

September 2, 2015

The Ellettsville, Indiana Plan Commission met in regular session on Wednesday, September 2, 2015, in the Fire Department Training and Conference Room located at 5080 West State Road 46. Terry Baker called the meeting to order at 10:00 a.m. Don Calvert led the Pledge of Allegiance.

Roll Call: Members present were: Terry Baker, President; Russ Ryle, Vice President; Don Calvert, Pat Wesolowski and Sandra Hash. David Drake and Scott Thomas were absent. Kevin Tolloty, Planning Director; Rick Coppock, Bynum Fanyo and Associates, Town Engineer and Darla Brown, Town Attorney, were also present.

Approval of the Minutes

Terry Baker entertained a motion for approval of the minutes for the regular meeting on August 6, 2015. Pat Wesolowski so moved. Russ Ryle seconded. Motion carried.

Monthly Conflict of Interest Statement

Rick Coppock is employed by Bynum Fanyo and Associates who provides engineering services for the Town, they have been working with Richland Convenience Store Partners, LLC to develop the site and they also did the plat amendment included in the meeting packet.

Old Business

Petition for Final Plat Amendment, 4723 W. State Road 46, Bloomington; Petitioner: Richland Convenience Store Partners, LLC; Case No. PC 2015-07

The parties are represented as follows:

Andrew Sheff, attorney for Petitioner, Richland Convenience Store Partners, LLC ("Richland").
William Beggs, attorney for Joseph V. DeSpirito, O.D., Hoosier Eye Doctor ("Dr. DeSpirito").
Darla Brown, attorney for the Town of Ellettsville ("Town").

Kevin Tolloty, Planning Director, explained this is a request to amend the final plat for the purpose of moving a utility easement that is currently located at 4723 West State Road 46.

Petitioner, Tom Orman, One of the owners of Richland Convenience Store Partners, LLC, thanked the Plan Commission for meeting on this date, outside of their usual business. He is seeking a plat amendment to relocate a 15 foot utility easement. They plan to upgrade the site with a new building which would partially cover the easement as it is currently located. When they started with the engineer drawings they found a 15 foot portion where Smithville Telephone ("Smithville") fiber optic cable transects the easement. There are no actual utilities located in the easement. A portion of a private sewer that runs from the building on Lot 2 to a 12 inch Eastern Richland Sewer Corporation ("ERSC") sewer main east of their property does lie within the easement. They're asking to relocate the private sewer line, at their expense, and relocate the 15 foot utility easement south of its current location. Doing so will allow them to develop the property as planned without affecting access to Lot 2 across the property to the sewer main and without having to relocate any existing utility lines. They're not asking for them to vacate the utility easement, only to relocate it within our property at our expense. The work will be on their

lot without disruption to Lot 2's business in any way, shape or form. They're not talking about buildings but only the purpose of this meeting which is to move a utility easement and nothing else. From a safety standpoint, they will be able to set their building back which will allow proper stacking of vehicles pulling onto State Road 46. When this plat was created years ago, Ellettsville had a two lane highway. Today, it is a four lane highway and things have changed. This is a nice commercial site and he thinks Ellettsville will be proud of it. It will benefit the Town from a tax base. They now have an eyesore that everybody drives by and it is right in the middle of the heart of Town. He has support from their neighbors including letters of support from Richland Plaza, who owns the property across the street from them, and Smithville stating their approval of relocating the easement and Walter Reska, owner of Jiffy Treet, is present. They had a utility locate done and there are no utilities other than Smithville in the easement. They have a letter from. He thinks it is the best thing for the Town and everyone in it. The current image makes a bad situation.

Pat Wesolowski asked if Smithville agrees. Mr. Orman stated there's a letter from Smithville included in their packet. They're not talking about buildings today. The plat needs approved so they can move forward with the normal process of stacking, safety, building codes and things of that nature. Today's purpose is just the utility easement. Mr. Wesolowski asked Ms. Brown if the Plan Commission has the authority to move an easement. Ms. Brown replied they do, and Mr. Beggs will address some of these issues when he speaks. There is a difference between a private restrictive covenant which is a covenant between the landowners with regard to how the property will be used and a covenant or a commitment listed in a plat. The latter is something the Plan Commission and/or the Board of Zoning Appeals ("BZA") definitely has authority over. In fact, when she and Mr. Beggs started talking about this case a couple of months ago, there was a case he cited, *Pulos vs. James*, 261 Ind. 279 (1973) and in that case the court discussed the difference between private restrictive covenants and commitments or the types of things plan commissions have control over. In their opinion the Court said, *"The mere fact that restrictions that were issued or inscribed upon the plat does not make them subject to commission approval. They are a matter of private concern and not for the public's use and benefit as are streets and utility easements. These are frequently inscribed upon plats but this is a matter of convenience only."* Since that case there have been some changes to the statute. She thinks the language of this case is helpful in pointing out the difference between a restrictive covenant which says, for example, "in this subdivision they can only use their property for residential use and not business versus where do they put the utility easements which is a matter of convenience." Mr. Orman stated they're simply talking about moving something 15' or 20'. They're not talking about recreating the wheel. This is not a major deal.

Andrew Sheff anticipated their question on authority. He received, this date, Mr. Beggs' letter regarding the concerns of his client. He thinks a lot of the arguments are putting the cart before the horse. They're talking about access agreements and traffic safety. What they're talking about is moving the easement. Call it an amendment, a partial vacation or whatever they want. This is what they are here to do and this is what they have the power to do. Looking at the Indiana statute, I.C. 36-7-4-11(B), it says, *"In a case in which not all the owners of land in a plot are in agreement regarding the proposed vacation this section provides an alternate procedure under which one or more owners of land in the plat may file with the plan commission, a petition to vacate all or only that part of the plat that pertains to the land owned by the petitioner."* This statute actually addresses exactly what

they are here to do. They are moving an easement solely on their client's land. It does not change the nature of the easement, the ability of Lot 2 to use the lateral and the movement of this has a *de minimis* effect on the other properties. As to the private restrictive covenant he agrees and thinks the language in *Pulos* is important in that it does differentiate between private restrictive covenants and utility easements. The statute, and the Town's subdivision ordinance, requires on the preliminary plat that utility easements must be shown. This is not something that is a mere convenience as a restrictive covenant but it is a requirement. On a subsequent subsection in the Town's ordinance they refer to private restrictive covenants. If they were the same as utility easements it wouldn't be necessary to have them listed in different places. He reiterates what Ms. Brown said in that the Commission has authority and it is proper in this case to proceed and amend the plat.

Rick Coppock, Bynum Fanyo and Associates, explained one thing in the letter came up about the floodplain line not being shown on the amended plat. It is shown on the amended plat but it is not labeled. The amended plat is exactly the same as the original and the only change is the location of the easement. He outlined the floodplain on the plat on the overhead projector. They will add the label. Mr. Wesolowski asked if the easement is moved will it be in the floodplain. Mr. Coppock answered yes. Ms. Brown asked if the sewer line it is hooking onto is in the floodplain. Mr. Coppock replied yes. Ms. Brown asked if the sewer line is on the west end of the property. Mr. Coppock answered yes. Ms. Brown asked if ERSC's sewer line that the lateral is hooking into is on the west end. Mr. Coppock stated there is a sewer line on the west end that runs north and south and then back to the west. Mr. Orman stated they are not going to build in the floodplain. Mr. Wesolowski had asked "*Does the new relocation put it in a floodplain?*" The sewer, currently, goes under the creek so water is not an issue. The second point is approximately 200' across the back of the property where Dr. DeSpirito has no cleanouts. If Dr. DeSpirito would have a problem he is going to have to dig up the whole back yard of Richland's property. They're actually going to update his system and put in proper cleanouts. The reason it didn't get marked all the way to the end is because they couldn't do it and he doesn't have the proper cleanouts. He wants this to be part of their consideration.

Joseph DeSpirito, O.D., Hoosier Eye Doctor, distributed handouts to the Plan Commission. He also thinks it is a "no brainer". They are not just relocating an easement and this is not what it is about. It is about changes in the future. Information that hasn't been submitted they'll see in the drawings. The sewer line is their easement and they believe it to be that with the transgresses through the property. Their access will change. They're not just changing an easement. The easement is there from 1995 to control a lot, growth, traffic and ingress and egress. The access will change by moving the easement. Maybe not to the easement but the traffic it creates totally on these lots. They are relocating an easement, a designated easement, and the plat says nothing is to be built on this location. It is notated it is not to be built on. It is also in a Federal Emergency Management Agency ("FEMA") floodplain. Again, they're not just moving the easement. It was a two lane highway but it turned into a four lane highway as the 1995 Commission was dividing these plats. They mentioned when they spoke about changing the easement it will not change accessibility. It will change it totally. Maybe not the sewer but the traffic between Lots 1 and 2. The surveyor did say the easement was moved into the designated floodplain and it also states no construction on the development plat. Mr. Orman spoke the last time about them not having the proper cleanouts in the sewer. That was the only thing Rusty Turner did not do because it was in good health. The previous people did not do the proper clean outs so he agrees with that. However, that can be done, so it is not a reason to

move their easement. When they were trying to photograph the underneath they could only go 100 feet. Why? Because there was no cleanouts. It is documented to show their sewer line was within the easement. However, as they tried to progress through the toilets and the sewer lines at the building located on Lot 1 they couldn't assess it either because the sewer lines were made incorrectly. The cameras couldn't get in them. So, it is not just them that was developed. The plumber at the time probably did both wrong.

He thanked the Plan Commission for letting him speak. Hoosier Eye Doctor has been in business approximately ten years near College Mall and their second location at 4719 West State Road 46 has operated three years on Lot 2 of Hukill Subdivision. Taking a step back . . . It is 1996, Ellettsville is expanding, road construction on the 46 overlay and projects are in work to control traffic and speed. The Monroe County Plan Commission is meeting for the second time to finalize the restriction on the Hukill Subdivision dividing two simple lots. There were deed restrictions on the lot at the time. The deed restrictions applied to Lot 1 and when they were divided they were applied to Lot 2. At the time they purchased the property the deed restrictions on both properties, Hukill 1 and 2 were: *"No grocery store, no package liquor store, no drugstore, no delicatessen, no bakery, financial institution, mortgage company, banking, finance company, credit union, savings, automatic tellers or any business or financial services shall be permitted on this lot."* This is what the deed restrictions were at the time the council was voting to divide the lots. It was also transferred to Lot 2 and it carried. They decided to approve the subdivision of two lots being split with five conditions, two of which are the most important. The five conditions are in the notes he supplied to the Plan Commission. Condition 3 states the direct access to State Road 46 is *"prohibited for Lot 2"*. It also states Condition [4], that floodplain boundaries on both lots shall be shown. The final plat is to be designated as a drainage easement to prevent the development of the area. On May 7, 2015, at the annexation hearing it stated in the minutes they will be adding fill dirt on the back of the lot and throughout the property. It is in direct conflict with what is on the deeds and the plats. Before deciding to purchase the property he, Sally and Dr. Tondle spent months in Ellettsville. They were one of the first to start the transition from Bloomington-Ellettsville proper and transferred their property here because they wanted to be great property owners in conjunction with Ellettsville. They observed the property for months and communicated with the prior property owners, the foreclosing point attorney on the piece of property that had been vacant for seven years, real estate agents and the title company.

Before purchasing the property they also talked to the owners of the gas station on Lot 1. They relied on the deed restrictions, which he had read, to protect the property. They're just not moving an easement today. There were also the easement restrictions of the designated areas of the floodplain. He was also informed of these restrictions, that he could only have a gas station next door by them and that they could only sell limited items due to the deed, covenants and restrictions. They could never expand because of the floodplains and because of the drainage easements. Also, their contractor, Rusty Turner, reached out at the time to Monroe County administrators who visited the property. There were lots of concerns. They came out and advised them of all the restrictions on the property used to create a subdivision. It was clear there could be no expansion next door whatsoever because of the floodplain, FEMA rules and everything there. They were allowed very limited expansion and it was approved. After they set there for months they had two concerns: the four lane highway was the traffic and the traffic generated from the gas station. Next door was closed, the weeds were 10 feet tall and there was no activity. The traffic backed up from the Union Valley Road intersection to Jiffy Treet during normal

times; morning, afternoon and evening which are typical rush hour times and this was a concern. On September 1, 2015, they walked down to Jiffy Treet and took a photograph during rush hour, with no construction or road crews, and traffic was backed up past them and accessibility for safety was really difficult. The second concern was traffic from the gas station. People may remember driving by the gas station or waiting in line for gas and traffic was sprawled out onto State Road 46. Traffic was stopped and others were flying by trying to get in. The pumps are created too close to the road, they're parallel and not perpendicular so traffic sets and waits their turn. Another concern was the shared driveway which is a lot of the reasons they're at the meeting because they're not just moving an easement. How would patients be able to get in and out of the access? Would there be a traffic problem? How would dilated patients be able to get out safely? Since most of the traffic, at this time, enter the gas station from the west and transverse to the east the shared driveway is treated like a double exit. There are no directional markings. They would set at the entrance and watch two cars facing them and not being able to get in.

As noted in the 1996 Monroe County Plan Commission minutes Swifty (former owner of said property) stated in the minutes, "*We do not want a shared driveway.*" It was even mentioned that a second curb cut would be placed on the northwest corner of Lot 2, Hoosier Eye Doctor's, current location. However, through the Indiana Department of Transportation ("INDOT") and all of the rulings it was only allowed to be placed on the northeast corner of Lot 1, a shared driveway. Swifty said they did not want a shared driveway because they wanted to sell the property. They also decided to purchase the property because they would rely on the aforementioned deed restrictions and wording on the final plat. They relied on the utility and drainage easements and setback lines which said "no construction may be erected or maintained". Even the sewer line is construction. In 1996, they wanted to ensure that the entrance, exit, growth and safety would not change. The owners of the property were aware of these restrictions on the property that were placed to control ingress/egress, growth, safety and traffic.

Last year, the owners filed a lawsuit and a majority of the deed restrictions have been lifted off of the property. However, for the subdivision, no deed restrictions were lifted, so, they're restricted. Now, they bring an amendment to the board to just move an easement. He reiterated it is not just moving an easement. They're wanting to relocate their easement in a FEMA designated floodplain. They relied on these restrictions to control their property so there would be no detrimental effect for future development on them. Months ago, they met with the owners who told them the sewer lines and clean outs are in all of the wrong places and they pointed to everything that was incorrect. They told him they're going to help them by spending \$6,500 to relocate the sewer lines at no charge to him. They also told him they're a busy optical store with parking problems. They're going to give them two parking spots and charge only \$1 a year for insurance reasons. However, as they met nothing was ever mentioned about an easement. As he reviewed the documents they wanted him to give away the utility easement that is there today, which they say is not. Not one time was the easement ever mentioned. After further investigation, they could not be more incorrect. Their cleanouts and utility lines have been verified to be in the right location. Richland wants a Starbucks or similar store with a drive-up wrap around window. Imagine all of the gas pumps in 1996 to current day sprawled out into the road because of the traffic and people wanting to buy gas next door. Because the gas pumps were designed parallel traffic sets on the road to wait their turn. How do they expect Hoosier Eye Doctor patients and employees to get to the entrance when it was a struggle as a gas station? It is much bigger than just moving an easement. The aforementioned 1996 minutes allowed the

lots to be subdivided, they placed the restrictions and designated a drainage easement to prevent further development in the area. It should be stated nothing should be built and this includes moving his easement area. The Owner's Certificate on the plat states the "strips of ground" which is his sewer line or the "easement are owned by the owners" which they represent. His sewer line is in that easement. In conclusion, he knows they can approve the conditions, continue or deny. He believes they are not just moving an easement. He asks the Plan Commission vote no because of the detrimental effects it will have on their lot. Traffic, property value and noise will go against the five conditions the 1995/1996 Monroe County Plan Commission meant to approve in the subdivision. The five reasons they approved it was ingress, egress, safety, traffic and growth. He asks the Plan Commission protect Lots 1 and 2 and vote no. They, The Hoosier Eye Doctor, have relied on the deed restrictions which are now gone. They relied on the easements and the wording on the plat before purchasing the property. He is asking them to vote no. He provided a copy of the Hukill Subdivision plat. It is incorrect and inaccurate for a couple of reasons. It shows the common creek plat of where the gas pumps appear to be intruding the easement. They weren't allowed to build up that far or they chose not to, to save money. He is unsure why but it is incorrectly drawn. He again showed the photograph of the traffic congestion at Jiffy Treet while there was not any road construction. He showed a photograph of the sewer line and locating people which shows his sewer line and utilities are clearly within the easement location. The petitioner's line could not be located because of sewer problems. A photograph of the ingress and egress of Hoosier Eye Doctor, the gas station and what they want to build was shown. This should have been on the corner of the lot to the right. This would have given each of them an entrance and an exit which wouldn't be a problem and none of them would be here today. However, they wanted it placed on the other side of the pole or the northeast corner of Lot 2 making it a shared driveway. Now, they're wanting to build from a 100 square feet convenience store that backed up traffic, to a 5,000 square feet convenience store and a 2,500 square feet Starbucks with a wraparound restaurant going around the back. When the gas station was there cars were parked and they struggled to get in and out. He loves Starbucks and knows the traffic it generates. Imagine cars hidden behind the building waiting to get their coffee which appears to be a single road. Six cars trying to get out, traffic trying to get into Hoosier Eye Doctor, traffic trying to get out, traffic trying to get to their gas pumps and this is what will change. There's not one parking spot and they're going to add more and all will leave through one exit.

Pat Wesolowski asked if the photos were taken at the same time. Dr. DeSpirito answered no, the traffic photo was from yesterday. Mr. Wesolowski asked if the photos of people exiting were taken at the same time as the traffic photo. Dr. DeSpirito replied it was not, it was taken early in the morning. Mr. Wesolowski commented as a point of order at this meeting they're not talking about buildings, they're talking about the easement. To save time, they should talk about the easement and not the building. Mr. Baker concurred. Mr. Tolloty clarified they have not received any plans for building on the site. What is or may be planned they cannot speak to. Mr. Wesolowski stated if the Petitioner plans to build on the site they can return to the Plan Commission for approval. He reiterated they're talking about the easement. Mr. Orman advised they do not have a lease with Starbucks. Mr. Wesolowski walked the property and there is a sewer connection between Jiffy Treet and Richland. Mr. Orman advised all work will be within their property. Mr. Wesolowski asked how far the connection is from the creek. Mr. Orman answered all sewer lines consist of plastic pipe that run through the creek and as they currently sit on the lot are in

the floodplain. Mr. Coppock outlined the existing and proposed easement, sewer line and floodplain on the plat. Mr. Wesolowski confirmed the sewer line goes under the creek. Mr. Orman said that was correct, they're not doing anything any different. Ms. Hash asked if the new easement is in a floodplain is putting pipe underground an issue. Mr. Coppock answered no. The sewer line to the treatment plant is in the floodplain. Dr. DeSpirito remarked they've been on the lot for three years and he has seen it flooded for a week all the way to the concrete. If they have an issue the safest spot is where it is. When it was originally laid out they put the right-of-way north of the floodplain and not on the backside of the property because of the safety and convenience of doing repairs. It may never be done in five or ten years but it does happen. Mr. Orman said that was a great point in that it was still in the floodplain. It crosses the floodplain and makes no difference. Mr. Wesolowski asked if a sewer line that goes under the creek connects to the mainline. Mr. Orman answered both lines go under the creek to Jiffy Treet's property. Ms. Hash asked if the sewer line comes off of Hoosier Eye Doctor and joins in with Richland's. Mr. Orman answered no, there are two separate lines, they both run into the same pit on Jiffy Treet's property and they cross the floodplain. Ms. Hash asked if the cap is located in the sewer main and if the lateral goes into that main. Mr. Orman said that was correct.

Rusty Turner was the contractor for Hoosier Eye Doctor. When they went through all of the loopholes to do what the county wanted they were told nothing could ever be changed in the floodplains. They talked about upgrading the sewer lines and were told they were fine, to leave them alone and they didn't want them to mess with it behind Swifty. They brought a new line out of Hoosier Eye Doctor and connected down to where it used to be and put in a clean out by the building. He feels they had to go through the proper channels. Why should it be easier for somebody to change something now?

William Beggs explained they are not at this meeting because of some desire by Dr. DeSpirito that nothing ever change on Lot 1. Dr. DeSpirito is in favor of the property looking better and being improved. They're at this meeting to object to changing a property right after having purchased real estate, meaning the easement location. Secondly, they object to clearing the way for increased intensity traffic and something that the site can't handle. As he reads the staff report, there is probably five or six different comments or recommendations to the Plan Commission that suggest they approve this based on future development. It seems by the staff report that future development is very much a part of what is happening today because they have been told to consider it for purposes whether or not they vote to change the easement location. Dr. DeSpirito relied on the plat before purchasing his property. The plat states *"There are utility easements, drainage easements and building setback lines as shown on the plat upon which no structure maybe erected or maintained."* This matters because that language told Dr. DeSpirito the concerns he had for patients and staff being able to get in and out of his location was protected. To come back and change the location is to change the deal for somebody who bought this property and made an investment in Ellettsville relying on that plat. If Dr. DeSpirito didn't share the access they wouldn't be at this meeting but he does and this is one reason for the objection. The current location of the utility easement governs or limits the intensity of the development that can go on that site. This is important because it is in the public record before Dr. DeSpirito purchased his property. Not only would it be unfair to Dr. DeSpirito to make that change now but it would be unfair to other businesses who are thinking of investing in real estate in the Town and who are reading the records as they should to find out later it got changed. They do not think this is in the public interest of the Town and the people whom want to invest their money here. A drawing the Petitioner gave to Dr.

DeSpirito was provided to the Plan Commission. The drawing explained their intent on the site and shows a 4,500 square feet building with a drive-thru behind the building. If the easement is moved the building would be located, more or less, on the present easement. All of the drive-thru and gas pump and convenience store traffic will go through the same Hoosier Eye Doctor's traffic is coming and going from. The reason this is related to the movement of the easement is because of what they have been told Richland will do and what the staff report tells them to consider. They believe this creates a situation that would not only be unfair because of changing the rules after the fact but also is an undesirable planning result.

The other issue is Monroe County Plan Commission final plat approved minutes say "*the flood plain boundaries on both lots be shown on the final plat and designated as a drainage easement to prevent further development in this area of the subdivision.*" To move this sewer lateral into the floodplain which is a drainage easement on the current plat would be directly in conflict with the premise they passed this ahead of time. He doesn't want them to think Dr. DeSpirito pulled the minutes before purchasing the property. They found those in preparation for this meeting. The plat Dr. DeSpirito had seen prior to purchasing the property is more clear and helpful to understand. They had Bledsoe Riggert Guerrettaz draw where the utility easement would be located. This shows the idea of moving the sewer lateral easement from mostly outside the floodplain to 100% inside it. Section 152 of the Town ordinance speaks to what happens when that occurs. There is language that permits some improvements to occur but it also sets a high bar and there's nothing in the staff report speaking to what other requirements the staff would impose in order to move the sewer lateral. He believes it qualifies as a special flood hazard area that is directly governed by the Town ordinance and it has to be followed no matter what if they want to move the sewer lateral completely into the floodplain. Why do you suppose when they platted this originally they required the easement to be where it is right now? It is because they wanted to keep it out of the floodplain. He requested his letter of September 1, 2015, with attachments be made part of the record as well as the information Dr. DeSpirito submitted and discussed. §153.003 of the Town ordinance states "*All parties who have a financial interest in the subdivision and subsequent development must be on record as agreeing with the submission provisions in the application to the Plan Commission.*" Dr. DeSpirito is the owner of Lot 2 and there are only two lots in the subdivision. He also owns three separate easements over and across Lot 1 and for those reasons he has a financial interest in the subdivision and is not on record as agreeing with this change. They respectfully want to say Ms. Brown and Town staff have been more than helpful. They could not be more appreciative for all the help and communication they have received but they respectfully disagree with the staff report suggesting somehow the owner of one of two lots in the subdivision and the owner of three easements over and across the very property they're here about has no financial interest in the project. He has a financial interest and he does not agree. §153.024 refers to restrictive covenants. The restrictive covenant they want to change states no buildings may be erected on the easements. The restrictive covenant in the plat to be approved is different language than what Dr. DeSpirito relied on when he purchased his property. Mr. Ryle asked if any governmental unit has authority on the change in the covenants. Was that something the current owner requested and was filed at the courthouse or was it ruled as proper by some Monroe County authority? He has covenants on his property. Is he telling him because he gets a surveyor to redo it and he goes to file it in the county courthouse he can change his covenants? Mr. Beggs replied that is what he's telling him they're asking him to vote yes on today. Mr.

Ryle asked if he is telling him this is what they have done. When a property owner wants to change covenants what is the legal procedure to do so? Does a county board have to approve it? Mr. Beggs said that is an ownership right and they have agree to it or they can't change it. Mr. Wesolowski explained a Town ordinance will supersede the covenants. Ms. Brown thinks it is how to interpret the particular provision Mr. Beggs is talking about and whether or not it is a restrictive covenant which is enforceable by the landowners. Or is this language that indicates where the utility easements are going to be and it is subject to Plan Commission or BZA changes? She thinks it is the latter. She and Mr. Beggs have a dispute as to how to interpret the language whether it is a private restrictive covenant or something else. The language from the case she read earlier suggests there is language in plats about utility easements as a matter of convenience. Certainly, this language makes sense. You don't want anybody building over easements because utility companies need to do repairs. Mr. Beggs suspects they do not disagree the effort before the Plan Commission is to change what currently exists. Mr. Wesolowski mentioned when the plat was put into effect by Monroe County and now it's in the Town who has a different program. Mr. Beggs said they also disagree whether this is a plat amendment or a plat vacation. He doesn't think a plat amendment exists legally. He thinks it is a plat vacation and re-platting and they contend they have not met the burden the Indiana legislature required them to meet in order to satisfy that.

There has been a statement that a sewer lateral is not within the platted easement right now and he thinks Town staff was told this early on and they disagree. They tracked it down and the sewer lateral is, in fact, within the easement. Also, there has been a statement about not having a proper cleanout. This is not true, and it is, in fact, present. It is to the east of the Petitioner's property. Mr. Ryle asked if it is on Lot 2. Mr. Beggs answered he believed so. There has also been a statement the amended plat is the same as the original which is not correct for the reasons previously discussed. They ask the Plan Commission deny the petition and proffered his Proposed Findings of Fact. In conclusion, they ask the Plan Commission deny the Petition and adopt the Proposed Findings of Fact which would be defensible for the Plan Commission.

Tom Orman said they had the sewer line marked and not the neighbors. They did go to the Planning Department because there was a sewer cleanout below what they thought was the utility easement. He did inform the Planning Department he had it marked and it is within the lines. The proper cleanout issue is 200 feet of sewer line on the back of their property which they own and has zero cleanouts. He and his partner, Dave Kaman, met with Dr. DeSpirito and a couple of his staff. Mr. Ryle asked what the 200 feet of sewer line across the back of his property is. It is clearly not serving Lot 2. Mr. Orman answered it is Dr. DeSpirito's sewer line. The only thing in the utility easement is a private sewer line. Mr. Wesolowski added Dr. DeSpirito has a private utility line that goes across. Richland has another line that doesn't connect to Dr. DeSpirito and is separate. Ms. Hash asked if both lines are within the easement. Mr. Orman answered their cleanout is a little below the easement so they're outside of it anyway. He found this out when he had ERSC mark it for them. Their sewer line is not in the easement. The sewers all feed into the main at Jiffy Treet which is in the 100 year floodplain. He has never seen water to the back of that building.

Dave Kamen, Partner in Richland, explained Dr. DeSpirito gave him a call early on, ranting and raving, and conveyed he is short on parking. He had a drone take an aerial photograph which shows Dr. DeSpirito's jeep parked on their lot. Dr. DeSpirito told him

there will be no parking lot lights because his patients have dilated eyes. He further stated he will do what it takes to stop anything from being built there which is contrary to what was said by Mr. Beggs. Dr. DeSpirito told him he tried to buy Swifty and they turned him down and after he stops them from building anything on the site then he is going to buy it from them. Dr. DeSpirito never knew where the sewer line was and they had to show him where the cleanouts were located. They settled the deed restrictions with their other neighbor, Michael Eaton of Richland Plaza. Mr. Eaton has provided a letter that he's in favor of relocating the utility easement and he wants them to build there. Their other neighbor, Walter Reska of Jiffy Treet, was contacted by Mr. Beggs asking them to attend this meeting and state he is against this. Mr. Reska wants this and wants a neighbor. The only things Mr. Orman said Mr. Reska wanted was to cut down some of the brush so he can get some visibility to help his business. Mr. Orman mentioned this is in the 100 year floodplain but Dr. DeSpirito said the property "has been flooded up to the concrete with water." He thinks the real problem is Dr. DeSpirito wants nothing to be built there because he needs more parking which is not their problem. Mr. Orman suggested adding parking for Dr. DeSpirito for \$1 a year but they have removed this offer from the table. Thank you.

Walter Reska has owned the Jiffy Treet for 41 years. In 41 years he has never seen water past the creek. The main sewer line everyone ties into is in the floodplain. A sewer easement says they're allowing them to have a sewer line across his property. If he wants to improve his property he would ask that the man have sewer. He can improve it if he can move his sewer back. He may want to do that. Last year he gave St. John's Church a sewer easement He didn't have to but, they had problems. The easement he gave them is in a floodplain behind the creek. If something happens that it has to be moved, he'll ask them to do so. All he did was give them a chance to have a sewer and it is the same thing here. He has never seen the traffic they talked about. He also walked the property and saw where the easement was at and where it connected with his property. He does not see an adverse effect. All he sees is a man has a piece of property with a sewer line he is enjoying and wants to move it back. He still has his sewer. They're not taking the sewer away, they just want to move it. He asks that the Plan Commission approve their request to push back the sewer easement and improve his land. He was the one that helped to bring that property into the Town. Years ago he felt a duty to pay a little more in taxes because he wanted to be annexed into Town. Because of this, the other properties are in Town. He wants the Town to grow and he thinks this is a wonderful development. He is asking they approve this.

Joe DeSpirito, O.D. confirmed there were conversations but he never ranted and raved. They're here about the easement so what Mr. Kamen said doesn't really apply so he won't offer a rebuttal. He has seen water up to near the concrete when there is a torrential rain and it does go away. On many occasions he has seen it half to where the sewer lines are with standing water and it can't be mowed for a period of time.

Susan Chen, employee of Hoosier Eye Doctor, was in a meeting with Tom Orman, Dave Kaman, Rick Coppock and Dave Kaman's wife. She doesn't recall Dr. DeSpirito being accused of ranting and raving. Dr. DeSpirito was very passionate about what was to take place. His main concern was the easement and what they were wanting to do. When she asked about their plans for the building, they talked about possibly putting in a sit down or drive-thru restaurant. When specifically asked about putting in a sit down restaurant one answered yes and the other answered no. Mr. Baker reminded Ms. Chen this is irrelevant. Ms. Chen disagrees because it has to do with the building, moving of this easement and

what they want to do with it. Moving the easement has everything to do with it. The bottom line is if this plan is approved the main concern is the safety of everyone going in and out of that property and not just their patients but the community as a whole. When they take into consideration moving the easement to develop the property they will have to consider what is safe for the community.

Kevin Tolloty, Planning Director, advised the property is zoned C-3 and there are a number of things that could go on the property right now whether or not the sewer line is moved depending on how it is laid out. What they're looking at is the sewer line. What can go there will go there and nothing has been submitted so there is not really anything to discuss. Development approval will come back before the Plan Commission.

Tom Orman agrees safety is a concern and they can stack it. They can build in such a way to stack the parking so safety is not an issue. Mr. Tolloty noted that will be done through the site plan.

Pat Wesolowski commented it is sad that two landowners in Ellettsville cannot agree. This day and age, things go on so fast and furious. The purpose of this meeting is to move an easement for a sewer line. Then a year down the road they will be talking about something else. They should be concentrating on the sewer line easement and nothing else. All he cares about is if they have the right and is it good for the Town to make a piece of property more advantageous for construction of whatever, by right, to be there.

Sandra Hash requested Mr. Tolloty publicly restate his recommendation to the Plan Commission so it is in the record. She also requested Rick Coppock, as the Town's MS4 Operator, tell them if there is an impact, or would it harm the area, to change the easement.

Kevin Tolloty advised staff does recommend approval of the Plat Amendment with any conditions as seen necessary.

Rick Coppock explained the floodplain is based on contours and flow of water. If they don't make any change to the area of the floodplain there will not be any impact. The sewer lines are below grade and that is why they don't have any impact on floodplains. If any changes are made to the contour of the ground within the floodplain then they have to have a permit.

Darla Brown agrees a lot of the issues raised by the remonstrator go to objections that could be raised at the development or site plan review. They've already discussed whether or not this is a restrictive covenant versus whether or not language with regard to the easements was inserted in the plat for the public's use and benefit. She agrees with Mr. Beggs in that this issue has been a friendly dispute. She does not interpret the language in the plat to be a restrictive covenant.

Pat Wesolowski asked if they approve the plat amendment what recourse does DeSpirito have. Ms. Brown answered his remedy is to file a Petition for Certiorari with the trial court and ask to review the Plan Commission's decision and they could remand it back to the Plan Commission or issue different orders.

Russ Ryle asked when they approve the revised plat are they, in fact, approving the removal of the restrictive covenants. He would be more comfortable if they would agree to go back, without changing any covenants, to the original 1995 plat, as filed, and prove the sewer line moved but he doesn't think they should vote on the plat amendment presented at

this meeting. Ms. Brown said the only issue with regard to the 1996 plat was the language with regard to the sewer line. Mr. Ryle said the 1996 plat also restricted what could be put on that lot. Mr. Tolloty noted the zoning code prohibits anything from being built in an easement. Ms. Brown stated the only language they're discussing with regard to the 1996 plat is the language of the utility and drainage easements. The other change he is referring to wasn't part of the plat but was language from a corporate warranty deed dated 1988. Mr. Ryle asked if the only thing they're modifying is the 1996 plat. Ms. Brown replied on utility and drainage easements and building setback lines as shown on the plat upon which no structure shall be maintained or constructed is the only issue for today. The other things brought up by Dr. DeSpirito are the covenants and restrictions from 1988.

Sandra Hash confirmed they aren't changing the covenants and restrictions. Ms. Brown agreed. Ms. Hash stated by doing the amendment to move the easement it does not affect the covenants and restrictions. Ms. Brown said not that she knows of. It doesn't have any effect on the covenants and restrictions brought up earlier by Dr. DeSpirito.

Andrew Sheff stated there were original use restrictions in the deed effective on Lots 1 and 2. When they acquired the property they filed an action to clarify because there were some vague words and eventually they reached an agreement and recorded the amended restrictions. The ingress/egress easement is specifically mentioned in the deed and it is not effected. Ms. Brown agreed. The plat amendment they are considering will not affect the Dr. DeSpirito's ingress/egress easement because it is part of the deed for his property.

Terry Baker entertained a motion for approval of the Plat Amendment for 4723 W. State Road 46, Bloomington, Richland Convenience Store Partners, LLC, Case No. PC 2015-07. Pat Wesolowski made a motion for approval of the Plat Amendment for 4723 W. State Road 46, Bloomington, Richland Convenience Store Partners, LLC, Case No. PC 2015-07. Sandra Hash seconded. Roll Call Vote: Terry Baker – yes; Russ Ryle – yes; Don Calvert – yes; Pat Wesolowski – yes and Sandra Hash - yes. Motion carried 5-0.

Darla Brown prepared the following Findings of Fact, Conclusions and Decision Regarding in Re: Petition 2015-07:

This matter came before the Ellettsville Plan Commission during its regular meeting on September 2, 2015, for hearing on Petitioner Richland Convenience Store Partners, LLC's application to amend the plat for the Hukill Subdivision located at 4723 West State Road 46.

And the Plan Commission having conducted a public hearing on the application on September 2, 2015; having accepted testimony during said hearing from the applicants, from Planning Director Kevin Tolloty, and from opponents of the application; having reviewed the staff report dated August 12, 2015, all documents submitted by the Petitioner, including the proposed plat amendment, and all documents submitted by those in opposition to the Plat Amendment, and the Town of Ellettsville's Ordinance Chapter 153, "Subdivision Regulations"; having reviewed the Indiana Code and reported judicial opinions; having been duly advised in the premises; and, having granted the application by a vote of 5-0 upon motion by Pat Wesolowski and a second by Sandra Hash, the Plan Commission hereby makes the following written findings of fact and conclusions in support of its decision as required by the Ellettsville Town Code and Indiana Code 36-7-4-707.

Application – Findings

- 1. Before the Plan Commission may grant approval for a plat amendment, the Plan Commission shall determine if the plat application and plat comply with the standards in the Town's subdivision control ordinance. I.C. 36-7-4-707.*

2. *Chapter 153 of the Ellettsville Town Code sets forth the Subdivision Regulations. The regulations regarding secondary plat approval are set forth in subsections 153.020 through 153.204.*
3. *On June 9, 2015, Petitioner, by its Managing Member, Tom Orman, filed its application for a final plat amendment.*
4. *The Petitioner is requesting to amend the plat to move the utility easement. The property is zoned C-3.*
5. *The subdivision was originally approved in 1996 by the Monroe County Plan Commission.*
6. *There is a total of two lots in the subdivision. Lot 1 is occupied by the Petitioner. Lot 2 is occupied by Dr. Joseph DeSpirito.*
7. *The plat amendment would affect only the utility easement on the Petitioner's lot as the easement ends at the adjoining lot.*
8. *The lot was recently annexed, and is officially within the jurisdiction of the Town of Ellettsville. The utility easement contains approximately fifteen (15) feet of Smithville cable and private utility (sewer) line. The utility easement which runs east-west through the center of the property is believed to have been established in order to provide sewer service to Lot 2.*
9. *The Petitioner is proposing to relocate the easement between 15 and 20 feet to the south. The Petitioner is also proposing to replace the private line with a new line, and have stated they will absorb the cost of the line replacement. The relocation of the easement would allow any new construction to be built deeper in the lot than would currently be permitted. The replacement of the private sewer line would cause only minimal disruption to Lot 2, but would allow for sewer usage indefinitely.*
10. *The Petitioners are planning to redevelop the site, formerly a Swift station, and the current utility easement significantly restricts the buildable area of the lot.*

Findings and Conclusion

1. *The application was assigned docket number PC 2015-07 and was originally scheduled for public hearing for the July 9, 2015 Plan Commission meeting. By vote of the Plan Commission the matter was continued to the August 6, 2015 Plan Commission meeting. By vote of the Plan Commission, the matter was continued to the September 2, 2015, Plan Commission meeting.*
2. *Public notice of the time, place and subject matter of the hearing was duly published.*
3. *The following Plan Commission members attended and participated in the September 2, 2015 Plan Commission meeting:*

*Terry Baker, President
Russ Ryle, Vice President
Sandra Hash
Pat Wesolowski
Don Calvert*

4. *Town of Ellettsville Director Kevin Tolloty presented his staff report on the application to amend the final plat. A copy of the staff report is attached hereto and incorporated as Exhibit "A".*
5. *The Board accepts as fact the following:*
 - a. *The replacement of the private sewer line would cause only minimal disruption to Lot 2, but would allow for sewer usage indefinitely.*
 - b. *Petitioner has stated that they will absorb the cost of the line replacement.*
 - c. *The purpose of the proposed plat amendment is to increase the buildable area of the lot.*
 - d. *The current location of the easement dissects the lot into two smaller pieces and restricts access to some of the buildable area of the lot.*

- e. *The proposed relocation for the utility easement represents the best location to allow for future development of the site and maintain the functionality of the sewer line.*
- f. *There has been no evidence presented which demonstrates that there would be any detrimental effects to the other property in the subdivision.*
- g. *No provision in the Town Code prohibits moving utility easements.*
- h. *The proposed plat amendment satisfied the Town of Ellettsville's subdivision control ordinance.*
6. *Those following individuals presented testimony in opposition to the plat amendment or testified as to concerns regarding the proposed new development: Dr. DeSpirito, Rusty Turner and Susan Chen. Rusty Turner and Susan Chen had concerns about the additional traffic that might be generated and the safety of individuals driving in and out of the property.*
7. *Copies of the Remonstrator's exhibits and letters in opposition to the plat amendment are attached hereto and incorporated herein as Exhibit "B". Copies of all other materials submitted at the hearing are attached hereto as Exhibit "C".*
8. *Those individuals who presented testimony in opposition to the proposed plat amendment presented no evidence that the proposed amendment fails to meet the Town's zoning ordinance or that the proposed plat amendment poses detrimental effects to the other property in the subdivision.*
9. *The Plan Commission finds that the redevelopment of the former Swifty station would be in the best interest of the Town of Ellettsville. The property is currently zoned C-3 and has two access points from State Road 46, and is position for a wide variety of commercial development options.*

Based on the above findings, the Plan Commission concludes and finds that the Petitioner's application meets all of the requirements as set forth by the Town of Ellettsville Zoning Ordinance, and the proposed plat amendment is hereby granted.

The Planning Director's staff report dated August 12, 2015 shall be adopted as part of the Findings of Fact.

So found and concluded by the Ellettsville Plan Commission this 2nd day of September, 2015.

Terry Baker entertained a motion to adopt the findings. Russ Ryle made a motion to adopt. Pat Wesolowski seconded. Motion carried.

Pat Wesolowski made a motion for Terry Baker to sign the document as proposed on September 3, 2015. Don Calvert seconded. Motion carried.

Planning Department Updates

Kevin Tolloty, Planning Director, would like a Board of Zoning Appeals appointment.

Sandra Hash nominated Pat Wesolowski to be on the Board of Zoning Appeals. Russ Ryle seconded. Motion carried.

Kevin Tolloty, Planning Director, reported on the recent Steering Committee meeting. Things are moving along nicely and he will discuss it in more detail at next month's meeting.

Darla Brown, Town Attorney, announced by the next meeting they will have the site plan for the new Town Hall.

Pat Wesolowski said when he made the motion for the removal of the easement and that is all he made. It doesn't mean he is in favor of putting a convenience store there or whatever else but he couldn't see any detrimental effect by moving it 10' or 12'. Ms. Hash would like to add there was a lot of emotion at the meeting and Dr. DeSpirito made some very good points. They need to take those concerns into consideration when they do look at the development plan. She also has faith in Mr. Orman that he is willing to work out these problems and be aware of the traffic situation and give them the best plan he possibly can. Mr. Ryle stated they're restricted by Town Code and what the regulations allow them to do. They are restricted by the zoning limits on a piece of property. If they are presented with a development plan that is within the given zoning restrictions and Town Code they may not appreciate or like the traffic situation. He thinks they're going to have a traffic nightmare as they develop a long State Road 46. Do they have any legal right to deny somebody a development on a piece of property just because globally they're creating a traffic nightmare and endangerment to the public? They have had four serious and two fatal accidents in the last two months along State Road 46 and it is only going to get worse. Ms. Brown doesn't think she should comment until they see the development plan. If a development plan is placed in front of them and meets the requirements of the Town Code the case law states they should grant the plan. The whole purpose of having the language in the code is to tell developers what they need to do when they come before the Plan Commission and submit a development plan. If they present a development plan that meets the code then by case law the Plan Commission is obligated to grant it or tell the developer what is wrong with the plan so they can go back and fix it and then present a development plan that meets the code. Mr. Ryle asked if their objection has to be based on the law. Ms. Brown answered yes. There is always going to be the issue of traffic and that is something to consider. The denial of a proposal of a development plan has to be based on language in the code.

Adjournment

Terry Baker entertained a motion to adjourn. Pat Wesolowski made a motion to adjourn. Russ Ryle seconded. Motion carried. Terry Baker adjourned the meeting at 11:52 a.m.

Terry Baker, President

Russ Ryle, Vice President

Sandra C. Hash, Secretary

Don Calvert

David Drake

Scott Thomas

Pat Wesolowski