

**PLANNING COMMISSION MINUTES
OCTOBER 20, 2016**

PUBLIC HEARING

CASE NO. 9-36-96 BE

Request: 9-36-96 BE Citation
Location: 9609 National Turnpike
Case Manager: Jonathan Baker, Assistant County Attorney

The staff report prepared for this case was incorporated into the record. The Commissioners received this report in advance of the hearing, and this report was available to any interested party prior to the public hearing. (Staff report is part of the case file maintained in Planning and Design Services offices, 444 S. 5th Street.)

An audio/visual recording of the Planning Commission hearing related to this case is available on the Planning & Design Services website, or you may contact the Customer Service staff to view the recording or to obtain a copy.

Agency testimony:

01:54:09 Jonathan Baker, Assistant County Attorney, presented the case and showed a Powerpoint presentation. Mr. Baker reviewed the history of the case (see recording for detailed presentation).

01:58:57 Mike Wilcher provided an update regarding a visit by the Code Enforcement Officer which occurred yesterday. Mr. Wilcher referred to a Powerpoint presentation showing the conditions of the property as of 10/19/16 (see recording for detailed presentation).

02:00:08 Mr. Baker stated it still seems there's a little bit of confusion with respect to what is appropriate on the property. He is zoned for automobile repair and parts repair, but it was made clear that these type of operations need to be behind the fence and the junked part of the vehicles need to be inside the building, which is what he had originally represented to the Planning Commission in '97 and no change to the use has been requested since '97 (see recording for detailed presentation).

02:01:18 Joel Dock stated they did review this plan against the Development Code in effect at the time of the rezoning in 1997, that was the Development Code of 1995. Mr. Dock stated any new signage for the site will need to be in compliance with Chapter 8 of the Land Development Code, but none was proposed with the revised plan that we received. Mr. Dock stated Article 12, Landscaping, was the big concern here and after discussions with staff and legal counsel he thinks the overall goal was to get a landscape plan in place that was workable and acceptable for the owner of the property, for the neighbors, as well as the Commission. Mr. Dock reviewed the site plan which shows the Alternative Landscape Plan (see recording for detailed presentation).

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02:08:01 Commissioner Brown asked if this was submitted as a Revised Detailed District Development Plan because they couldn't fulfill the requirements in the previous plan, why wasn't it reviewed under the current code?

02:08:26 Joel Dock stated it's a unique situation, there's no threshold for landscape review (see recording for detailed presentation).

02:09:20 Mr. Baker stated the duty to submit the Chapter 12 Landscape Plan never happened, so that triggered one Binding Element that was a violation. Also, during the inspection of the property, whether it was the pole barn or that little hatched out building behind the main principal structure, was also not on the plan so those have been added to the plan as well. Mr. Baker stated not only did we want the Landscape Plan, but we also wanted the most updated depiction of what's on site, and we didn't have the gentleman bring it up to 2016 standards, we were looking for compliance with what was required at that time, so we're giving some leeway here. Mr. Baker responded to questions from the Commissioners (see recording for detailed presentation).

The following spoke on behalf of the appellant:

Attorney Paul Curry, 1038 Edward Avenue, Louisville, KY 40204
Daniel Nelson, 9609 National Turnpike, Louisville, KY 40118

Summary of testimony on behalf of the appellant and discussion:

02:13:36 Attorney Paul Curry spoke on behalf of the appellant. Mr. Curry stated that Mr. Nelson had taken pictures today showing the vehicles that were there yesterday are now gone. Mr. Curry stated in previous appearances it has been suggested that anything that's there for less than 24 hours is not storage and if that's sufficient, then we're still in the spirit of the Binding Element. Mr. Curry presented photos of the property that were taken today (see recording for detailed presentation).

02:18:28 Mike Wilcher reviewed photos of the property that were taken yesterday (see recording for detailed presentation).

02:19:48 Mr. Curry stated they would be very concerned and interested in directions regarding what would be storage. If it's a violation for Mr. Nelson to have vehicles on the property that he's going to be working on, it's his understanding they need to be moved within 24 hours or else they're storage; if he's moving vehicles within 24 hours is he going to be in violation of his Binding Elements. Mr. Curry stated he has advised him that issue could be resolved and addressed in a filing for a modification of the Binding Elements, but that's not why we're here at this point. Mr. Curry stated as far as the

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landscape plan being submitted, he thinks the major aspects of the new plan that will need to be executed are the paving of the driveway and the installation of a few trees. Mr. Curry stated he has not seen the landscape plan (see recording for detailed presentation).

02:23:00 Mr. Baker reviewed the violations of the Binding Elements (see recording for detailed presentation).

02:24:13 Commissioner Jarboe said it seems this is the first he has heard about asphaltting, and asked if that was because of the new plan coming forward (see recording for detailed presentation).

02:24:32 Mr. Baker stated it was on the old plan (see recording for detailed presentation).

02:25:18 Mr. Curry reviewed the old plan showing the parking slips. Mr. Curry stated Mr. Dan Nelson was not the owner of this property in 1996 and 1997, it was his father's property, and the parties that sought this zoning were his parents. Mr. Curry stated he believes this action was initiated against Daniel's father and that Daniel has only been the owner of this property since December (see recording for detailed presentation).

02:28:06 Daniel Nelson responded to questions from the Commissioners regarding the photos of the property that were taken yesterday (see recording for detailed presentation).

02:36:15 Commissioner Brown asked if there were building permits issued for those two structures that show up now on this revised plan.

02:36:24 Mr. Nelson stated his mom had this place back in the '90's and those buildings were already there (see recording for detailed presentation).

02:37:48 Mr. Curry stated he's not sure if that rear building was present or present in some other form when the plan was approved in 1996, but what he can say without a doubt is that it was there when the property was conveyed to Dan Nelson which was last December. Mr. Curry stated he doesn't know if there had been building permits, if there has been building done in the meantime, but what they have tried to do is to represent the property as it is now in the plan that they've presented. Mr. Curry and Mr. Nelson responded to questions from the Commissioners (see recording for detailed presentation).

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02:42:56 Commissioner Jarboe stated we've got to get to an end on this. He stated all the Commissioners agree that it was a junkyard, and they had said that everything that you do for this business has to be indoors, inside a building. That's where all the work has to be done, that's where all the storage – there's not supposed to be any outdoor storage whatsoever unless it is a car that the next day you're going to pull that inside and work on it. Commissioner Jarboe stated the appellant has made a lot of progress, but when he sees those pictures it looks to him like it's going right back to the same thing that it was before, which is a junkyard. Commissioner Jarboe stated the appellant is not very close to where he's supposed to be from when we started this to now in October. Commissioner Jarboe stated we've given you a lot of leeway and you're still against the Binding Elements that we've talked about for almost a year now (see recording for detailed presentation).

02:44:55 Mr. Nelson stated he's asked the same question, "what am I supposed to do".

02:44:59 Commissioner Jarboe stated "you're supposed to pay a fine, in my opinion, is what you're supposed to do" (see recording for detailed presentation).

02:46:29 Commissioner Howard asked to see the plan that she thought was the original plan. She stated it looked to her like the part behind the main building was covered and it's not covered anymore. Commissioner Howard stated the original plan shows that they intended to have a paved driveway and parking, and a building behind the original building (see recording for detailed presentation).

02:47:51 Mr. Curry reviewed the original plan depicted in the Powerpoint presentation (see recording for detailed presentation).

02:52:10 Commissioner Jarboe asked Counsel Baker to come up so he could ask him a question. He stated he doesn't understand the idea that they're saying that this has changed ownership. If this has changed ownership, the zoning still remains the same and the use still remains the same, it just happens to be a new owner, isn't that correct?

02:52:25 Mr. Baker stated that's accurate, Binding Elements run with the land. Just as anyone would undergo any kind of due diligence to investigate the property before purchasing it, the same responsibility falls on this purchaser.

02:52:40 Commissioner Jarboe stated he would assume that Mr. Nelson should go through the process of getting himself in compliance with, if he wants to continue his business, to build a building, get the building permits, go through Planning; that's why these people are here is to help him go through that process. Commissioner Jarboe

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stated that's all fine, but he thinks that's a separate issue from what we're here today to talk about. Commissioner Jarboe stated if any other Commissioners need to give their opinion, please do (see recording for detailed presentation).

02:53:23 Commissioner Brown stated he thinks we've brought this up before, that if the original approved plan wasn't going to work for the operations that he wanted to conduct that he needed to submit a Revised Detailed District Development Plan, go through the review, the public process and then get a site that he can actually use (see recording for detailed presentation).

02:54:07 Commissioner Howard stated the main building had 4,000 square feet when it was originally approved; it's now 7,000 square feet (see recording for detailed presentation).

02:55:39 Commissioner Carlson stated to him the question is, are pretty much the same conditions existing today that were way back when. Commissioner Carlson stated there may be progress, but this has been going on for a very long period of time (see recording for detailed presentation).

02:57:00 Commissioner Jarboe stated it goes without saying that a lot of progress has been made, but we're still here with some of the same violations that we originally talked about. Regardless of whether all that junk is there, the use of the property is still the same Binding Element violation citation that we've been dealing with. Commissioner Jarboe stated he believes he is still out of compliance and that in the future he's going to stay out of compliance because of the way he uses his property (see recording for detailed presentation).

02:58:01 Commissioner Lewis asked if we had a suspended fine on this property, and the amount (see recording for detailed presentation).

02:58:14 Mr. Baker stated a fine was imposed back in March of \$1,000 penalty per day that was to accrue between March and the 2nd day of June because June 2nd was another day where they were going to present their plan to remedy the whole property. That would be 91 days at \$1,000 per day (see recording for detailed presentation).

02:58:58 Commissioner Jarboe asked how much leeway do we have in instituting a fine.

02:59:04 Mr. Baker stated since he appealed the case to you instead of paying the fine, it's kind of in your court. You have the ability to use punitive measures, whether that's financial, remedial measures which you've asked for already, so you have that ability to do either/ both (see recording for detailed presentation).

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02:59:27 Commissioner Jarboe stated he would assume that Planning and Design would be hopeful for us to require them to come in with a new plan. They have a new ownership of this property since December of last year, so we should be able to require them to come in with a new plan that gets it into compliance with whatever business Mr. Nelson wants to do (see recording for detailed presentation).

02:59:48 Mr. Baker stated that is accurate (see recording for detailed presentation).

03:00:07 The Commissioners and Legal Counsel discussed the issue of outdoor storage (see recording for detailed presentation).

03:01:32 The Commissioners discussed the options available (see recording for detailed presentation).

03:03:37 Joel Dock stated he thinks we've gotten a little off track from what he presented. Mr. Dock stated the plan he presented is the revised plan that was submitted to staff under 16DEVPLAN1170, and an Alternative Landscape Plan is being pursued. The structures shown on the plan are existing conditions, the parking shown and driveway shown are existing conditions with the exception of to be paved. The landscaping is existing with the exception of what is shown as proposed on the plan. The plan that was presented was intended to serve as the revised plan as requested by the Commission on June 2, 2016. Mr. Dock stated it was unclear to himself and counsel in the minutes of that meeting what action and what level of review and the intensity of the review that you all wanted on a revised plan, whether you wanted that revised plan to be reviewed against the 2016 Land Development Code as in effect today, or whether you wanted that plan to be reviewed against the Development Code that was in effect at the time of the rezoning. Furthermore, whether or not you all wanted that to go through the full public hearing process or to take action, because it's a unique situation, to then take action today on a plan or delegate the final approval of such plan to staff. Mr. Dock stated as far as the plan goes with what you've been presented today, without the use discussion that's occurred, between himself and Bill Shroll who was the surveyor and engineer on the plan, it was asked if the Binding Elements would need to be modified. Mr. Dock stated he was advised that no, the site would be in compliance with the Binding Elements, so he would ask that the Commissioners specifically direct Planning and Design Services staff the level of review that you want as well as what Code you would want us to review it under. Mr. Dock stated he thinks the 1995 Code is the most appropriate because we don't know when the structures were built; Construction Review Division also purges their permits after five years so there's no way for a public agency like Planning and Design or Code Enforcement to go back and discover those permits. As far as the Binding Element Modification goes, if you want that to be part of the revised plan or you're satisfied with

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the plan today and you would just like a Binding Element Modification Review conducted (see recording for detailed presentation).

03:06:46 Commissioner Jarboe stated that did get a little lost in our discussions. He asked if the plan that Mr. Dock has has the buildings that are there now and if the square footages are correct.

03:06:57 Mr. Dock stated the plan he presented today is in compliance with the Development Code of 1995 as well as it satisfies the requirements of an Alternative Landscape Plan of Article 12 of the 1995 Development Code. So the plan is in compliance, no waivers or variances have been requested with that plan, and it was not reviewed against the 2016 Development Code. As far as the Binding Element goes, we did not touch the Binding Elements because he was advised that the site would be in compliance and the applicant did not apply to revise those Binding Elements (see recording for detailed presentation).

03:07:51 Commissioner Jarboe stated with this new plan there's a certain period of time for him to finish that (see recording for detailed presentation).

03:07:56 Mr. Dock stated the plan is good, he is comfortable with the plan today.

03:08:01 Commissioner Brown stated he thinks the original plan included a right-of-way dedication and it's not on this revised plan and that would have been a requirement in the previous Code as well.

03:08:10 Mr. Dock stated they can do that through a deed, they can dedicate right-of-way. Mr. Dock stated they can red line that on the plan and it doesn't affect VUA , it doesn't affect any of the buffers, so it's something that can just be changed quickly.

03:08:25 Commissioner Lewis asked what about carrying the Binding Elements over to this plan.

03:08:30 Mr. Dock stated the Binding Elements run with the land, so unless we revise those Binding Elements, then they stay the same. Mr. Dock stated we can change at staff level revisions to square footages of less than 20 percent, but because they're existing conditions, that's where we say this is a unique situation, and what level of review you all would like (see recording for detailed presentation).

03:08:51 The Commissioners, staff and legal counsel continued to discuss the case. Commissioner Jarboe asked the appellant's attorney, Mr. Curry, if he was here today to tell us that you are going to submit a new plan and follow all the way through with that process (see recording for detailed presentation).

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03:15:26 Mr. Curry stated his advice to his client is that he submits a plan to public review and ask for the Binding Elements to be addressed in a way that does what he wants to do with the property. Mr. Curry stated the storage element completely frustrates his intention of doing auto repair, which is one of the other Binding Elements (see recording for detailed presentation).

03:17:55 Commissioner Jarboe asked Mr. Baker if the Commission makes the decision for this to go all the way through the process, does this eliminate the idea that there's any Binding Element violation (see recording for detailed presentation).

03:18:10 Mr. Baker said not necessarily, but it is in the context of the discussion that we had that initiated this enforcement proceeding at this level. Mr. Baker stated once he appealed that and we came before you, it was similar to the case that Mr. Carroll presented to the Commission; you set a fine because you did find that there were violations on site, however, it was more of a carrot for the gentleman to chase in that, this fine, because there are site violations, will continue to accrue until the point where you show us that you have the site into compliance, and if you have the site in compliance then we'll forgive the fine that currently is suspended right now, we'll forgive that fine if you can show us that you can bring it into compliance. Mr. Baker stated that's what we're wrestling with right now, and understanding that you've given that type of relief is why you're frustrated (see recording for detailed presentation).

03:19:10 Commissioner Jarboe stated while he's conducting his business, he's also going to have Attorney Curry go through this process to set everything up to go through our process to get him zoned correctly and Binding Elements correct, but he's still conducting his business and it looks like to me he's still conducting his business against the Binding Element violation that we have. Commissioner Jarboe stated that's the part we're all confused about. Now that we've settled the fact that they're going to go try to get his business all the way through our process to get zoned correctly and everything right, are we still dealing with the Binding Element violation (see recording for detailed presentation).

03:19:55 Mr. Baker stated we have a pattern of history of working with the property owner as long as they're putting a good faith effort forward to come into compliance, we allow them to continue their operations so long as they're coming towards compliance. To the point where that stops happening, they stop putting their good faith effort forward but yet they're continuing their operation, that's when we go back out and either say cease and desist what you're doing until you're in compliance, because, no one wants to shut the business down so they have no income coming in so that they can also use that income to come into compliance, but at some point, you're right, you can't have your cake and eat it too (see recording for detailed presentation).

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03:20:51 Mr. Curry stated if it is our intention to address the Binding Element of storage, what we have on the table is a plan that represents the buildings as they stand, could we come up with a proposal on a modification of that storage element that he could adhere to until we could submit it to a public hearing and come back. The photos that we saw today, almost all of them as far as the engine that was exposed and that white truck that you were concerned wasn't movable, those elements were behind the fence, they're not visible from the street and what was visible from the street in the photos that he presented from today was five vehicles that were not disabled. Mr. Curry stated if we can approach a proposed modification of that storage element that allows him to have vehicles that he's in program to repair along the driveway in the front so that he can have quasi-storage, then that would be what he would be asking for on review. Mr. Curry stated if this body tells him that's never going to happen, then Mr. Nelson is basically out of business, he's not going to be able to operate as a car repair facility without some ability to have a car parked in front of his property (see recording for detailed presentation).

03:23:38 Commissioner Carlson stated he thinks it's fair to say that Mr. Curry knows what the sentiments of the Planning Commission are, and he certainly should have the ability to take those sentiments into consideration and address the particular things and how you're going to deal with those as you submit your plan. Commissioner Carlson stated maybe there is some level of agreement that can be had. Commissioner Carlson stated the thought that comes to his mind is establishing a \$10,000 fine, suspending that for 90 days, see whether or not you've got the plan submitted and approved and then at the end of that time if you've got your plan submitted and approved we may want to either eliminate that fine or suspend it again for another 90 days to give you time to plant the trees that you said you were going to just to be sure that you really do (see recording for detailed presentation).

03:24:56 Mr. Curry stated it's certainly his understanding that Mr. Nelson would embrace the obligations to comply with the plan that's been presented to you to this point. The plan that has been prepared by Mr. Shroll does not address the Binding Element of storage because that's not a physical aspect of the land, that's a usage problem and that would be a matter of having that approved and as I understand have a public hearing to have that modification. Mr. Curry stated if he had a sense that this body would be okay with a modification of the storage element then we would be able to go forward at this point with a general understanding that he's quasi in compliance because he does fix cars for a living (see recording for detailed presentation).

03:25:59 Commissioner Carlson stated he certainly should be able to address on his plan through additional Binding Elements that there shall be no more than X number of cars, etc. etc., and that's things you can deal with (see recording for detailed presentation).

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03:26:13 Mr. Curry stated there might be an appropriate view toward what's behind the fence line because it's not visible from any public space (see recording for detailed presentation).

03:26:55 Commissioner Carlson stated he's throwing out a general concept, he really doesn't want to muddy up some waters that are already pretty muddy right now (see recording for detailed presentation).

03:27:04 Mr. Curry stated he would like to get to a point where he can advise his client what he can do with his property while we're moving forward in the process of asking for that public hearing (see recording for detailed presentation).

03:27:24 Commissioner Lewis stated she likes what Commissioner Carlson said about imposing a fine, 90 days to get a plan approved through this process.

03:27:39 Commissioner Carlson added suspended for 90 days and at the end of that 90 days we see where everything is as far as plan submittal goes.

03:27:49 Mr. Baker stated that's certainly within your authority to do; he would just ask – we need to clean up prior actions that this Commission has taken. Right now, there's a fine of \$91,000 that's accrued that's suspended right now. If you want to reduce that to around \$10,000 and then attach that to the condition you were just describing you can do that because this is still an open case. Based on the fact that you've given this gentleman so much time to come into compliance, I have not reduced it into a final order and you haven't voted on a final action yet. So that's still ball game if you want to reduce the \$91,000 fine that's currently in suspension to a \$10,000 fine that will be imposed after so many days if X doesn't happen, those are options that you have (see recording for detailed presentation).

03:28:37 Commissioner Lewis stated she would also like to see this follow the current Comprehensive Plan and not the 1995. Commissioner Lewis stated she thinks we've worked with this long enough, we're past that point. She stated that's not the use that was presented to us when it first came in. She stated she distinctly remembers the gentleman saying "I don't work on anything larger than I can carry through a 3 foot door", and yet we've got all this stuff stored out there, so she thinks the use has changed from what he portrayed it to be (see recording for detailed presentation).

03:29:10 Commissioner Brown stated maybe whatever reason they denied and then approved the original rezoning, those conditions have changed and the outcome of a revised plan and Binding Elements could be totally different this time. Commissioner Brown stated he thinks we should go ahead and levy the fine, ten percent, \$9,100 and we set a new fine moving forward, maybe on the lower end, \$400 per day, until he

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brings either a revised plan for amending the Binding Element and uses on the site to meet what he's doing today or he finishes the work as approved on the original development plan (see recording for detailed presentation).

03:29:48 Commissioner Smith stated she would like to see the new plan conform to our current Code and not the 1995 plan.

03:30:01 Commissioner Brown stated he would leave that up to the applicant. If he thinks he can work within the confines of the current Binding Elements and Development Plan, then he doesn't think they need to revise the plan. If he can't make that work, then they do need to revise the plan and bring it back through the regular process (see recording for detailed presentation).

03:30:16 Commissioner Peterson asked if Commissioner Brown was suggesting we levy the fine, not suspend the fine.

03:30:20 Commissioner Brown stated he thinks we've given them a lot of opportunities, and they have made a lot of progress, that's why he couldn't see going the full fine. Commissioner Brown stated he thinks they've gone as far now as they can and they're just not going to be able to meet the conditions that were put on that plan (see recording for detailed presentation).

03:30:36 Commissioner Jarboe stated before they started this process of talking about fines he was not interested in setting a fine that would possibly be so punitive that it would put him out of business, and he believes a \$9,000 fine might be too high. He said he was going to impose something like just enough of a fine that it gets the gentleman's attention so that he stops taking the actions that he's been taking, and then obviously they need direction in how to get there. Commissioner Jarboe stated the idea that they haven't known what we've been requiring them to do through all this time is a little disingenuous; we've been very up front since March of this year of what they needed to do. Commissioner Jarboe stated he agrees with Commissioner Brown wholeheartedly, he would just suggest that the fine be a little smaller than that. Commissioner Jarboe stated if anyone else has any opinions that's fine, if not, we should entertain a motion (see recording for detailed presentation).

03:31:37 Commissioner Turner stated he would like to see a door and the completion of that building (see recording for detailed presentation).

03:31:57 Commissioner Jarboe stated they have to put a plan through first.

03:32:08 Mr. Baker stated we can't really tell him to enclose the building if he doesn't want to use it, that's up to him. What we're saying here, and the Commission

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has been saying it, is whatever your use is, abide by the guidelines that apply to your property. If you're going to use that half-enclosed building for storage then you need to get a building permit and enclose it so it's enclosed. If you don't, then, okay (see recording for detailed presentation).

03:32:41 Commissioner Carlson stated he can understand why you would certainly want to levy a fine. It's not the big fine that was laid in the beginning, and you're giving him credit for what they've done; Binding Elements have to mean something (see recording for detailed presentation).

03:33:05 Commissioner Brown suggested 2 ½ percent, which would be \$2,275.00. The Commissioners discussed the fine and further actions moving forward. The Commissioners discussed the appellant's options with Mr. Curry and Mr. Baker (see recording for detailed presentation).

03:46:42 On a motion by Commissioner Brown, seconded by Vice Chair Lewis, the following resolution was adopted:

RESOLVED, that the Louisville Metro Planning Commission in Case Number 9-36-98 BE does hereby direct the County Attorney to draft a **FINAL ORDER TO LEVY A FINE** on the property at 9609 National Turnpike in the amount of **\$2,275.00** as part of the suspended fine that had been approved by the Planning Commission at the June 2, 2016 Planning Commission meeting, and that will be the **FINAL ORDER** on this action.

The vote was as follows:

YES: Commissioners Howard, Smith, Turner, Peterson, Brown, Vice Chair Lewis and Chair Jarboe

ABSTAIN: Commissioner Carlson

NOT PRESENT: Commissioners Kirchdorfer and Tomes

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STANDING COMMITTEE REPORTS

Land Development and Transportation Committee

No report given.

Site Inspection Committee

No report given.

Planning Committee

No report given.

Development Review Committee

No report given.

Policy and Procedures Committee

No report given.

CHAIRPERSON/DIRECTOR'S REPORT

Brian Davis, on behalf of Emily Liu, advised the Commissioners of the KIPDA Regional Planning Council training sessions on Wednesday, October 26, 2016.

Mr. Davis stated there is nothing on the agenda so far for November 3, 2016, so we may try to have a training session on the new Vote Cast system.

ADJOURNMENT

The meeting adjourned at approximately 4:53 p.m.

Chair

Planning Director