BZA minutes are transcribed in a summarized manner. Video footage is available for viewing in the (CATS) Audio-visual Department of the Monroe County Public Library at 303 E. Kirkwood Avenue. Phone number: 812-349-3111 or via email at the following address: moneill@monroe.lib.in.us

The Board of Zoning Appeals (BZA) met in the Council Chambers at 5:30 p.m. Members present: Throckmorton, Stewart Gulyas, and McManus (Klapper to join the Board at approximately 6 PM-after the Historic Preservation Committee meeting).

MINUTES: Throckmorton asked if the minutes could be forwarded to the end of the meeting when all members of the Board would be present. No objections to this request. **McManus moved to forward the minutes to the end of the agenda. Motion carried.

REPORTS, RESOLUTIONS AND COMMUNICATIONS:

Jackie Scanlan, Development Services Manager, stated that Barre Klapper would join the BZA at approximately 6 PM. We will move forward with the first petition and then take a break so that we have a full Board for the rest of the petitions on the agenda.

PETITION CONTINUED TO: June 21, 2018

- AA-12-18 **Bryan Rental, Inc.**
  3175 W. 3rd St.
  Request: Administrative Appeal from Staff's decision regarding limiting the size of an individual tenant panel.
  Case Manager: Eric Greulich

PETITIONS:

- V-05-18 **Shahyar Daneshgar**
  703 W. 9th St.
  Request: Variance from front yard setback standards to build a porch in the Residential Core (RC) zoning district.
  Case Manager: Jackie Scanlan

Jackie Scanlan presented the staff report. The property is located at 703 W. 9th St., at the northwest side of downtown. The petition site is a single-family property that is zoned (RC) Residential Core. The GPP designation under which this was filed is *Mixed Urban Residential.* The petitioner is requesting a variance from front yard building setback standards to build a covered porch; however, the petitioner cannot meet the front yard setback build-to-line requirement. The proposed porch would be located on the front of the existing house. The required build-to-line in the (RC) zoning district is 15 feet from the right-of-way line or the block face average whichever is less. The proposed porch would be 8-foot deep which would put it about ½ foot from the right-of-way. The property was surveyed and the building sits 8-1/2 feet behind the right-of-way line. The unique characteristics of properties located in this area is that the property line where it meets the right-of-way is set far back from the edge of the sidewalk. Typically in our downtown areas the property lines go pretty close to the edge of pavement or edge of sidewalk. In this instance, the petitioner has approximately 10 feet or a little more of space between the back of sidewalk and his property line that abuts the right-of-way. If he were to build the porch in this area he would still be 10-1/2 feet back from the back of sidewalk.

Additionally in this area most houses do have open porches. The houses on Mr. Daneshgar's block are pretty much in line with one another. The way the build-to-line works is that the maximum you can be from the right-of-way line is 15 feet and if the properties on your block are closer to your right-of-way line than that, then you have to build along that line. The need for the variance arises because the petitioner is already in line with the other properties and two of those properties have open porches; one has a porch that has clearly been enclosed. Given that open porches are characteristic of the area, Staff is recommending approval of the variance. There is no adverse impact on the welfare of the community. Again he would be approximately 10-1/2 feet behind the back of sidewalk. It would also improve the relationship of the private property with the public; private porches are promoted in this area of town. Staff found no adverse impacts on surrounding uses because it is characteristic of the area as previously mentioned. The practical difficulty and peculiar condition found are that it's a characteristic of most of the other houses in this area that have open porches but they meet the current setback. The (RC) zoning district actually seeks development closer to the road so this is in keeping with the spirit of that portion of the UDO. There is excessive right-of-way in front of the petitioner's property so it will still feel set back to the adjacent pedestrian. The house sits in such a way that it's 4-6 feet above the sidewalk, so it sits back and up from the road. Staff recommends approval of the requested variance based on the written findings, including the following conditions:

1. The variance is only for an 8 foot deep covered porch. Enclosure of the porch is not included in this variance approval.

2. Issuance of a building permit is required for construction of the porch.

3. The petitioner shall record a *Zoning Commitment* which states that the petitioner shall agree to forgo any damages during the acquisition of any needed property for the widening of 9th Street that would be incurred due to the approval of this variance. This commitment must be recorded in the Monroe County Recorder's Office prior to release of any building permit related to this variance.

Shahyar Daneshgar, petitioner, explained that he wishes to build a covered porch. Almost all of the houses starting at Kirkwood up to 10th or 11th Street all have porches minus one house that does not have a porch. He is nearing retirement and he would like to sit on the porch and look at the park that is adjacent to his house.

McManus asked Staff about condition #3 regarding the acquisition for the widening of 9th Street and if this is something that typically happens.

Scanlan said 9th Street is a width that we would expect a local road to be. Sometimes when we have to do road work or an expansion, the City has to acquire right-of-way from adjacent property owners which involves buying it from them. If you have an improvement on the site like this porch or a deck it could involve the City paying you for the removal of that. This would simply be a recognition by the petitioner that if that were to happen in the future for some reason, the City would not be paying the petitioner for the improvement. There would still be negotiation for the land but this porch improvement would be left out of it.

Throckmorton said the actual setback from the property line, according to code, should be what?

Scanlan said the actual setback is 8-1/2 feet which is where his house is right now.

Throckmorton: So he's on it right now and he would chew up 8 feet with the porch? (Scanlan said yes).

****Stewart Gulyas moved to approve V-05-18 based on the written findings, including the three conditions outlined in the staff report. McManus seconded. Motion carried by voice vote 3:0—Approved.**

~15 Minute Recess—Board to reconvene at 6 PM.

~Meeting reconvened. Let the record reflect that Barre Klapper joined the Board.
Note: Scanlan reported the petitioner for Storage Express (V-14-18) has requested a continuance to the June hearing date.

Klapper entertained a motion.

****Throckmorton moved to continue V-14-18 to the June hearing. Stewart Gulyas seconded. Motion carried by voice vote 4:0.**

- AA-09-18 **U.J. Eighty (UJ80) Corporation**
  1640 N. Jordan Ave.
  Request: Administrative Appeal of Staff's decision to issue two Notices of Violation (NOV) of non-compliance with the *Unified Development Ordinance (UDO) Section 20.02.500*
  Case Manager: Jackie Scanlan

Jackie Scanlan presented the staff report. This is an Administrative Appeal. The property is located at 1640 N. Jordan Avenue which is on the northeast side of town near campus. The building was formerly used as a fraternity house and is zoned Institutional (I). The property received Notices of Violation (NOV) that were issued by the Planning and Transportation Department for an illegal land use in the Institutional (I) zoning district and the petitioner has appealed those notices. The use that was previously on the site was a fraternity/sorority house. This use is a permitted and approved use in the Institutional zoning district. The fraternity was operating at the site as a fraternity recognized by I.U. and national chapters. On February 18th the fraternity vacated the property and on February 20th Planning and Transportation staff was notified that there were still occupants on the site. At that point, Planning staff looked through the Institutional (I) zoning district uses to see if there were any other residential uses that could be permitted on-site besides a fraternity/sorority house. Staff found none. Staff issued a Notice of Violation (NOV) on February 22nd. Staff subsequently had a discussion with the owner and a second Notice of Violation (NOV) was issued clarifying some technical errors in the first Notice of Violation (NOV). In this zoning district, there are 26 permitted uses and 5 of them Staff believes would have a primary residential component. There are also 9 Conditional Uses and of those 9, 4 of them have a primary residential component. Of the permitted uses--fraternity/sorority house (again, is the use that was on the site), then its three residential care home uses, and then university or college. And of the Conditional Uses there is homeless shelter, jail/juvenile detention facility and prison. After looking through those and knowing that at least two of the previous fraternity members were still living on the site, we were unable to identify a use that could be described as going on in a permitted fashion at the site. Again, only 9 possible residential uses in the Institutional (I) zoning district. The inhabitants on the site no longer meet the fraternity/sorority house definition of the Unified Development Ordinance (UDO) nor can they meet any of the other 8 possible options. As a result, the inhabitants must vacate the property and that is what the Notice of Violation indicated. In response, the petitioner submitted an Administrative Appeal. One of the issues raised was that they felt as though the property had been rendered useless. Scanlan said obviously any of the permitted or Conditional Uses allowed on the site are still

allowed there and it could be used as a fraternity/sorority house again. And there has been no change in use so there are no non-conforming use issues as was raised in the letter as well. Staff recommends denial of the Administrative Appeal (AA-09-18) based on the written findings outlined in the staff report. Staff is happy to answer any other questions. We also have representatives here from the City Legal Department if there are things that I can't quite cover and they can help us with that.

Garry Founds, Attorney for the petitioner, said we're dealing with two Notices of Violation (NOV) but both of them dealing with essentially the same subject matter. The first letter was received on February 25, 2018. That notice alleged that *"The property no longer meets the UDO permitted use in Institutional zoning districts."* The Planning and Transportation Department was informed on 2/20/18 that two individuals had not vacated the house at 1640 N. Jordan Ave., thus an illegal use. That was the extent of the description in the letter. The letter didn't allege that these individuals were not members of a fraternity or a sorority so the exact nature of the violation was a bit unclear at that point. Nevertheless, a second Notice of Violation (NOV) dated February 28 was later received on March 3, 2018. This notice made the same basic allegation but contained a bit more specific statement. It recited the definition of fraternity/sorority house that appears in the UDO (Unified Development Ordinance). It stated that two (2) individuals remained in the house and demanded that the owner cease using the house as a dwelling unit. Again, this letter did not state exactly that the individuals remaining in the house were not members of a fraternity or sorority, but the staff report that we received did shed some light on that situation. It read, *"The Planning and Transportation Department was informed that as of February 18, 2018 the occupancy of the property could no longer meet the definition of fraternity/sorority house as defined in the UDO as the fraternity on the site was no longer sanctioned by Indiana University."* And that kind of goes to the characterization that the fraternity vacated the house. The students were informed directly by the university that the fraternity was no longer going to be sanctioned and then they were offered university housing, and of course most of them opted to move into university housing. The two that remained, one of which was a house director whose task was to watch over the house. Regardless, our position is that the petition was not in violation of the UDO. As I pointed out, the letter simply alleged the individuals remaining on the property constituted an illegal use but did not exactly explain why. Presumably because they were not members of a fraternity or sorority. That aside, if this definitional provision for fraternity/sorority house had been interpreted properly in the only manner that renders it constitutional, the university and the City would not have had even a purported right to remove the students from the property. And there certainly could be no allegation of a violation. I want to focus on the definition of fraternity/sorority house as it appears in the UDO and I think you have a copy of that in the staff report. Planning interprets this definition such that *"A property can be a fraternity/sorority house only if it is occupied by students who are members of the Greek society that is officially recognized as a Greek society by Indiana University."* The problem with that interpretation is that it renders the provision unconstitutional. Founds referenced a U.S. Supreme Court case involving the State of Washington vs. Roberge. He said in that particular case, the Supreme Court struck down as unconstitutional a local zoning ordinance that required the consent of at least two-thirds of certain property owners in order to use a property in a given way. The Supreme Court held that there was no provision for review under the ordinance; the decision of the property owners was final; the decision-making property owners were not bound by any official duty; the decision-making property owners were free to withhold consent for selfish reasons; arbitrarily make the property owner subject to their own self-interested whim, and the ordinance provided no standards or guidelines for the application of the legislative police power by the decision-making property owner. In response to these issues, the Supreme Court said, *"That the attempted delegation was repugnant to the due process clause of the 14th Amendment" (In the words of the Supreme Court).* This decision has been cited by a number of State Courts to

strike down local zoning ordinances as unconstitutional**.** *A few examples are: The Supreme Court of Illinois--1960, Texas Court of Appeals--1990, Supreme Court of South Dakota--1997, Supreme Court of Montana--2013.* In 2015 our own Indiana Court of Appeals cited this decision with approval in Counselor vs. City of Columbus Plan Commission. The Indiana Court of Appeals acknowledged that zoning ordinances that have granted unrestricted power to neighbors to withhold consent to a particular property use, have been held to be unconstitutional citing with approval the Roberge decision. The court ultimately upheld the zoning ordinance in that particular case, but only because it contained a mechanism by which the local Planning Commission could overrule the consent requirement of the neighbors. Of course the ordinance at issue tonight doesn't have such a mechanism. If we apply the reasoning or test laid out by the Supreme Court and adopted by numerous State Courts the ordinance at issue is unconstitutional. There is no provision for review of the university's decision with respect to a fraternity tenant. They could refuse to recognize any fraternity proposed and there is no recourse whatsoever for the property owner. The decision of the university is final. The university is not bound by any official duty to other property owners. The ordinance provides no standards or guidelines for the application of the legislative police power. The university is free to withhold consent for selfish reasons, and is free to act arbitrarily and may subject property owners to its own whim. All of the boxes are checked. The ordinance is unconstitutional as interpreted. With respect to two of those guidelines mentioned by the Supreme Court *(No standards and guidelines and the ability to act arbitrarily)*, the ordinance at hand overtly invites the university to act arbitrarily. As interpreted by Planning, the ordinance requires that a Greek society be sanctioned or recognized—quote, *"Through whatever procedures Indiana University uses to render such a sanction or recognition."* Whatever procedures—we don't care. Whatever guidelines or standards, we aren't even going to suggest any. In addition to all of these constitutional problems, what is even more troubling in the (inaudible) case, is that the property owner who is granted governmental authority to control the property use of others, has a vested financial interest in exercising its authority to the detriment of nearby land owners. Applying the reasoning of the Supreme Court and the many other State Courts that have addressed similar issues, and even our own Indiana Supreme Court citing with approval the reasoning employed by those decisions, the ordinance at issue is unconstitutional at least as interpreted by Planning. Now Planning contends that there has not been any delegation because—quote, *"Fraternity/sorority houses only exist because of the university and it is reasonable to define the term according to whether the university acknowledges that the occupants are a sanctioned fraternity/sorority."* Well that reply doesn't even address the issue. It doesn't address the question. It's the same thing as saying, *"I didn't delegate authority because what I did was reasonable."* Well, that's a non sequitur. It also begs the question then, why change the definition of fraternity/sorority house that existed for decades until 2016? Was the prior definition unreasonable? The prior definition in pertinent part reads as follows: *"A building or portion thereof used for sleeping accommodations with or without accessory common rooms and cooking and eating facilities, for groups of unmarried students in attendance at an educational institution."* Under the prior definition of fraternity/sorority house, the use of the property by a fraternity that is not sanctioned by I.U. was entirely acceptable. Under the prior definition the university had no power whatsoever to prevent such a use of private property. However; under the new definition as interpreted by Planning, the university does now have the power to prevent such a use of private property. How did the university get that power? It can get that kind of power only from a governmental authority. In this case, it obtained that power from the City of Bloomington UDO (Unified Development Ordinance). In other words, the City granted to the university the power to deny a use of property that the university could not previously exercise. That power was a power that Planning could previously exercise in theory, and Planning did not retain the power to override the university's exercise of such power. That's the very definition of delegation. Obviously, the City has delegated governmental authority and has done so in a manner that is unconstitutional. There is an interpretation of the provision that can save the

ordinance and that interpretation was set forth in the petitioner's letter. To save the provision as constitutional the definition must be interpreted as follows***:*** *"The provision does not require that the fraternity or sorority be recognized by the university, but it requires that the students living in the building be recognized as members of a fraternity or sorority."* If you read the sentence carefully or even diagram it, it is clear that the object of the verb "has recognized" is not fraternity or sorority. Instead the object of the verb "has recognized" is clearly the word "students". Which students? The students living in the building. This interpretation is grammatically correct and this interpretation is the only interpretation that might allow this provision to be upheld as constitutional. If the Board remains unconvinced and upholds the unconstitutional interpretation of the ordinance then the City will have participated in the taking. As noted in the petitioner's letter to the Board. If I.U. is allowed to dictate that only certain members of fraternities or sororities may lease the property, the pool of potential tenants for the property becomes nearly non-existent. This is even more problematic when the university has a financial interest in constraining the pool of applicants so that more students will be forced to live in university housing. When a governmental authority takes action that dramatically reduces the value of land held by a private land owner, that land owner has a takings claim in the amount of the reduction in value. Given the manner in which the university can arbitrarily limit or even exclude potential tenants from the property, buyers will be quite reluctant to purchase that property. The fair market value of the property naturally would fall. Then again perhaps that is the goal. Regardless of the motive, if the provision is interpreted as suggested by Planning, then a "taking" has in fact occurred and the land owner must be justly compensated. Planning contends that the property has not been rendered useless because there are 26 permitted uses; 7 Conditional Uses for the property. This argument either misunderstands or simply ignores the requirements for a taking claim. Under applicable law the exercise of other permitted uses is simply not dispositive. The inquiry is whether the provision is #1--substantially advances a legitimate State interest, and #2--whether it deprives an owner of economically viable use of his property. That was language from a Supreme Court decision in 1987 and quoted by our Indiana State Supreme Court in 1989. With respect to the second prong—whether it deprives an owner of economically viable use of his property; the Indiana Supreme Court further parsed that and said that, *"The key is whether the provision interfered with the distinct investment backed expectations of the owners."* I understand that this is not the forum in which to debate the amount of damages that that would result from a regulatory taking of this type, and we certainly aren't trying a takings claim tonight (this is not the forum). But the point I am making is that Planning's claim that the remaining permitted uses somehow eliminates the possibility of a taking is unfounded and frankly incorrect based upon applicable Federal Indiana precedent. The fact remains that a taking will have occurred if this provision is interpreted as proposed, and the only way to avoid a takings claim is to apply appropriate constitutional interpretation of the provision. I want to address one further issue that was raised in our petition—it's the grandfathering claim. I want to have Mr. Shartag *(spelling of last name unknown)* address this issue directly. He has personal knowledge of this type of activity. But nearly every sorority and some fraternities have house directors who stay throughout the summer when there are no fraternity members living in the house. These house directors usually are not members of a fraternity or a sorority and they often aren't even students. If the City insists on its application of the UDO then almost every sorority and fraternity house owner will be in violation of the UDO every summer. Frankly, they will also be in violation throughout the year since Planning seems to be arguing that only members of a recognized fraternity or sorority may live in a house in order for it to be considered a fraternity/sorority house. This application of the UDO is highlighted in the staff report where they state, *"On February 20, 2018 the department was informed by the City Legal Department that two individuals were still occupying the property. Since residential occupancy outside of the five listed above uses is not permitted, a Notice of Violation (NOV) was issued."* Now every year, especially during the summer, this residential occupancy occurs within almost every Greek house. If this is the application upon which Planning

is going to insist, then they need to issue Notices of Violation to every owner of a sorority or fraternity property every year. The unreasonable and unworkable nature of this approach is obvious. Of course these other owners have not received Notices of Violation, but why not? The City should treat all property owners equally. The City cannot arbitrarily single out one property owner for a violation and ignore all other similar activities. If Planning insists upon this application of the UDO, then this property and most every other fraternity and sorority will have been engaging in a non-conforming use since the definition of fraternity/sorority house was changed in 2016. In light of that fact, there should be no violation because the use about which the City complains is a grandfathered, non-conforming use.

Beth McManus said my first question is for Staff or Legal. Essentially, this is my first Administrative Appeal. Typically with a variance we have specific criteria by which we determine whether something is approved or not approved. One of the questions is the definition of the fraternity or sorority. Is the UDO what we are supposed to be using or do we have a wider birth than that or how does that work within our charter?

Anahit Behjou, City of Bloomington Legal Department, said as far as your question the UDO is what the Board members rely on to decide whether the Planning staff made the determination correctly or not. (McManus: Okay, thank you).

McManus said another one of the points that we are deciding on is the definition. What is the definition of something that would be legal non-conforming or grandfathered? What do you have to do to fall within that category?

Scanlan explained that a legal non-conforming use would have to be established before the zoning code. And then the zoning code changes and the use is no longer allowed in the zoning district so then it would be a legal non-conforming use. For example, if we used to allow gas stations in the (Residential--RS) zoning district in the 1973 code or in the update in the 1990's, and then when we did the 2006 code we changed that and took those out and decided that those were no longer appropriate in that zoning district, if you already had a gas station then that use could continue on at that location as legal non-conforming. You couldn't put in a new gas station but if one already existed there you could continue.

McManus said prior to 2016 if there was already a fraternity or sorority in the house that was not sanctioned by I.U., would that constitute a legal non-conforming use?

Behjou responded by saying it would constitute a legal non-conforming use if it continued as such. This property in 2016 was leased to a fraternity that was sanctioned by I.U.

McManus: And that's what triggers?

Behjou: Absolutely. (McManus said I understand).

Jo Throckmorton said so a good amount of your arguments are legally and constitutionally drawn throughout your statement? (Founds: Correct). Has this ordinance that you're making those arguments against, been argued within the legal system? (Founds: No, not that I'm aware of). Secondly, you stated that the fraternity students would be—that there may be some issues of propriety on I.U.'s part because the students lose the ability to stay in the fraternity house and would then be required to have I.U. housing. I just want to be clear. Are the fraternity students forced to use university housing as you contended (or sounded as if you contended) in your statement, or can they go anywhere for housing? In other words, will I.U. be the only beneficiary?

Founds responded I'm not aware of I.U. policies with respect to lower underclassman. I think they might have had some policies with respect to freshman and sophomores but I don't know what those are. Of course they are free to go elsewhere. Knowing what I know about the market in Bloomington, the most economically viable in that situation would certainly be university housing but they can go anywhere that's true.

Jo Throckmorton said I just want to make sure I get it cleared up. It sounded as if you're saying that there is an ulterior motive to move them out so that they would then be forced to go on campus.

Founds said we can't assign motive certainly but it looks odd. I will leave it at that.

Throckmorton said you're contending but that is not something you know to be a fact? (Founds: No. I don't know for a fact).

Carol Stewart Gulyas said this question is for Staff. All of the community statements that we've read have to do with the behavior of the residents. (Scanlan interjected by saying the packet you have is not for this petition).

Stewart Gulyas: I see. So this is strictly a legal argument about the change in status? (Scanlan: Yes, for this site).

Barre Klapper said I was looking online today and saw within the Greek system that they basically sign a covenant or an agreement with the university. So this whole idea of sanctioning and not sanctioning; could you *(directed question to the City's legal counsel)* talk a little bit about the relationship of the university and why the code changed to include this language because of that relationship with I.U. and the existence of sororities and fraternities?

Behjou responded I can certainly try. It was before my time *(meaning prior to her employment by the City) w*hen the change happened. But most of the language for fraternities is in the definition for fraternities and sorority houses in the code. Usually there is a relationship; the correlation between the university they are in and the code (the zoning requirements). We did not have that in our code. So when it was revised in 2015 it changed prior to me coming to the City. It was revised in December of 2015 and we were just trying to define that definition better.

Klapper: So that is something that is fairly common in university towns?

Behjou said usually they refer to it as something *(Behjou didn't finish her sentence. Klapper interjected by asking a question).*

Klapper: That there is that relationship?

Behjou responded because fraternity and sorority houses are related to universities. (Klapper: Right. Thank you).

No public comment.

Tim Burke, Attorney, said I agree that I'm telling the truth as I understand it as an advocate. One of our specialties across the country is representing fraternities and sororities. Our entire law firm has been doing that for forty (40) years. We publish the *National Fraternal Law* newsletter that goes out four times per year. We conduct an annual national conference on fraternity law. The

counsel for the City misstated the facts when it comes to the practice by "some" universities of saying, "You must be recognized." It's only some. Just yesterday, one of our attorneys was at Ohio State University where a fraternity lost its university recognition. The discussion that took place yesterday between the Vice President for Student Affairs and our attorney is that, that chapter has every right to continue to exist as a fraternity off campus without recognition by the university. They simply lose the benefits of being recognized by the university; the right to have some funding assistance, the right to use university facilities, but they can still exist under the law. The United Stated Supreme Court in the case of *CLS vs. Martinez* involving the Christian Legal Society in a law school; the U.S. Supreme Court said, *"The university does not have to recognize a group that doesn't comply with university rules, but recognized very clearly that fraternities and sororities have existed for decades without recognition by the university."* So it's inaccurate for the City to tell you that all colleges require that universities recognize fraternities and sororities. And frankly, if that were to become the rule, it violates the 1st Amendment Freedom of Association Rights of those students who have a right to associate with one another without recognition by the university.

BZA Discussion:

Throckmorton said I will just make a comment on that last point. Item 2--The City of Bloomington is creating an unlawful delegation of zoning authority to I.U.—that's the statement from the petitioner. I don't see where it was contended that all universities across the United States have to have the university recognize fraternity or sorority for it to actually be a fraternity or sorority. I just want to understand clearly that that's not what we are stating here. Are we stating that all universities have to comply with our definition?

Behjou said that's not what we are saying, no. (Throckmorton: Well that was how I'd heard it so I just wanted to make sure it was clear and on the record).

McManus: This question is for the petitioner. Is there anything unique about this property in particular that would not allow you to have a different tenant of a fraternity or sorority or one of the other uses? That is to the point of "Rendering the subject property useless."

Founds said rendering it useless isn't the contention. Rendering it useless is nearly irrelevant to the "taking" idea. All you have to do is cause a diminution in value. Is there something unique about this property that makes the other uses difficult? Yes. If you look at the other residential uses; are we going to put a jail there or a house for the mentally ill? And we're going to do that next to a fraternity or sorority? I don't think that is a viable option. If we want to get into the hardship issue; I was going to address that later with the other petition but it would certainly be an unnecessary economic hardship. And it would be an unnecessary hardship for the other property owners. If we're going to raze this structure and build something else there like a parking garage, home for the mentally ill, or detention center, then that would be a hardship for them as well. Yes, there is something unique about this property. It sits right in the middle of *Fraternity/Sorority Row.*

McManus: Can you address the possibility of taking on another tenant that would also be a fraternity or sorority?

Founds: There are two issues. Will they be able to find a tenant that satisfies I.U.? Eventually, maybe. It depends on how cooperative the university wants to be frankly. They probably can at some point but they haven't been able to for next year, and it's not going to be possible for next school year just because of the timing by which leases are signed in this community. So they are going to be out 1-year without a tenant. They want someone to stay in the property to watch it. It

certainly is a better approach than boarding it up and letting it be an eyesore; having security guards drive by every now and then. It's certainly better for the neighbors and the property owner.

Klapper said it seems as though the Greek system has a very strong relationship with the university; they enter into an agreement. And through that agreement, they therefore can subject the organizations to different types of sanctions. I assume that's what happened with this fraternity. I don't know why it ceased to exist at I.U., but typically if there is some consequence of behavior or what have you; whether they exist outside the university system or not as an organization I don't know but it seems as though at our university, I think there are over 70 recognized fraternities and sororities that are a part of the Greek system—it's a system, part and parcel of the I.U. experience. I don't know about other places. I can ask a question. I don't know if it's relevant why this fraternity is no longer there. As an owner of a fraternity or sorority house, knowing there is a possibility that that fraternity or sorority could get in trouble at some point and lose its ability to stay on campus according to the terms that have been defined by all parties in the system, am I misunderstanding that? I will ask the petitioner.

Founds responded by saying I think you were getting to the real issue towards the end of what you were saying but I wanted to clarify. A sorority or fraternity can get in trouble and it's possible. But we're not talking about fraternities and sororities here. We are talking about the landowner and their ability to lease the property to a tenant of its choice. Now they might want to lease the property to what is a fraternity or sorority on the national stage, and that fraternity or sorority has not yet been recognized by Indiana University, or Indiana University for whatever reason doesn't want to recognize it. Not because of past behavior at the university, but because for whatever reason they don't think they are worthwhile, and the property owner isn't free to do that in this situation.

Klapper responded I would say that one could come forward and then ask for a Conditional Use to allow that fraternity or sorority to exist there, independent of whatever their relationship is to I.U.

Throckmorton: You said that this is not an issue about whether they are a fraternity or a sorority but it's an issue of land use by owner. Did I hear you say that correctly?

Founds: Yes, but I don't want that to be misconstrued. (Throckmorton: Well, that's what you said).

Throckmorton: If that is the case then we only need to look at this request as a land use issue and have nothing to do with a fraternity/sorority?

Founds responded let's not lose sight that it's actually an Appeal of the Notices of Violation (NOV). Yes, it's a land use issue but that land use is controlled by the definition of fraternity/sorority house in the UDO and that's the problematic provision.
Throckmorton: So each of the other Conditional Uses of that property that don't involve the university, you say that the landowner can't use it for those other items?

Founds said I would like my client to speak to this directly. Again, I do not have personal knowledge because I haven't looked at the deed but apparently there are deed restrictions that require this property (correct me if I'm wrong), to be used only as a fraternity or sorority so those possibilities are gone.

Throckmorton: Who is dictating that it can only be used that way? (Founds: It's a deed restriction).

Throckmorton: Was that in the deed when it was purchased? (Founds: I don't know).

Throckmorton said I want to get back to your statement of, *"We shouldn't consider any of the issues that you brought up about all of the Supreme Court rulings about what is a sorority and what is a fraternity, we should only be looking at if it's the proper use of land within the ordinance."*

Founds responded that is not what I said. Because all of those Supreme Court decisions were dealing with zoning ordinances. None of them dealt with fraternity/sorority directly. (Throckmorton: Thank you for clarifying that).

Throckmorton: So this is not a court, is that correct? We are not deciding legal issues. We are making decisions based on local ordinances and code? (Scanlan: Correct. Yes, it's quasi-judicial).

Throckmorton: We are interpreting and issuing judgment on the local ordinances and codes, correct? (Scanlan: Yes).

Throckmorton: This is not a forum for making legal opinions on issues such as Supreme Court rulings and other court cases?

Scanlan said I think you can weigh whatever evidence they offer you. (Throckmorton: Okay).

Throckmorton said allegations of being legally unconstitutional should be adjudicated perhaps in a court rather than in a local Board of Zoning Appeals? (Scanlan: That would be my opinion, yes).

****Throckmorton moved denial of AA-09-18. Stewart Gulyas seconded.**

McManus: Could you clarify?

Throckmorton said I am going to move denial of AA-09-18.

Scanlan: Which would uphold the Planning staff determination and the Notice of Violation (NOV).

Klapper: Please say, *"Based on the findings in the report."*

Throckmorton added the language, "Based on the findings in the report" to his motion of denial.

Klapper: I have a second?

Stewart Gulyas seconded. Motion carried by voice vote 4:0. Petition AA-09-18 is denied.

- UV-13-18 **U.J. Eighty (UJ80) Corporation**
  1640 N. Jordan Ave.
  Request: Use variance to allow a single-family detached dwelling in the Institutional (I) zoning district.
  Case Manager: Jackie Scanlan

Jackie Scanlan presented the staff report. The petition site is the exact same location at 1640 N. Jordan Avenue. This is a separate request. The petitioner is requesting a Use Variance at this location. Again located in the northeast portion of Bloomington near Indiana University. The site is .95 acres and is zoned Institutional. The Comprehensive Plan designation is Institutional Civic. There is an existing building on the site that was formerly occupied by a fraternity. Surrounding uses are fraternity/sorority houses as well as Indiana University property to the south and across the highway to the north. The Use Variance request is to allow the use "dwelling, single-family (detached)" in the existing building in the Institutional zoning district. Dwelling, single-family (detached) is not a permitted use in the Institutional zoning district. The reason the petitioner is requesting this particular use is due to the fact that the former tenant is no longer on the property, and the petitioner would like to have someone at the property full-time living there to be an on-site caretaker; someone or someone's (it hasn't been identified how many). In this zoning district there are thirty-five (35) available uses; 26 permitted and 9 conditional. Again, one of which is a fraternity house/sorority house which was the previous use of this site. At this point, the petitioner does not desire to use the site for any of those uses which is why they are requesting "dwelling, single-family." So "dwelling, single-family" was chosen because they would like to have a caretaker. We do not have a caretaker use in the code, so "dwelling, single-family" is the closest associated use in terms of the described use they are seeking. Again, in the Comprehensive Plan the site is designated Institutional Civic. Two of the main points in that district are that the area includes uses such as libraries, schools, cemeteries, municipal buildings, fire stations and utility stations, and that the intent of the district is to provide adequate land to support the activities of compatible government, social service, and limited non-profit entities. Staff does not find that the request is injurious to public health, safety, and morals nor did we find adverse impacts on the immediate neighbors. However; we found no peculiar condition on the site. No practical difficulties are found in the characteristics of the property or its surroundings that necessitate relief from the use regulations of the Unified Development Ordinance (UDO). No unnecessary hardship has been found as all thirty-five (35) uses are still available for use here. Staff finds that the request does substantially interfere with the Comprehensive Plan, which does not envision single-family in the Institutional Civic designated areas. Additionally, related to zoned property in the City, there is only so many properties zoned Institutional in the City. And there are only so many purpose built buildings built for fraternities and sororities. To allow a use such as single-family dwelling in a building like this, would take away a possibility for reusing this building in a way for which it was built and which does benefit the community if used appropriately. Staff recommends that the BZA adopt the proposed *Findings of Fact* included and to deny petition UV-13-18.

Garry Founds is the attorney for the petitioner. It was stated that the property owner does not want to use the property as a fraternity house. Of course it does but that's not the point of the request. The variance request is temporary in nature. They simply want someone to be there in the interim. This happens every summer with every frat and sorority anyway. We are just forced to make this as a variance request because of the position that Planning has taken with respect to the Notices of Violation (NOV). We can't do what we normally do because now they're saying it's a violation of the UDO (Unified Development Ordinance). Well that hasn't been the case with any of the other fraternities or sororities. And now suddenly it is with us and we're not sure why.

The staff report acknowledged that the first two factors were satisfied, so I'm obviously focusing on the next three. It was said that the property is not peculiar; there is nothing peculiar about the property. Yes, there is. I would point out that there is a deed restriction in place which was put in place by Indiana University when our client purchased the property—that is peculiar. The staff in its report made the point that there are many vacant buildings in town at any given time, and numerous options exist for care of the building outside of the resident on-site. There may be vacant buildings in Bloomington but are they are large residential buildings? Are they large and valuable? Are the owners willing to pay for a live-in caretaker? Are these vacancies ideal situations? Of course they aren't. Finally, are they vacant fraternity or sorority houses in which nobody lives, not even a director during the summer? These factors too are peculiar to the property. Again, we want to use this building as a fraternity or sorority. In fact, that argument doesn't comport with the argument that we can use this structure as some other use; those are incongruent. Planning cannot have it both ways. Do they want this to be a fraternity/sorority house or would they prefer this be a home for the mentally ill? Factor #4—the strict application of the terms of the UDO will constitute an unnecessary hardship if applied to the subject property. Again, planning points to the (35) thirty-five other uses but none of those are viable or even legal at this point. Planning also ignores the fact that even if we could pursue these other uses, they would constitute a severe hardship economically for our client because the structure wouldn't function as it exists for any of those other uses. It would have to be modified severely or it would have to be demolished and something rebuilt in its place, and of course that would be a hardship for the surrounding property owners. In addition, none of these other uses would generate the income that is typically generated by a property like this. The requested Use Variance would allow the current structure to be preserved for its intended use and that is what we are seeking. The department says that the uses discussed for the Institutional designation are all institutional or civic in nature and do not include single-family residential. Well that's true. Again, this response kind of ignores the fact that we just want a temporary variance. In addition, as planning points out in its staff report, (5) five of the permitted uses in this zoning district involve a residential component in the primary use of the property and that's true. The requested use fits in with that residential component in the five permitted uses highlighted by Planning and allow the property to be preserved. Going back to the goal issue; you need to focus on the fact that it's temporary. The requested use does not substantially interfere with the goals of the Growth Policies Plan (GPP) because it is temporary; it furthers these goals by preserving the property. We talked about the grandfathering issue and I don't want to lose sight of that either. It does strike me that since other fraternities and sororities do have non-students and non-Greek members staying in the houses during the summer, and if that use is a violation of the UDO, that use has been going on for a very long time and certainly ever since the change in definition in 2016. So that use should be grandfathered and allowed. And if that's the case, then the Use Variance isn't even an issue but I wanted to point that out.

Barre Klapper said it seems to me that a caretaker role is part of a fraternity/sorority use. Could that not be a continuation of the use sort of in absence of the fraternity?

Jackie Scanlan said what you're saying is that it sounds like a caretaker or similar role (house director or something) is a typical accessory use for a fraternity? Is that what you're saying? (Klapper responded yes).

Scanlan said I would agree with that but there is no fraternity use here so an accessory use to a use that's not here is accessory to nothing. There is no fraternity use here. The fraternity that was here before is gone so they are basically just asking to have 1 to 5 people live here.

Klapper: Is there no way to allow just a caretaker to be there as part of *"It's being maintained as a fraternity/sorority building for the eventuality of another tenant?"*

Scanlan said I think that would be up to you—the BZA. Our opinion is that, that isn't necessary. As I stated in the staff report, we have vacant buildings in this City of all shapes and sizes that are all vacant for one reason or another that don't require a 24-hour, live-in caretaker to keep them in good repair. In weighing a Use Variance, we look at the Comprehensive Plan and it's so far outside of the Comprehensive Plan and seemingly unnecessary in our opinion, we didn't feel as though the *Findings of Fact* supported the request.

Klapper: So it would be up to us to define whether there is a peculiar condition here to allow for that use?

Scanlan said if you would like to approve the Use Variance request then the *Findings* in the staff report that do not support the request, numbers 3 through 5 would need to be re-written.

Carol Stewart Gulyas said she had a question for the petitioner. You say it's a temporary variance so what conditions would make that end?

Founds responded the condition that would make that end would be the signing of a new tenant that is a fraternity or sorority. It's simple as that really.

Jo Throckmorton said I'm having trouble finding in any of the documentation where it says this is a temporary request. Did I overlook it? I looked at page 29 and I didn't see temporary, and I looked at page 36-37 in our packet. I just wanted to get my eyes on that. I took a guess where it might be in the letter from Mallor and Grodner?

Founds: Yes. The letter and the page is……it looks like that page is missing.

Throckmorton asked if the temporary variance language was requested by the petitioner and not included.

Scanlan explained we do have temporary Use Variances in our code. This petition would not meet that so they are requesting a Use Variance. They can offer that they want it to be a temporary variance and if you wanted to consider it, we could condition it to a time limit.

Throckmorton: My question is, was that offered?

Scanlan said what they filed for was a Use Variance for single-family dwelling.

Throckmorton questioned the petitioner. So you're saying now that you are willing to offer a temporary?

Founds said it was discussed that it would be temporary. If I could find the last page in the packet —it's not there. We intended it to be requested as temporary variance and that was discussed with Staff as well.

Scanlan said we discussed numerous things.

Throckmorton said this use really doesn't allow for a temporary? (Scanlan replied it could if you condition it to do so).

Throckmorton said it's my understanding that what the petitioner is asking for is a caretaker in-residence? (Founds responded correct).

Throckmorton: So you're not looking necessarily for 5 people you are looking for 1 person? (Founds: Correct).

Throckmorton: I just want to make sure I understand what you're asking for. Must that caretaker be a resident caretaker? (Founds: For the property to be cared for well? Yes).

Throckmorton asked the petitioner to explain why it's important that they sleep there in order for it to become a better cared for property.

Founds explained that given the property location and the activities surrounding the property it's a constant target. There are YouTube videos of this property at night since it's been vacant. Yes, it's important that we have someone there 24-hours.

Throckmorton asked if the property currently has surveillance. (Founds said I think it does).

Throckmorton: Even if someone wasn't there at night there is surveillance?

Founds said there are cameras but someone is not monitoring those cameras 24/7.

Throckmorton: And it's reasonable to expect that when they were sleeping they weren't monitoring those cameras either? Is that reasonable?

Founds said yeah but if someone breaks in to the property and the caretaker is there they know.

Throckmorton said you mentioned the financial cost to the owner to adapt this for other uses. The cost of any types of renovations, changes to property, or the overall long-term economic value of the property is not a consideration for the Board. Valid feelings on the petitioner's side but it isn't something the BZA considers. I want to be very clear because it's come up three or four times. There are really not 34 or 35 other uses of this property due to the deed restriction? There is only one possible use of this property and that is as a fraternity or sorority, am I understanding that correctly?

Scanlan said the deed does not change the fact that there are (35) thirty-five uses allowed in this zoning district. If two private properties have entered into a deed that restricts the uses that is between them.

Throckmorton: But the City recognizes there is a deed in existence and that deed is restrictive? (Scanlan: Yes).

Throckmorton and the City also recognizes that the only way out of that is that there would have to be negotiations to change the deed? (Scanlan: Yes).

Throckmorton said your purpose of this request is that you just want a full-time, live-in caretaker? (Founds: Correct).

McManus asked the Legal Department what sort of things the BZA could put in place about it not being a student or not being a member of the previous fraternity.

Behjou said I'm not sure if I understand the question.

McManus explained that if we wanted to say, for example, *"The caretaker couldn't be a member of the previous fraternity."* Would that be some sort of discrimination?

Behjou said I would have to look into that but the fraternity does not exist anymore.

McManus said I'm just saying in terms of this being a request to have a professional caretaker and not this being a way around keeping members of the fraternity in the house. Does that make sense?

Behjou said I believe you could just say that you grant the permission to have a caretaker.

Scanlan said when we began discussions with them it was a caretaker and that is what the letter says. When the filing came in, Staff asked in order to clarify (Are you asking for one person?) and they decided to leave it open for now and that is why we linked it to the definition of "family" which would allow for five. They didn't say they wanted five. They would not commit to one necessarily at that time. So if you approve this it could be five people unless you condition it otherwise. That's why it's in there in that manner.

Klapper said but you feel the single-family zoning is the best starting place?

Scanlan responded I don't think there is another option for a residential use here. The petitioner stated that Planning stated that someone couldn't be there in the evening or at night. That's not accurate. You could have a security guard there 24-hours per day but we don't want someone living there; that's not compliant with our reading of the Comprehensive Plan.

Throckmorton said the City's position is that because there is not an existing recognized fraternity or sorority in that space currently, that's what precludes having an on-site caretaker over the summer? (Scanlan: Yes).

Scanlan said you could argue that, that is customarily incidental but they don't have a primary use here.

Throckmorton said but if it were any of the other fraternities and sororities on campus, the fraternity or sorority member would be allowed (possibly) to stay in that space over the summer? (Scanlan: Yes. Part of their lease).

Throckmorton said it just so happens that it's still an ongoing entity but no one happens to be there so those two aren't a good comparison? (Scanlan: Right).

No public comment.

Throckmorton: If we were to provide some relief by saying that we could have a caretaker at this property and make it somehow temporary, and restrictive on the number of people, how would something like that look? How do we determine that if it were an option?

Klapper said I think we would have to determine some *Findings* as to why we feel that this property would require that or that it rises to the level of that. I think some of the evidence that has been put forward and the nature of its context is highly open and vulnerable to damage. There is concern for the property and for the wellbeing of the property. This is a customary function or role

within that use; I think is also a peculiar to the nature of fraternity and sororities that they have on-site caretakers. I think those would be the main two that I heard.

Scanlan directed the Board to look at the *Findings for # 3, #4, and #5* in the staff report if they decide to approve this petition. She said alternative *Findings* would have to be created for all three including whichever conditions they want to place upon them.

Throckmorton said his main concern is there are times when appeals are granted and advantage is taken of the situation. I want to make sure that whatever we do to be very clear that we are not going to allow it to have some fraternity members *(Example: No longer recognized by I.U. fraternity members or sorority members)* show up and live there and call themselves caretakers.

Scanlan said you could continue this until next month and Staff could work with Legal on drafting *Findings.* We wouldn't necessarily change our recommendation but we could offer you alternative *Findings.*

Throckmorton said I think it's our right on this Board to say, *"We are inclined to approve this use but saying here is what we think it should be."* Because there has been no compelling statement given, in my opinion, as to why it cannot be handled with a daily caretaker who doesn't live there.

Scanlan: Staff would suggest that if you're inclined to recommend approval with tight conditions, we could work on them right now or it would make more sense to continue the petition and work with Legal.

Klapper: I would entertain a motion to continue if we are inclined to consider this petition.

****Throckmorton moved to continue UV-13-18 to the next BZA hearing in order to consider clear language for the Use Variance. Stewart seconded. Motion carried by voice vote 4:0 to continue this petition to the July 2018 hearing.**

~2 Minute Recess.

~Meeting reconvened at 7:40 PM.

- AA-15-18 **BMI Properties, LLC**
  1000 & 1002 E. Atwater Ave.
  Request: Administrative Appeal of issuance of Notice of Violation (NOV).
  Case Manager: Jackie Scanlan

Scanlan presented the staff report. This is our second Administrative Appeal located at 1000 and 1002 E. Atwater Ave. This is two properties; two adjacent structures zoned Residential Multi-family (RM), located in a Local Historic District. The uses on the site were previously designated as legal non-conforming. The Administrative Appeal is an appeal of a Final Notice of Violation (NOV) issued, notifying the abandonment of that legal non-conforming use in the Residential Multi-family zoning district. The department issued a series of Notices of Violations and the Final Violation notified the property owner that they had abandoned the legal non-conforming use they previously had and that is what the petitioner is appealing tonight. A brief history of the Notice of Violation and this was included in your packet. We were notified in late August of last year of a potential illegal land use on the site. Planning and Transportation, HAND, and Indiana University staff all met with the owner of the property and tenants at the beginning of September 2017. There was discussion about what sorts of behaviors were alerting the department that there was

possibly a fraternity being used on the property, which is not an approved use. A compliance plan was drafted by Planning and Transportation staff and sent to the owner on October 10, 2017. Previous to that, a Notice of Violation was sent and as you can see here, Notices of Violations and fines were issued for the site for various reasons over the course of the next few months. The use that was on the site is from the 1973 zoning code. Rooming/Lodging House is defined as *"A building with more than two guest rooms where lodging, with or without meals, is provided for compensation, or a single household dwelling occupied by more than five unrelated adult individuals, but not a hotel or motel."* The department has determined that, that use has been out of commission at both buildings for at least (6) six months and that the buildings have been being used as a fraternity/sorority house (the UDO definition), but more specifically, as a fraternity house or houses. I will go over some of the evidence we have which led us down this road to the determination. There were multiple things that were identified as customary things done by a fraternity use. Many of these were listed in the original compliance plan that was drafted after meeting with the owner and occupants. As you will see, these things were still done after that point in time. Mr. Brawley appeared with the occupants at a June 2017 Historic Preservation Commission (HPC) where they were attempting to put up a fence, which was a response to another fence they had put up without permits. Because they are in the Historic District they have to go before the (HPC) to be able to do that. It was discussed "why" did they need a fence? Mr. Brawley explained that it's basically an outdoor hangout area; there were lots of questions about the use. Mr. Brawley stated in that hearing that it's a national fraternity that doesn't have a house but it is a national fraternity. When describing the tenants he listed positives of these tenants as opposed to previous tenants he had which were: They were part of a national housing cooperation, they have a board of directors, a house manager and a hired chef, and that there is structure in place. All of these things being characteristics typically of a fraternity house and not a boarding or rooming house. At the beginning of August there was a press release from this group indicating that they had a new address, new living space, and that it was at 1000 Atwater. So listing this address as their new fraternity house and all of the positives that would be bestowed upon the fraternity brothers because of the change in location Mid-August and article appears in the IDS (Indiana Daily Student) describing again the new location. Also indicating that the owner was contacted and was glad to have the fraternity members there at the location. This is around the time that we (P&T) got our first complaint—September 5. You can see (photos shown) the makeshift fence along with the flags that are sometimes draped between the homes. September 13, signage for the fraternity. September 19, signage on the flags and in front of the 1002 for their fraternity. October 13 is a flag that is, not sure if it's still in place or in place again. November 28 a flag hung out the front of the building again. Going through all of these; these were the times that we were alerted of uses that would be customarily incidental for a fraternity and then a Notice of Violation was issued along with fines that have yet to be paid. February 4, 2018, advertising for RUSH events at their house on Atwater. Again, another advertisement on February 15. I think this is Twitter (not sure) advertising for RUSH events at 1000 E. Atwater. More signage at the end of February and then even today on the *Be Involved* site which is part of I.U.'s contact for fraternities and sororities, they are still listing 1002 E. Atwater as the fraternity location for this group. So the determination that Staff made about the abandonment of use is found in Chapter 20.08.100(b)—**Abandonment of a non-conforming use**. It reads: "*A lawful non-conforming use shall be deemed abandoned when the non-conforming use has been replaced by a conforming use or when the non-conforming use has ceased and has not been resumed for a continuous period of six (6) months, or when the furnishings have been removed and not replaced for a continue period of six (6) months."* It is the department and the City's determination that because the fraternity has been in use repeatedly and ongoing at the site, that the previous use is no longer in existence. Such behavior typical to a fraternity includes like the images that you saw, signage at the site advertising it as a fraternity location, advertising RUSH events at the location, calling the use a fraternity at a public meeting, and generally operating as a fraternity and not as a typical

rooming house would. The department determined that they have abandoned the non-conforming use that they previously had which was the rooming house use. The petitioner must bring the property into compliance with the Unified Development Ordinance (UDO). The way these houses are configured each house would have a maximum occupancy allowance of five (5).Under our current code, a rooming house is still a Conditional Use in this zoning district. A Conditional Use could be requested but it does require the person operating the rooming house to live on-site, so it does not function in the same way as it did previously. Based on the findings in the staff report, Staff recommends denial of AA-15-18. Again, the appeal is to the Notice of Violation (NOV) that says that they have lost their previous non-conforming use.

Cheyenne Ryker is representing BMI Properties, LLC. We are here to appeal the City's determination that the properties located at 1000 and 1002 E Atwater are being operated as a fraternity, which resulted in a Notice of Violation and extensive unreasonable fines against BMI Properties. The City's claim is that BMI has lost its legal, non-conforming use as a rooming house. We disagree. If the BZA rules in favor of the City then there could be broad sweeping implications for landowners who purchase property without knowing how the City will arbitrarily characterize their properties, and that's what has happened here. I think its import to understand that they're currently operating as a legal non-conforming use under the 1973 UDO—which is *"A building with two or more guest rooms where lodging with or without meals is provided for compensation. Or it's a single household dwelling occupied by more than five (5) unrelated adult individuals but not a hotel or motel."* The property at 1000 E. Atwater has eight (8) rooms and eight (8) separate leases. It still operates a rooming house. It doesn't deviate from the legal, non-conforming use. The property at 1002 E. Atwater has thirteen (13) rooms and thirteen (13) separate leases. It also still operates as a rooming house under the prior UDO. It is still operating as a legal, non-conforming use. The properties have been operating as a rooming house for decades. BMI has not changed the use or expanded the dwellings. The only thing that has changed is the manner in which the occupants of 1000 and 1002 E. Atwater have been viewed by the surrounding property owners. The views of those property owners don't play into the definition of the UDO. The definition of fraternity as set forth in the UDO, wholly disregards surrounding property owners opinions as to the behavior. As a result of mounting neighborhood pressure though, the City has taken the position that this is a continued legal, non-conforming use they are going to call the properties fraternities. There are two important provisions that I think the Board needs to review in making a determination. I'll be brief on the definition because it's long. The second clause of the first sentence after the semicolon says, "*An Indiana University has sanctioned or recognized the students living in the building as being members of a fraternity or sorority through whatever procedures Indiana University uses to render such a sanction or recognition."* That's important because we really haven't seen any determination or evidence to show the I.U. has sanctioned these individuals who live in these units. The second sentence of the definition is also important because it applies to these properties. It says, *"Shall also include a building or portion thereof in which individual rooms or apartments are leased to individuals, but occupancy is limited to members of a specific fraternity or sorority."* In this case, there is no limitation on occupancy to members of a specific fraternity or sorority. As such, this is not a fraternity or sorority. The City is required to prove that the properties are no longer operating under the legal, non-conforming use as a rooming house. The City's position is that the properties were not operated as a rooming house for longer than six (6) months. This isn't true. The use under which the property is currently operated is a rooming house. The City hasn't put forth any evidence to show that the individual students living in the properties have been sanctioned by I.U. as a fraternity. Now they have posted a screen shot of the webpage; student organizations themselves post online but that isn't the final determining factor. There is nothing on that page that says whether or not the individuals living at these properties were sanctioned by the university. Prior to today's meeting, I called the university and I asked them, "Is the Phi Kappa

Sigma operating a fraternity at these properties?" And what I got was a PO Box. They gave me a PO Box for the fraternity. Today I received this letter from the City saying that it has the address listed as 1002 E. Atwater. Again, that's not the determining factor. When you look at the UDO, in order to qualify as a fraternity or sorority, the fraternity or sorority has to have posted something in *Be Involved*. What the City has done is created their own definition of fraternity or sorority. The City is stating that there are Facebook posts by members of a fraternity; there is a Greek flag placed among numerous other flags, hanging of signage, there is an advertisement for RUSH events and a claim by individuals that the fraternity is using those premises as a fraternity house. If the BZA finds the properties are fraternities then it will have deviated from the definition set forth in the UDO for fraternities. The City's action against BMI is arbitrary and capricious or presumably the City would have required landlords to take steps to determine the group affiliations before leasing to tenants in order to maintain proper uses of their properties. If landlords are forced to ask about group affiliations, then they can use affiliations as a pretext for denying rentals. So what the City in essence is sanctioning is discrimination. It's not a question of whether or not the tenants are doing what fraternities do. There are houses all over the City where there are tenants that do what fraternities do. That's why the UDO says what it says. It provides a specific definition and refers directly to I.U. to make the determination as to whether or not they are fraternity members. It seems the City's position is that if neighbors complain enough then the City will call the property whatever they need to, to stop the neighbor's complaints. Zoning cannot be a popularity contest. The definition is clear in the UDO. He urged the Board to honor what the UDO states with particularity. I love Bloomington and this isn't the Bloomington I know. The City understands the importance of the rule of the law in the manner in which it was drafted. I am requesting that the Board grant our appeal.

Beth McManus asked how we define "sanctioned by the university" because there are different types of fraternities and sororities at I.U.

Scanlan explained that in our definition it indicates that it's sanctioned by whichever measures I.U. uses to render such a sanction or recognition. If it's recognized by I.U. *(Scanlan did not finish her sentence).*

McManus: Recognized by being listed on a website?

Anahit Behjou, City Legal Department, said the *Be Involved* website is part of the requirements when a fraternity or sorority wants to be recognized by I.U. It is part of the process; they fill out that information and that is part of their approval. After they are approved, then they have that webpage and that is part of their process to get recognized. So you should be able to type in the name of the fraternity or sorority and it will pull the information for the recognized sorority or fraternity.

McManus: So there is a list that I.U. keeps of recognized fraternities and sororities?

Behjou responded yes. There are contracts and code of ethics. I believe their Student Services office has all of the information online that they have to follow in order to be a recognized fraternity or sorority.

McManus: Phi Kappa Sigma is on that list? (Behjou: Yes).

McManus said there is also a question of whether the occupancy is limited to members. Individuals sign leases but was it coordinated through the organization or how did the leasing process work? Is there one person who is not a member of this fraternity there?

Ryker said my understanding is there is at least one member or one tenant who is not a member. This isn't about whether or not the fraternity itself is sanctioned by I.U. because definition requires that the individual students be sanctioned by Indiana. If you look to the second clause after the first semicolon it appears it's about whether the students themselves and not the fraternity itself is sanctioned by the university. I just wanted to clear that up.

McManus: You said one tenant is not part of this fraternity but aren't the others self-identify?

Ryker: My understanding is that at least one tenant is not a fraternity member.

McManus: Were the leases coordinated through one person?

Ryker said each lease is separately signed by students, tenants, and their cosigners.

Throckmorton: So there are 21 rooms for lease in those two building; 8 in one and 13 in the other. And of those 21 rooms, 20 are leased to people who self-identify as being members of the fraternity? Am I hearing you correctly?

Ryker responded I don't know the exact number.

Throckmorton: You just said only one person. (Ryker: I said at least one).

Throckmorton: Why would you not know the number coming here tonight of how many are in those buildings?

Ryker responded because I know that there are several but the number and who is a member of the fraternity fluctuates. Guys get sick of each other and they move out, etc. I can't say with certainty, without speaking with the fraternity who is a member and who isn't.

Throckmorton: You mentioned a third party signatory. You said, *"Of the 21 leases they all have the same third party signatory."* What does that mean?

Ryker explained they don't have the same third party signatory. If I said that I apologize. They have their parents. As a general rule students' parents cosign for them as a guarantor under the lease.

Throckmorton: Some of them may be underage? (Ryker: Some of them may be).

Throckmorton said so right now you know at least one is not a self-identified fraternity member. It's reasonable to believe that it's possible that 20 are since you don't know those exact numbers?

Ryker: That's not unreasonable. Correct.

Throckmorton said so do you contend that the behavior explained by the City does not constitute activity seen in a fraternity or do you concede that the behavior could be viewed as fraternal behavior?

Ryker responded I don't think it's any different than what you see in a number of other residences across Bloomington. (Throckmorton: Stick with the question).

Throckmorton: Do you believe that the behavior that's described can be applied to a fraternity?

Ryker said no more than most any other behavior can be applied to members of a fraternity. I can't concede entirely to that question.

Throckmorton said so you're saying the behavior that's described can be attributed?

Ryker: It can be—of course.

Throckmorton: So it can be attributed. So it can represent behavior of a fraternity? (Ryker: Sure).

Throckmorton said you had mentioned something about a written limitation to occupy the house. You said that these two facilities don't have a written limitation to be occupied by anyone. However; are you saying that it's not possible that there is a defacto limitation?

Ryker: I don't remember saying there was no written *(he didn't finish sentence).*

Throckmorton: You said, "There is no written limitation to the occupancy of these two building."

Ryker said there is no limitation. BMI just wants to lease the properties.

Throckmorton: There is no written limitation?

Ryker: Okay, well I'm stating for correction. (Throckmorton: There is none).

Throckmorton said so BMI would not say, "Hey we're not going to lease it because we would rather give 1st dibs to the people who self-identify as a fraternity?"

Ryker: No. Not to people who self-identify as a fraternity—to anyone. We just want someone to come lease the property.

Throckmorton: But I'm asking you specifically so we can get at this issue about whether it's a fraternity or not. My question is, does BMI have a policy written or defacto that says, "You know we're going to give first preference to folks that self-identify as being members of this fraternity." And you're saying? (Ryker: No).

Throckmorton: Thank you. So this argument about not being able to discriminate due to zoning, I don't quite understand that. You're saying there is a slippery slope involved that if we actually abide by our own zoning codes that somehow it's discriminatory, but I thought that's what zoning codes were for—to identify where were would have certain things in our community?

Ryker responded saying my fear is that the City has not complied with the UDO. If the City is correct in this situation then landlords now have to ask about group affiliations. What landlords can then do is, once they see the group affiliations, discriminate based on those and use the City's interpretation of the UDO as a pretext for denying admission to the property by the tenant.

Throckmorton asked Ryker to go into more detail. If the property may only be used for certain uses, such as a religious group for a church, how would they know whether they are in compliance if they don't ask?

Ryker said that's my point. They are required to ask about particular religious affiliations so that they can be in compliance which is against the law. You can't discriminate based on religion.

Throckmorton said you can ask if it's in the code. You can't discriminate between people who qualify. You can't discriminate between Muslim religions versus a Christian—that's discrimination. Let's be clear about what discrimination is here. So you're contending that it's discrimination to ask whether someone qualifies to use that facility under the code.

Ryker: I'm saying that it invites discrimination. It gives them a pretext for discriminating. (Throckmorton: Please go further).

Throckmorton: It gives them a pretext to do it how?

Ryker responded now you're saying, *"Well we have to ask you these questions. And the reason you can't live here is because if you live here then it's going to be a fraternity or it's going to be a place of worship."* The pretext is, it's not zoned properly. But the real reason is that we don't like your religion. But we're going to say, *"You can't live here because it's not zoned properly, but the real reason is we don't like you because you're Muslim."*

Throckmorton responded I'm having a hard time taking that answer seriously because it's nonsense. So Phi Kappa Sigma is a sanctioned fraternity? (Ryker: Yes).

Throckmorton said so the question is if this group is recognized by I.U. or is it just a question that they are behaving like a fraternity. Is that the question?

Ryker responded I think the City's position is they are behaving like a fraternity so they are one under the UDO. Our position is they are not a fraternity under the UDO because they don't qualify under the definition. And they have continued to operate as a rooming house.

Throckmorton: Your contention is that they are not behaving or operating as a fraternity house?

Ryker: As defined in the UDO—they are not.

Barre Klapper said at the meeting on September 1 there were certain options laid out. Basically it was brought to the owners attention that there was concern that the use of the property; people there were using the property as a fraternity house. Different options were discussed and then there was a compliance plan. Was there agreement?

Scanlan: No. I do not have anything. It was attended by HAND staff, Legal, and our former Sr. Zoning Compliance Planner. The product of that was a letter. No, we do not have a signed agreement. My understanding is that there was a verbal agreement and then Planning and Transportation staff produced the letter saying, *"Based on our conversation of such and such date, these are the things you agreed to do"* which were pretty minimal.

Klapper: So nothing was done. The owner didn't say to their tenants, *"These actions are constituting a different use that we are not zoned for and you can no longer put signage up."* None of that behavior was being altered after it was brought to their attention?

Scanlan: Right. We don't know what happened between those two parties after the meeting. They were both present at the initial meeting and obviously the behavior didn't stop.

Klapper: So there were a number of notices and only six (6) months after that initial date it was then that it was sent to the owner? (Scanlan: The Final Notice, yes).

Scanlan: Just to clarify. Establishing that a legal, non-conforming use is gone is a really big deal and it's not something we do very much. The use on this site; the way that I've described the things they are doing in this presentation—they are a fraternity. They are an I.U. and nationally sanctioned fraternity. They are regulated by the agreement that they sign with the trustees of I.U., they are a fraternity. Also, it's not just 21 individuals it's more people than that rotating in and out of apartments. We feel like these properties are operating as fraternities and they have abandoned their previous use because they have moved on to a new use even though it's not a legal use.

Public Comment:

Jason Millican, President of Bloomington Board of Realtors, said there are challenges to living in a college town. He read a statement into the record from the Board of Realtors. They would like to work with everybody to work out a solution.

Jenny Southern is representing the Elem Heights Neighborhood Association. This problem has been on-going for 2 years. Last year complaints were given through HAND. This seems to be a growing problem with fraternities off campus. There was an article in the IDS (she read an excerpt from this article). We have worked with IU last year about this so they know about his problem. She said she's happy that Staff has taken this position. In the end, it should really be I.U. who should be helping to fix this problem.

Robert Winch said I moved to Elm Heights District in 1982. For thirty-four (34) years I have lived immediately behind these rooming houses; the number of occupants was never an issue. My quality of life has deteriorated including the value of my property. The function of those two buildings as a single social organization is firm in his mind day and night. He strongly supports the City's movements in this case.

Jodi Winch (Robert Winch's spouse). The letter that the City sent out to Mr. Brawley says, "*You have agreed to discontinue the fraternity use including but not limited to the below requirements. The fraternity use must be discontinued by 10/10/2017. These buildings cannot be the site for any formal fraternity activity. There can be no fraternity signage, meetings, sanctioned events, state inter-fraternity counseled sanctioned events, or recruitment events (RUSH) at these buildings. The addresses of these two buildings cannot be used as the addresses for the fraternity with Indiana University or any other marketing mechanism."* Please remember that you saw that on May 24 (as of today) they are still using that address. Please also remember that Mr. Brawley announced in front of the HPC that he knew it was a frat so I'm sorry for the lawyer who gave you a lot of other things that weren't true. We were given a paper this year with the contacts (referring to fraternity members). On June 8, 2017 which is when the HPC meeting occurred, they requested a noise permit on June 12, 2017 for an annual charity event (Concert for a Cure) and they acknowledge themselves as Phi Kappa Sigma--1000 Atwater Ave. I have been a resident in this house for over twenty (20) years. I've made numerous complaints regarding the parking in this area. When I asked the young gentleman to move his van he spat out his toothpaste at me. We have noise. We have rudeness. Please make these rooming houses again.

Brian Dodge said I find it ironic that their attorney began his speech talking about personal behavior. The noise that keeps us up sometimes 24-hours at a time. I find it extremely disgusting that the attorney dares to bring up the idea of discrimination, when "I" as a bisexual man and my partner as a bisexual women came in from the backyard crying because those individuals were screaming the words of profanity multiple times; Bloomington Police were called. I won't talk about the personal behaviors. I'll talk about the behaviors listed which included fraternity signage

for fraternity events and RUSH activities. If it looks like a duck, swims like a duck, and acts like a duck—it's a duck.

Kappy Phillips said my husband and I have lived at 1002 E. Hunter Ave. for over 30 years. We never had problems with the rooming houses. The past two years, all of that has changed as a result of renovating and marketing these buildings to fraternities. On May 14, 2018 I called on behalf of my niece who was looking for a place close to the I.U. Music School; 1002 happened to be listed. When I called the BMI office, I was told that it probably wouldn't be a good fit for my niece as the buildings were rented to a fraternity and the fraternity was planning on renewing their lease and possibly renewing their lease for the 2019-2020 year.

Howard Thicke is a resident in this neighborhood. He would like to make the point that there has been a huge amount of resources wasted on this situation for the last two years by Indiana University, City of Bloomington various departments—HAND, public transportation, zoning, legal, City of Bloomington police, I.U. police, have all been affected by this situation. At some point, this should be entered into your consideration.

Wendy Kowelman wanted to clarify. I know it was stated that neighbors have been complaining and complaining about all of these issues, but we have met with I.U. and the police department and everybody says its complaint driven. I spoke with Harmony School today and they support the City's denial of this petition. When Kappy's car was side swiped it was a hit-and-run. A couple of kids from Harmony said, "We saw who did it." So the school has been involved in this kind of thing, and it's not a situation that should be happening in a residential neighborhood.

End of public comment.

Jeff Brawley said it was originally stated in a historical meeting that I was there for a variance which is incorrect. I was actually there in support to deny the variance for the fence. That should be on record and corrected because I wasn't there to ask for a fence to be built. There was a question about individual leases; all requirements have been met through HAND. Individual leases have been signed by guarantor(s) who are the parents. We have over 700 I.U. tenants in our properties. No time do our applications state are they affiliated with a fraternity or sorority or another affiliation. I have no record of that. From what I understand there is 130 members of this fraternity that are living in housing in Bloomington. So if this is in violation, there is another house or two, three, ten, or twenty that same occupants of the same fraternal organization are occupying that would be in violation.

Founds reiterated that the definition of fraternity has not been met.

Throckmorton said the facts are that Phi Kappa Sigma is presented clearly as a frat house. The City cannot discriminate based on a group affiliation. The point is that's exactly the purpose of our code, is to discriminate whether the property is being used for what it's intended to be used for. In general, there seems to be a complete disregard for the policies and ordinances. The most damning evidence in this case is the IDS article and the press release that clearly states that this is designed, functions, and is used as a fraternity house.

Klapper: Is one of the houses also not in compliance with HAND?

Scanlan: Yes. One of the houses is not in compliance with HAND. They did address the issues related to what the HAND code requires, but one of the HAND code stipulations is that they are in compliance with the rest of the code which is Title 20. So they can't have that permit renewed.

Additionally, as far as the individual leases go it meets HAND requirements because we have established it as a rooming house and that's what is require. Each room is rented individually. Additionally, the example we put of Mr. Brawley appearing at the HPC meeting, I think he remembers incorrectly. It's not a variance, it's a COA (Certificate of Occupancy). But he had previously appeared at the Preservation Commission (HPC) before the June 8th meeting to speak against a fence that the renters had put up without his knowledge. And then on June 8th he came back with the renters to ask the Historic Preservation Commission if there was some way that they could put up a fence. So that is when it was discussed at length.

****Stewart Gulyas moved to deny AA-15-18 based on the written findings and recommendation of Staff. McManus seconded. Motion carried by voice vote 4:0—petition denied.**

APPROVAL OF MINUTES: February 2018
March 2018

****McManus moved to approve the February minutes. Klapper seconded. Motion carried by voice vote 4:0—Approved.**

****Throckmorton moved to approve the March minutes. McManus seconded. Motion carried by voice vote 4:0—Approved.**

Meeting adjourned.