

**STATE OF GEORGIA
COUNTY OF HENRY**

The Henry County Board of Commissioners held a Special Called Meeting for a Zoning Appeal *via teleconference* on Wednesday, October 13, 2021, 9:00 a.m.

Carlotta Harrell, Chair
Johnny Wilson, District I Commissioner
Dee Clemmons, District II Commissioner
Greg Cannon, District III Commissioner
Vivian Thomas, District IV Commissioner
Bruce Holmes, District V Commissioner

Also in attendance: Cheri Hobson-Matthews, Patrick Jaugstetter, County Attorney; Stephanie Braun, County Clerk; and Nathifa Cunningham, Deputy County Clerk

CALL TO ORDER

Carlotta Harrell, Chair, called the Zoning Appeal Hearing to order. She advised that evidence will be heard from county staff and from applicant; *no Public Comments will be heard at this meeting.*

PLANNING & ZONING

ZONING APPEAL: Case #AP-21-03

D.R. Horton, Inc. of Conyers, GA appeals the administrative interpretation of zoning conditions leading to the issuance of a stop work order for property located to the west of Flippen Road in Land Lot 6 of the 12th District. The property consists of 168.51 +/- acres and the request is for a single-family residential and townhome development. District 5 (Presenter: Toussaint Kirk, Cluster Leader) (Exhibit 1)

Patrick Jaugstetter, County Attorney gave a brief explanation of how the appeals process works and why the Board of Commissioners (BOC) has assembled today, to either uphold or to reverse a decision made from the Zoning Advisory Board (ZAB). He advised that Molly Esswein, an associate attorney with Mr. Jaugstetter's law firm, is present on the call along with Mr. Kirk in presenting the determination and evidence in support thereof. The applicant/appellant will have the opportunity to present their evidence. Once concluded with questions for either side, closing remarks will be made and then turned over to the BOC for final determination. This is not a Public Hearing for general comments and discussion from the public; this is only limited to the county's and the appellant's representatives.

Molly Esswein, attorney, Jarrard & Davis, LLP, gave some background on Broder Farm and conditions imposed on the request made by applicant/appellant. The appeal was filed specifically as to the letter issued by Mr. Kirk on August 16, 2021. Essentially, the argument is a matter of filings not done in a timely manner based on violation of conditions alleged against the developer regarding materials for homes in that development.

Board of Commissioners Minutes from the meeting held on Tuesday, January 22, 2019, was first presented by Ms. Esswein. In addition, the meeting video from the same date, Planning & Zoning file including the zoning Resolution, letter from Mr. Kirk dated 8/16/21 regarding stop work order, the appeal which was filed, the staff report and the Building & Plan Review's file, all of which are certified copies; photographs relevant to the property were also included and the stop work order and the 8/9/21 correspondence to the developer. She then yielded the call to the developer.

Tiffany Hogan, Forward Planning Manager, D.R. Horton, Atlanta East Division, joined the call to give further remarks in evidence to the appeal at hand. She stated that stop work order was posted on August 10, 2021 and contact was made with the Planning & Zoning to garner the exact reasons for the stop work order; this was received on August 16, 2021. She further gave background on the appeal including the open records request which included documentation with Condition #7, of which this appeal is based regarding the materials used for the homes in the development.

Ms. Esswein then turned the call over to Mr. Kirk for testimony, as follows:

***Direct Examination and Testimony of Mr. Toussaint Kirk, Henry County Planning & Zoning Director
By Molly Esswein, attorney, Jarrard & Davis, LLP***

Ms. Esswein: Mr. Kirk, what is your job role and duties for Henry County?

Mr. Kirk: I am the Planning director for Henry County.

Ms. Esswein: How long have you been in that role?

Mr. Kirk: I started this role in February of 2020.

Ms. Esswein: As part of your job duties, do you have a reason to review and interpret zoning conditions that are imposed by the County?

Mr. Kirk: Yes, ma'am.

Ms. Esswein: Have you ever had to do that with regard to Broder Farms?

Mr. Kirk: I have.

Ms. Esswein: And when did that come to your attention, what was the reason for that?

Mr. Kirk: It came to my attention around August the 9th or so; the reasons was I was contacted and asked to take a look at the conditions because there seemed to be some discrepancy in the elevations.

Ms. Esswein: Okay, what kind of discrepancies specifically?

Mr. Kirk: The discrepancy was that all the homes should have been all four sides brick and they were being built with water tables and Hardy board siding.

Ms. Esswein: So at the time that you were contacted you first looked at the zoning resolution?

Mr. Kirk: Yes, ma'am.

Ms. Esswein: And what did that resolution say?

Mr. Kirk: The resolution did specify a combination of brick, stone, or stucco, or Hardy board.

Ms. Esswein: (Displays copy of BOC Resolution with zoning conditions) So you're referring to Condition #7 that's shown on the screen?

Mr. Kirk: Yes, ma'am.

Ms. Esswein: Okay, does that condition say all sides brick or is there any elaboration on that?

Mr. Kirk: No, it says "all sides brick, stone, stucco or any combination of two or more of the following materials".

Ms. Esswein: Okay, but brought to your attention was that it was supposed to be exclusively brick?

Mr. Kirk: Correct.

Ms. Esswein: What did you do once you saw this in the resolution; did you review anything else?

Mr. Kirk: We looked at the resolution, the audio from the original meeting and, of course, the condition itself.

Ms. Esswein: Okay, did you look at the meeting minutes as well?

Mr. Kirk: Yes, definitely.

Ms. Esswein: Okay and what did the meeting minutes say?

Mr. Kirk: The minutes spoke to all sides brick as was being contemplated by the commissioner and they did reference all sides brick.

Ms. Esswein: (Displays BOC Meeting Minutes of January 22, 2019) Are these the minutes that you're referring to? Let me zoom in a little bit more.

Mr. Kirk: Yes, ma'am, yes, ma'am.

Ms. Esswein: Okay, so once you reviewed these did you have a conclusion or did you, you reviewed the video after that is that what you said?

Mr. Kirk: Yes, ma'am. We tried to look at all the evidence and we; at that point, we issued the stop work order.

Ms. Esswein: Okay, I'm going to show the excerpt from the video where that was discussed so, one moment.

(Video excerpt is played)

Ms. Esswein: So, Mr. Kirk, following your review of -- I'm not sure how Netflix ended up on the screen, I'm sorry -- after your review of the meeting minutes and video along with the zoning resolution, what was your conclusion?

Mr. Kirk: So basically we concluded that the intent of the subdivision was to be four sides brick and that the condition was not appropriate for that subdivision.

Ms. Esswein: Did the resolution accurately reflect what was approved by the commissioners in your interpretation?

Mr. Kirk: No, ma'am.

Ms. Esswein: And what did you ultimately conclude?

Mr. Kirk: Basically the condition needed to be upheld to all four sides brick and that the condition was not accurate.

Ms. Esswein: Okay. Had any action been taken with Broder Farms while you were conducting your review?

Mr. Kirk: We placed a stop work order.

Ms. Esswein: Okay, once you completed your review did you follow up with Broder Farms at all?

Mr. Kirk: We did. We issued a letter on August 16th notifying them of - I guess you can say - the findings in our decision and the path they can take to appeal.

Ms. Esswein: Okay, I'm trying to pull that up now, the August 16th letter so that the commission can see. (Displays letter) And was this your ultimate conclusion? This is your August 16th letter?

Mr. Kirk: Yes, ma'am.

Ms. Esswein: And it accurately states your conclusion as to the review of the minutes, the meeting video and the resolution?

Mr. Kirk: It does.

Ms. Esswein: Okay. I have no further questions, so I turn it over for cross-examination.

***Cross-Examination and Testimony of Mr. Kirk
By Tiffany Hogan, Forward Planning Manager, D.R. Horton***

Ms. Hogan: Thank you, counsel. Mr. Kirk, I actually cannot see you now that I am speaking but hopefully you are still there at the podium. I just have a few questions for you.

Mr. Kirk: Yes, ma'am.

Ms. Hogan: So, prior to the Zoning Advisory Board meeting, is there a staff report that's prepared for that?

Mr. Kirk: Yes, ma'am.

Ms. Hogan: And is it someone from your staff in Planning & Zoning that prepares that report?

Mr. Kirk: That's correct.

Ms. Hogan: And do you review that report before it goes before the Zoning Advisory Board?

Mr. Kirk: Normally I do; yes, ma'am.

Ms. Hogan: And was Condition #7 in that report?

Mr. Kirk: So at the time in which this went before ZAB and BOC it was actually before my time, actually being employed by Henry County.

Ms. Hogan: I appreciate that clarification, Mr. Kirk, but as you have reviewed in preparation for this hearing is it your understanding that Condition #7 was the condition that was included in the staff report for the Zoning Advisory Board meeting?

Mr. Kirk: Yes.

Ms. Hogan: And Mr. Kirk, do you review the minutes, are the minutes prepared from the Zoning Advisory Board?

Mr. Kirk: Normally sometimes I do, not all the time, but in this case, I did.

Ms. Hogan: Okay. And I am going to share my screen, Commissioners, and as a procedural matter I will email all of these documents to the clerk at the conclusion of this hearing to make sure that they are included as an official part of the record since I am not there in person. Are you able to see my screen right now?

Mr. Kirk: No, ma'am.

Ms. Hogan: Are you all now able to see my screen?

Mr. Kirk: Yes, ma'am.

Ms. Hogan: (Displays document) Mr. Kirk, are you familiar with this document?

Mr. Kirk: Yes, ma'am.

Ms. Hogan: Okay and for everyone that's viewing, this is the Executive Summary for the Board of Commissioners meeting, meeting date January 22nd, 2019; and Mr. Kirk, I'm going to scroll through this document. Your staff prepares this Executive Summary, correct?

Mr. Kirk: Yes.

Ms. Hogan: And in the Executive Summary, there is an excerpt of the relevant portion of the Zoning Advisory Board meeting from the case that we are here about today. That case number is RZ-18-17, is that your recollection?

Mr. Kirk: Yes, ma'am.

Ms. Hogan: And if I scroll down here, Mr. Kirk, you see Condition #7 there?

Mr. Kirk: Yes.

Ms. Hogan: So would you agree that the Zoning Advisory Board then also saw Condition #7 which utilizes a mixture of materials as the condition that was presented to the Zoning Advisory Board?

Mr. Kirk: *If it's in the Executive Summary of the document, so yes.*

Ms. Hogan: *Thank you. And again, Mr. Kirk, the Executive Summary is created by your office, correct?*

Mr. Kirk: *Yes, ma'am.*

Ms. Hogan: *In preparation of the Board of Commissioners' meetings; is that correct?*

Mr. Kirk: *Can you repeat that?*

Ms. Hogan: *In preparation of the Board of Commissioners meeting and Public Hearing?*

Mr. Kirk: *Yes.*

Ms. Hogan: *And is it your understanding that this is provided to the Commissioners in advance of those hearings for them to have the opportunity to review the cases prior to the Public Hearing?*

Mr. Kirk: *Yes.*

Ms. Hogan: *And Mr. Kirk, I've scrolled here to page two of that document. Page two, the top there says, "Additional Comments/Recommendations", do you agree?*

Mr. Kirk: *Yes.*

Ms. Hogan: *And then it says, "The following conditions include the applicant's revisions", would you agree with that?*

Mr. Kirk: *Yes.*

Ms. Hogan: *And then number seven says all homes shall consist of all sides brick, stone, stucco or any combination of two (2) or more of the following materials on all sides and then it lists those materials which includes cement fiberboard, would you agree with that?*

Mr. Kirk: *Yes.*

Ms. Hogan: *So you would then agree, Mr. Kirk, that in the Executive Summary provided to the Board of Commissioners prior to the hearing on January 22, 2019 that there was a copy of the staff recommendations which, written here, also says, includes the applicant's revisions; there was also a copy of Zoning Advisory Board minutes which you agreed included Condition #7 as well, correct?*

Mr. Kirk: *Correct.*

Ms. Hogan: *So there are three documents then, Mr. Kirk - the staff report to the Zoning Advisory Board, the Zoning Advisory Board minutes and then the Executive Summary prepared in advance of the Board of Commissioners' meetings for the Commissioners to review that all include Condition #7 which provides for a mixture of materials to be used on the home and specifically states that these include the applicant's revisions which would*

indicate there was an opportunity for amendments to be made prior to the hearing on January 22, correct?

Mr. Kirk: Possible, yes.

Ms. Hogan: Is that a yes or a no, Mr. Kirk?

Mr. Kirk: It's possible, I mean, conditions are changed, can be changed at the meeting in themselves; so, is it on the paper? Yes, but is there a possibility to change it after the fact, after the three revisions, or three reports - then it's possible.

Ms. Hogan: Thank you, I appreciate that. Let's explore that. So, if the conditions were to be changed or amended during the meeting there would need to be a motion to amend that, is that your understanding of Robert's Rules of Order and how it would work to amend the condition?

Mr. Kirk: Well, I think you have to ask for clarification in some instances but...

Ms. Esswein interrupted the questioning to advise the Board that this line of questioning pertaining to Robert's Rules of Order goes beyond the scope of expertise for Mr. Kirk. She further explained that the Rules of Order is controlled by the Chair with legal advice and consultation.

Ms. Hogan rebutted that she is not asking Mr. Kirk for expertise in his role but is asking him that if a condition is to be amended, that it is amended through a motion during Public Hearing. She stated that Mr. Kirk did state that Condition #7 is in the documents, but it can be amended at a later time. **Chair Harrell** explained that the Board determines to add conditions and is not a question that Mr. Kirk can answer as it is left up to the Board and can be done without motion. If a final motion is made, any changes to conditions are included in that motion.

Ms. Hogan: So, Mr. Kirk, just one final question for you. After reviewing the video and reading the minutes, was there a motion or was there an addition or a change to Condition #7 that was relayed during the January 22, 2019 hearing?

Mr. Kirk: In my opinion, yes.

Ms. Hogan: Could you explain that?

Mr. Kirk: Well that's my interpretation of what I saw in the video and unfortunately --

Ms. Hogan: What is your opinion based on?

Mr. Kirk: Well, the conversation was had about the brick, and we all - I guess - at that time understood that -- what the intent of the subdivision was to be and so, again, motions are made; I think the chairwoman at that time asked, does that include all the conversation - or something to that effect - and he said, yes. So my interpretation is that it was included in the motion.

Ms. Hogan: Thank you, Mr. Kirk; no further questions.

Redirect Examination and Testimony of Mr. Kirk
By Molly Esswein

Ms. Esswein: I have a couple of follow up questions. Mr. Kirk, when the Board approves a zoning is it always exactly as was included in the staff report?

Mr. Kirk: No, ma'am.

Ms. Esswein: Is what the Planning & Zoning committee - or Board - is it what they recommend; is that the final result?

Mr. Kirk: No.

Ms. Esswein: And was your determination based on what the recommendation to the Board was?

Mr. Kirk: No, ma'am.

Ms. Esswein: So, it was based on what, specifically, just to make sure that they're clear?

Mr. Kirk: The final recommendation for the BOC?

Ms. Esswein: (indicates affirmatively)

Mr. Kirk: That was based off the conversation that was had at the BOC meeting itself.

Ms. Esswein: Okay and what the district Commissioner said?

Mr. Kirk: Correct.

Ms. Esswein: Okay. Thank you. No further questions for this witness.

(End of examination of Toussaint Kirk, Planning & Zoning Director)

Ms. Esswein then called Mr. Redding for testimony:

***Direct Examination and Testimony of Prentiss Redding, Jr., Director, Building & Plan Review
By Molly Esswein***

Ms. Esswein: Mr. Redding, just for the record, can you tell the commissioners what your role and responsibilities with the county is?

Mr. Redding: I'm Henry County's Building and Planning Director. I've been in this position for ten months now.

Ms. Esswein: Okay and I assume you have familiarity with Broder Farms?

Mr. Redding: Yes, ma'am, I am.

Ms. Esswein: And how was that issue with the conditions and the stop work order brought to your attention?

Mr. Redding: It was brought to the attention by my Cluster director, Mr. Toussaint Kirk, informing me of concerns that Broder Farms had not met the intent of build - being 4-sided brick.

Ms. Esswein: Okay, and what specifically did you do after that was raised to your attention?

Mr. Redding: I reached out to Ms. Tiffany Hogan via phone call to inform her about the concerns that Broder Farms had not met the intent and I followed that up with an email to her because of her request stating that because she had to have physical documentation stating that prior to that day. Then I went out on August 10th to administer a stop work order after going out there to physically see the build.

Ms. Esswein: So I'm pulling up a copy of the email that you're referencing just so that the Board can see it to make sure. (Displays email) I'm going to zoom in; is this is the email you were referencing when she asked for written documentation?

Mr. Redding: Yes, ma'am, it is.

Ms. Esswein: Okay, so you sent this on August 9th and then you mentioned that you issued a stop work order; when did you issue the stop work order?

Mr. Redding: I issued the stop work order on August 10th after going out to observe and witness the build.

Ms. Esswein: So you went to the site on August 10th?

Mr. Redding: Yes, ma'am.

Ms. Esswein: Had you been to the site previously?

Mr. Redding: No, I have not.

Ms. Esswein: Okay, so on August 10th what did you see when you went to the site?

Mr. Redding: I saw water tables, part of the work build of homes, so pretty much the conditions that were stated that should have been met during the BOC meeting hadn't taken place out there.

Ms. Esswein: So there were materials other than all sides brick?

Mr. Redding: Correct.

Ms. Esswein: Okay. So, following your issuance of the stop work order have you done anything else regarding the site?

Mr. Redding: No, ma'am.

Ms. Esswein: No further questions.

Ms. Hogan stated she had no questions for Mr. Redding.

Ms. Esswein called Mr. Haynes as a final witness.

Direct Examination and Testimony of J. Brett Hanes, Assistant Director, Building and Plan Review

By Molly Esswein

Ms. Esswein: *Mr. Hanes, can you tell the commissioners your job duties and responsibilities for county?*

Mr. Hanes: *I'm the Assistant Director for the Building & Plan Review Department for Henry County.*

Ms. Esswein: *And how long have been in that role?*

Mr. Hanes: *Eighteen days.*

Ms. Esswein: *Okay and in your eighteen days have you had any reason to interact with Broder Farms or visit the site?*

Mr. Hanes: *Yes, ma'am.*

Ms. Esswein: *And what was the extent of that?*

Mr. Hanes: *I visited the site to not only take a look at the construction work taking place but also wanted to get a status on every project that is currently underway.*

Ms. Esswein: *Okay and about when did you go out to review the site?*

Mr. Hanes: *I was actually out there yesterday.*

Ms. Esswein: *Okay. Was that the first time you've been out there or have you been out there previously?*

Mr. Hanes: *No, ma'am. I have been out there previously.*

Ms. Esswein: *Okay, were you there after the filing of this appeal?*

Mr. Hanes: *Yes, ma'am.*

Ms. Esswein: *Okay and at the time that you visited the site did you observe the condition of the homes that had been constructed?*

Mr. Hanes: *Yes, ma'am.*

Ms. Esswein: *What was the condition of the homes the time you've been out there?*

Mr. Hanes: *At that time, the homes that were at the stage where siding was being installed, no home in which where the siding was being installed was compliant with the four sides brick stipulation.*

Ms. Esswein: *Okay, so you observed other materials on the property?*

Mr. Hanes: *That is correct. The majority of the material used was commonly referred to as Hardy board; it is cementitious fiber with a set up for a brick water table.*

Ms. Esswein: *I'm going to show a couple of pictures to see if the Board (Displays pictures) - so, Mr. Hanes, is this picture that I'm showing - what kind of a state does that show?*

Mr. Hanes: *That would be what we refer to as sheathing or nail pattern state, no moisture barrier or siding installation has occurred at this time.*

Ms. Esswein: *Okay. At this point, if they were to change their construction could they put brick on this?*

Mr. Hanes: *Yes, ma'am.*

Ms. Esswein: *Okay. Were there any homes where brick would not be feasible at this point?*

Mr. Hanes: *At this time, out of 221 possible lots in this neighborhood, only eight currently have siding installed. Those will be the ones where it is still possible to add brick. They can either add brick directly over the siding by adding a moisture barrier or remove the siding that is installed as they did have intention of installing brick water table.*

Ms. Esswein: *(Displays report) And would this report be reflective of that comment that you just mentioned of the number of homes that have siding and that do not?*

Mr. Hanes: *Yes, ma'am. That's correct.*

Ms. Esswein: *What would the construction modifications take, in your opinion, to accomplish the compliance with the four sides brick condition?*

Mr. Hanes: *With the four sides brick you are going to have additional weight so a brick ledger would need to be added around the slab. Each of these homes has remarkably straight wall construction, making this addition easily feasible and there are documentations even by the national brick standards industry as to how to add brick to existing construction. Many of these projects are not even at that stage where they would have to go above and beyond as well as many of projects are going to require additional grading as the sheathing material must have six inches of clearance from grade and that is currently not achieved.*

Ms. Esswein: *Okay and in that image that's currently up on the screen what do - what is the state of these homes?*

Mr. Hanes: *These are the homes in which siding has already been installed.*

Ms. Esswein: *How far from completion are these homes, in your opinion, based on what you've discussed with the developer, if you even know?*

Mr. Hanes: *While I haven't discussed any of this with the developer, I would state that these homes are around 65% completion. One of them, I believe, did have sheetrock installed; the majority of the ones where siding is already installed; the sheetrock has only been stocked but has not been installed.*

Ms. Esswein: *Okay and these would be the homes that it's still possible to encase in brick?*

Mr. Hanes: *Yes, ma'am.*

Ms. Esswein: Okay, no further questions, so if opposing counsel has any questions for cross-examination.

Ms. Hogan had no questions for Mr. Hanes.

Ms. Esswein concluded the case for the county.

Ms. Hogan made a brief presentation prior to calling witnesses and reminded the Board that the issue surrounding Condition #7 as it states that it could be any mixture of materials used on the exterior elevations of the homes. She asserted that D.R. Horton was not the applicant in this case but was a purchaser in this action and purchased from the seller who had this case zoned. Ms. Hogan further asserted that due diligence was done in this project. Resolution 19-28 was what D.R. Horton relied upon as to what could be built on this property; email was sent by D.R. Horton to a staff member asking for clarification upon Condition #7. (Email was displayed relevant to statement) Ms. Hogan referred to the homes seen by Mr. Hanes had already had permits to approve the building and is under contract with future Henry County residents, by D.R. Horton. If these homes need to have 4 sides brick that would change the contract price that the buyers had already submitted with an expectation that they would close sometime in 2021. D.R. Horton is not the applicant but rather is the purchaser of the project from the applicant (who sought the zoning request) and had already started developing these homes with the understanding of the language on Condition #7 that says that there can be a mixture of materials used on the exterior of the homes and not 4 sides brick. Proper due diligence was required by the applicant. When the stop work order was issued on August 10th, there are consequences of the stop work order, which goes beyond the exterior appearance of the homes. Builders and vendors have been put out of work since the stop work order was issued. D.R. Horton admits to no wrongdoing but tried to offer a compromise to those who were put out of work as well as residents who are delayed from moving into their homes. Ms. Hogan further asserted that it will cost an estimated \$355,000 to resume the project. She noted that Georgia Court of Appeals has set precedent in *Cherokee County, et al vs Martin* (559 S.E. 2d 138(2002)) (253 Ga. App.395) which states that inferences should not be made that the zoning classification of a property is conditioned on any particular uses of that property. Such condition must be expressly made within the four corners of the rezoning resolution. The resolution signed had Condition #7 allowing for the mixture, even though the District V Commissioner's remarks specified wanting 4 sides brick but were not made part of the motion and not part of the resolution; therefore, they were only remarks. The Commissioner had requested adding a 9th condition and wanting to move forward, which would indicate that he was about to state a motion. Ms. Hogan alleges that Condition #7 was left as-is with the mention of an additional 9th condition.

Ms. Hogan then called Mr. Kilgallon as a witness.

***Direct Examination and Testimony of Mike Kilgallon, President, The Pacific Group, Inc.
By Tiffany Hogan, Forward Planning Manager, D.R. Horton, Inc., Atlanta East Division***

Ms. Hogan: Mike, would you please tell the commissioners what your position is and who you are with?

Mr. Kilgallon: Yes, Madam Chair and member of the commission, my name is Mike Kilgallon with Pacific Group; we are the applicant in the zoning and through an affiliated entity, we are the actual developer of the property and have been selling -- developing the property, and then selling completed building lots to D.R. Horton. In all the meetings, the ZAB and council hearings, all of the renderings that were shown to the commission, none of which all showed the mi of materials and none of which were showing four sides brick. Commissioner Holmes, somewhere in the commentary that somebody pointed out at one

hour and some minutes made a comment that the developer reads it as four sides brick - Commissioner Holmes and I had two meetings, both of which were well before the ZAB Board meeting and they were attended by a number of people and four sides brick was never mentioned by Commissioner Holmes and certainly - hearing that we presented the illustrative board, the architectural renderings that didn't show four sides brick and we had no communication with Commissioner Holmes after that point, so I, as the developer, did not agree to do four sides brick at any time; and so I'm at a loss to understand that comment. Perhaps it was for prior people who were interested and never followed through with it.

Ms. Hogan: And Mr. Kilgallon, I would ask you to clarify that you as the developer and the seller of the land took this action through zoning prior to entering into contract with D.R. Horton for the purchase of the property, is that correct?

Mr. Kilgallon: Correct.

Ms. Hogan: Thank you, Mr. Kilgallon.

Ms. Hogan summarized that the builder in this case, D.R. Horton, has presented clear evidence that as a bona fide purchaser there was no way they would have been notified of any issues with the right the property including that which relates to the exterior materials on the homes. D.R. Horton alleges to have done due diligence on the projects and has been a good faith and good development partner within Henry County and wishes to continue with that partnership. Condition #7 states mixture of materials and will stand in the Resolution and also, nothing in District V has a mixture of materials. She gave another example of Condition #7 with mixture of materials allowed. D.R. Horton respectfully requests that the stop work order be lifted from the Broder Farms project and work to begin again on those homes and not have to go through further approval processes and allow for completion of those homes. D.R. Horton further alleges to no wrongdoing but will provide four sides brick homes along the perimeter of the property including the area along I-75. She pointed out that area for clarification to the Board. Ms. Hogan hopes that this is resolved in a timely manner and that the developer will do four sides brick along the perimeter of the property as well as make full front brick throughout the remainder of the community and a water table on all the other sides.

Chair Harrell asked if Ms. Esswein had anything to add. **Ms. Esswein** asked Ms. Hogan about the site plan, as it does not look to be the current site plan and asked for clarification. **Ms. Hogan** stated that this was the most current plan that was received very late the other day and will provide documentation upon request on the builder's offer of compromise.

Ms. Esswein recalled the District V Commissioner making comments on what he wanted the condition to state but upon making his motion that condition was not modified, not reflected in the Resolution, not reflected in the minutes, thus indicating an error. The actual action taken by the Board of Commissioners would control and anything to the contrary would be in error. This means that all sides should be brick and not a combination and she asks the Board to uphold the determination and keep the stop work order in place until all the homes are constructed with four sides brick, as intended.

Chair Harrell called for questions.

Johnny Wilson, District I Commissioner believes that information is important and asked Ms. Hogan if the people out of work filed for unemployment; **Ms. Hogan** stated she is unsure but anytime that a stop work order is issued, people are out of work and they were committed to work at those sites. District I Commissioner asked Mr. Kilgallon about Commissioner Holmes' remarks regarding the

Condition #7 and whether he heard the District V Commissioner mention the four sides brick change to the condition; **Mr. Kilgallon** stated he did attend that meeting but did not recall that remark made by the District V Commissioner. He added that sometimes it is hard to hear discussion. The District I Commissioner asked if the presenter of the case heard the comment; **Steve Moore, Moore Bass Consulting**, stated he was at the podium and did not remember the conversation until he looked at the video. Commissioner Wilson recalled the four sides brick was going to be in the community. If that comment was made then it should have been brought up then, not now.

Greg Cannon, District III Commissioner asked if there are only eight homes with the Hardy plank siding; and where those eight homes are located. **Ms. Hogan** stated she cannot show a markup on where the homes are located; however, she referenced that Mr. Hanes testified that there are eight with the siding on them and 40 homes were (detached and townhomes) permitted and under contract. Commissioner Cannon asked whether those homes are in the front or the rear of the development. Ms. Hogan deferred until after the District IV Commissioner speaks.

Vivian Thomas, District IV Commissioner remarked that this project started with one developer and was then sold to a second developer; **Ms. Hogan** responded that there is a developer of the land, in this case Pacific Group, who provided lots to D.R. Horton to build upon those lots. The District IV Commissioner then recalled the meeting where this project was represented by a third party and that developer representative may have been in the audience, Steve Moore with Moore Bass; Ms. Hogan affirmed and added that he was the third party engineering and entitlement work. Commissioner Thomas stated that Moore Bass is very familiar with the process and that commissioners routinely make changes to conditions and documentation that come in from Planning & Zoning for clarification. The third party is responsible for conveying those conditions to any third party buyer with documentation from that meeting. She then asked what responsibility lies upon the third party to convey the information to anyone purchasing the lots. **Mr. Moore** responded that they are the third party representative for the Pacific Group through the project's entitlement phase and for nothing more than that. He had not been involved in that project since that time until today. None of the engineering design or survey was done by Moore Bass; nor was he involved in the transactional portion.

Commissioner Thomas pushed that a third party was present representing the developer when District V Commissioner clearly stated the condition changes and asked who was responsible for conveying that condition change to the developer; **Patrick Jaugstetter, County Attorney** explained that the obligation of different people involved in this sale is defined by the contract that creates the transaction. This Board is obligated to uphold the zoning ordinances it adopts. After the ordinance is adopted, what conversation is held between interested parties is not of the Board's concern. The District IV Commissioner stated that there was a representative present who clearly heard the change in condition and the County Attorney reminded the Board that this is not their focus; only to determine what the zoning conditions imposed on this property.

Ms. Esswein stated that Mr. Hanes pulled up the image of the site to show the homes to answer the question previously asked. **Mr. Hanes** responded that the current structures with siding are located on the map (indicating). He added that the five homes are 60-65% complete and they are on the perimeter and would be four sides brick.

Bruce Holmes, District V Commissioner stated he intended to have these homes four sides brick and stated so before the motion. There was no rebuttal at that time either. He had a separate meeting with Mr. Kilgallon and former Commissioner Prince and emphasized that all homes in District V will be four sides brick. When he rode past this subdivision, he called the County Manager to check the video, check the zoning conditions to ensure that he made the comments on four sides brick. There is no

October 13, 2021

Page 15 of 15

compromise on this condition and it is a problem between D.R. Horton, Moore Bass and Pacific Group. There is no problem with the county and the county is not at fault for this.

With that, **Commissioner Holmes** made a motion to deny their requests. **Chair Harrell** agreed that the video was clear on Commissioner Holmes' modification of that condition. The Zoning Advisory Board made recommendation and condition to the Board of Commissioners (BOC) and the Board of Commissioners has the right to change them. While there may have been an error in transcription, there was video. **Dee Clemmons, District II Commissioner** seconded the motion. Motion carried and the request was denied.

ADJOURNMENT

There being no further business at this time, **Chair Harrell** adjourned the meeting. ***Meeting adjourned at 10:17 a.m.***

Carlotta Harrell, Chair

Stephanie Braun, County Clerk