases with Special Use Permits. I believe that he thinks this would be too soon. He might think that it erodes the authority by routinely dismissing them. I don't know how the court would rule on it.

Bill Tharp: The county attorney is not a real estate attorney, I think it's important to note. He deals with criminal cases. No offense given, it's just a statement of fact.

Carol Schlueter: Okay, so where he wants to build there is no problem with the flood plain?

Eric Furnas: There is plenty of buildable space on this property that is not in the flood plain.

Carol Schlueter: Okay and it is pasture ground, right?

Mark Brown: Right.

Carol Schlueter: It's not tillable ground?

Mark Brown: No, it will never be farmed.

Mike Birkinbine: So I will make a motion if we are ready to go.

Bill Tharp: Okay, I agree.

Mike Birkinbine: And I don't know if it's going to sound right. I will make a motion to approve releasing the Restrictive Covenant so that Mr. Brown can apply for an ag exemption. Does that make sense?

Bill Tharp: So to deny the Special Use Permit?

Mike Birkinbine: I guess that would be part of it, right?

Eric Furnas: Yeah, you should probably clarify that.

Mike Birkinbine: Yes, to deny the Special Use Permit.

Bill Tharp: Is there a second to that motion?

Martha Peterson: Do we have to split the motion up into separate votes, the Special Use Permit and the covenant?

Eric Furnas: Do you mean split the issue?

Martha Peterson: Yeah.

Eric Furnas: Yeah, the motion isn't being split, the motion is splitting up the request that is before you but it's a whole motion. No, it's within your authority if someone were to make the motion to grant both the release and the Special Use Permit or if you are not in favor of the motion to vote against as it was presented, you can make a motion to amend that motion or it could die for lack of a second.

Bill Tharp: Is there a second? Can I second a motion?

Eric Furnas: I believe that you can.

Bill Tharp: I will second the motion. All in favor of the motion please say Aye (2) Opposed (2) Absent (Harper). It's a tie vote, so that motion is not approved. Is there any other motion that anyone would like to make?

Martha Peterson: I would make a motion to drop the Restrictive Covenant and to approve the Special Use Permit in order for Mr. Brown to build a one family dwelling on this property for himself.

Bill Tharp: Is there a second?

Dixie Seitz: So you are saying to drop the covenant just on the property that he wishes to build the residence, not on the entire property?

Martha Peterson: Yes, to enforce the covenant on the remainder of the property and to approve the Special Use Permit so that Mr. Brown can build his house on that property where he showed us, on that one acre.

Bill Tharp: Is there a second?

Mike Birkinbine: I'll second it.

Bill Tharp: All in favor say Aye (3) Opposed (1) Absent (Harper). The motion is 3-1, and so the motion is declared approved. Any construction or use allowed by the board must begin within six months from the date of the decision.

Dixie Seitz: It says six months?

Bill Tharp: That's what it says here. Any construction or use allowed by this Board must begin within six months from the date of this decision, or the permission will be void. Any person desiring to appeal this decision to District Court may do so within 30 days after filing this decision. Are there any other matters before the board? If not, the meeting is adjourned.

MUSCATINE COUNTY BOARD OF ADJUSTMENT  
By Eric S. Furnas, Planning & Zoning Administrator