CITY OF NORMAN, OK
BOARD OF ADJUSTMENT - SPECIAL MEETING
Municipal Building, Council Chambers, 201 West Gray, Norman, OK 73069
Wednesday, March 06, 2024 at 3:00 PM

MINUTES

The Board of Adjustment of the City of Norman, Cleveland County, Oklahoma, met in Special Session in City Council Chambers of the Norman Municipal Complex, 201 West Gray Street, at 3:00 p.m., on Wednesday, March 6, 2024. Notice and agenda of said meeting were posted in the Municipal Building at the above address and at Agendas/Minutes | City of Norman Oklahoma Meetings (municodemeetings.com) in excess of 24 hours prior to the beginning of the meeting.

Members: Brad Worster, Micky Webb, Curtis McCarty, Ben Bigelow, James Howard

Chair Curtis McCarty called the meeting to order at 3:01 p.m.

ROLL CALL

PRESENT
Brad Worster
Micky Webb
Ben Bigelow
Curtis McCarty

ABSENT
James Howard

A quorum was present.

STAFF PRESENT
Jason Murphy, Stormwater Program Manager
Beth Muckala, Assistant City Attorney
Todd McLellan, Development Engineer
Scott Sturtz, Interim Director of Public Works
Melissa Navarro, Planner II
Justin Fish, Planner I
Roné Tromble, Admin. Tech. IV

ACTION ITEMS

1. CONSIDERATION OF APPROVAL, REJECTION, AMENDMENT, AND/OR POSTPONEMENT OF BOA-2324-10: Raven Investments, L.L.C. appeals the approval of Floodplain Permits 684 and 685 for NextEra Energy Transmission Southwest, L.L.C.

   ITEMS SUBMITTED FOR THE RECORD:
   1. Staff Report for Permit #684
   2. Signed Approved Minutes of Floodplain Permit Committee – January 2, 2024
   3. Legal Staff Report with Attachment A
   4. Location Map

5. Raven Investments, L.L.C. Appeal of Floodplain Permit Committee Decision
6. NEET SW's Response to Raven's Floodplain Appeal with Attachments 1-5
7. Shaz Investment Group, L.L.C. Support of Appeal

PRESENTATION BY STAFF: Jason Murphy reviewed the staff report for Permit #684, a copy of which is filed with the minutes.

Beth Muckala reviewed the City Attorney Staff Report, a copy of which is filed with the minutes.

Mr. Bigelow asked how any decision made at this meeting would affect the previous decision of the Board. Ms. Muckala responded that they are wholly independent; they are two separate applications, treated as such today. Whatever decision is made today will not affect that District Court proceeding.

PRESENTATION BY THE APPELANT: Amanda Carpenter, of Williams, Box, Forshee & Bullard Law Firm representing Raven Investments, L.L.C., 522 Colcord Drive, Oklahoma City, provided copies of her presentation.

We're here to really talk about your question, Commissioner Bigelow. The issue is that if this Board approves Permit 684 and 685, you will have effectively made the appeal moot. There is no other matter to be considered at District Court. If NextEra is given this floodplain permit, the entire matter in Case CV-2023-3288 before the Cleveland County District Court would be moot and would have no further action to litigate. The Board sets up an appeals process for a reason, and that's very important. It allows property owners, developers, and all the parties involved to know exactly what the process is, and there's an expectation that process will be followed. That process we're dealing with today is that when the Floodplain Committee makes a decision it is appealable to the Board. The Board reviews that decision *de novo*, as Ms. Muckala has explained, and upon making a decision, either approval or denial, that decision is appealable to the District Court. The District Court then steps in the shoes of the Board of Adjustment and does a review *de novo*. They get to consider all of the factors: the application that was submitted. They also get to consider any additional information that the applicant, in this case NextEra, would like to present. So, therefore, the District Court would have the opportunity to review not only the application that was submitted in July of 2023, but it would also have the opportunity to consider all of these matters that Ms. Muckala just explained to you – those District Court filings on the condemnation, those public records as to ownership, the additional documentation that's provided in terms of tribal and environmental reports. The District Court would have that opportunity to review that and make the decision *de novo* as to whether or not a floodplain permit should or should not be issued. That is the process that has been in place. That is the process that NextEra actually is the one that kicked off and started that process when they were denied their application of their original application in July – when they were denied that application they filed the appeal. They have not dismissed that appeal. They could have not filed that appeal and waited until conditions changed and made another application. In fact, in their appeal document and appeal response they cite other cases from Missouri and Connecticut and Kentucky, and all of those cases are exactly that position, where the applicant came and filed for a permit, decided to not appeal, filed a second application for a permit which was considered and heard and ultimately approved. Those cases don't deal with the situation we have before you right now, where a permit was applied for, denied, gone up on appeal. That's not the situation that was dealt with in the cases that are cited by NextEra. What they cite is a

situation where they just decided to file a second permit. If you all approve this permit – really, if you deny this permit, you're taking into consideration jurisdiction which you don't have, and that's based upon your own City code. The City code that's before you on the screen and in your packet under Tab 1, provides that: An appeal to the District Court from the Board of Adjustment stays all proceedings – all proceedings, not just the original application – all proceedings and the action appealed from the Chairman of the Board of Adjustment, from which the appeal is taken, certifies that the Court Clerk after notice of the appeal has been filed, that by reason of fact – unless the Chairman does this. The Chairman has not done that. They never made an attempt to have the Chairman of the Board certify to the Court Clerk that the notice of appeal had been filed and that by reason of fact stated in the certificate that in their opinion there would be imminent peril to life or property. There has been no request for that. That's not the situation we have. And so, since the Chairman has not done that, we are under that first sentence that all proceedings are stayed when the appeal to the District Court is filed. This Court does not have jurisdiction to hear any permit.

As Ms. Muckala has pointed out in her staff report that is included with the packet today, she states on the first page that NextEra previously applied for a permit from the committee for the same project as was denied. She further states that the December application, which is 684, contained much of the same project and floodplain calculations as the July application. She goes on to state that, as provided as supplemental – supplemental – that's additional documentation – there's tribal and environmental regulatory information, as well as detailed information regarding ownership and access. This is the same application. And I ask you to look at Tab 4, where we go through, page by page, and you can look at the application. It is substantially the same. In fact, I would ask, if you're going to consider this, that you please detail for the record how this application is substantially different, because it is not. The number is different, yes. The signature is different, yes. But the content of the application is the exact same. They used some slightly different wording you'll see on page 2 of Tab 4, and on page 3 of Tab 4. But ultimately the content is the same. It's the same exact project, the same exact properties, the same exact owners, the same exact locations that they asked for in July. There is no substantial difference.

Now, Ms. Muckala said that you are able to deny this application if it is indistinguishable. I, respectfully, disagree with that. Your job is not to determine whether it's indistinguishable or not; your job is to determine whether or not you have jurisdiction. We would argue, based upon your City code, you do not have jurisdiction to consider this because, upon the filing of a District Court appeal, all proceedings are stayed.

Now I'm going to address some other matters, because they were brought up both in our appeal and in their response. We did assert under the Oklahoma Meetings Act that the Floodplain Committee's consideration of Permit 685 and splitting it out was a violation of the Open Meeting Act. The respondent, or NextEra, has provided that this is not the proper venue to distinguish that or not, that truly that is a criminal violation where the District Attorney of the County determines those, and they're right. That is correct. What we provide for you is to show that there was some underhandedness going on when this permit application was presented. We arrived at the hearing for the Floodplain Committee. We were not aware that it was going to be split out into two. The staff report says that it should be handled in two parts, meaning two parts should be considered, not two permits. It has zero indication that two permits are going to be considered. On top of that, there was an entire PowerPoint presentation provided by the Municipal Counselor's Office that detailed the properties, detailed the conditions, detailed how these are to be considered two different permits. If that was the case, why

was there not another permit applied for? And I would state to you that your Floodplain Committee requirements state that only permits can be issued upon an application. There was no application for Permit 685. There was no indication from the agenda that 685 was going to be considered, that the item was going to be split into two permits. There was no indication to the public that they would be coming forward and having this argument before the committee that additional permits should be considered. That was a surprise to not only me and my client, but to others in the room as well. Additionally, there is still eight properties – there was additional information that was presented by NextEra on March 4th – additional easements that took care of five of the outstanding properties that they do not have ownership to; there are still eight properties that they do not have ownership to. And one of the conditions is that they do have ownership before Floodplain Committee presents a permit. And the reason is because they don't have the ability to go onto someone's property, and when you give a permit giving that ability – giving them the right to do that, that creates a property issue.

And, lastly, we think it is wholly irrelevant – we think it is actually contrary to State statutes that NextEra brought up settlement discussions. 12 OS 2408 – that's a State statute – in civil procedure states that it is not proper evidence to prove liability of a claim or invalidity of a claim to consider settlement negotiations. You all are a quasi judicial board. You have that element of considering evidence, and we would argue that it is wholly irrelevant, highly prejudicial for you all to consider any settlement negotiations between the parties.

Secondly, the information that was provided to you was inaccurate. The settlement offer was never conditioned upon this appeal. What was left out is my conversation with Mr. Tift, who is NextEra's representation – legal representation in the condemnation, where we had a telephone conversation where he asked me, Amanda, these two shouldn't be tied. Settlement of the value should not be tied to the permit. And I said, I absolutely agree with you. The only reason that I included that in my communication with you is because on a prior case that we settled you asked me – speaking Aaron Tift asked me whether or not, if we settled the case, that client would be resuming their appeal of the floodplain permit. That's the only reason it was included in the communication. It was never contingent. It was never a use of this process to try and get more money. In fact, we submitted additional information to this Board on March 4 to show you what the value is of this very valuable commercial and residential property that is owned by Raven Investments, who is a well-known developer within this community, as well as the Oklahoma City community as a whole. We believe this property is valued at much more.

But, again, those settlement negotiations should not be considered by this Board. What is important is whether or not you have the jurisdiction, and I would submit to you, based upon your code, the process you all put in place for how these matters will be determined, prohibits you from considering any permit and all proceedings are stayed in this matter. We ask that you deny hearing this matter. That you deny the permit, that it was not properly heard before the Floodplain Committee, because that Floodplain Committee and this Board does not have jurisdiction since there is an ongoing open District Court appeal of the previous denial of the permit.

Nothing further.

PRESENTATION BY THE PERMIT APPLICANT: Jim Roth, with Phillips Murrah Law Firm in Oklahoma City, 101 N. Robinson Avenue. I'm here on behalf of NextEra Energy Transmission Southwest, L.L.C., who requested and obtained a floodplain permit from a super-majority of Norman's Floodplain Committee on January 2, 2024.

The floodplain permit is for the construction of an electric transmission line that NextEra is building on behalf of our region's grid operator, the Southwest Power Pool. The line will benefit residents of Central Oklahoma, including Norman, bringing more reliable, cost-effective energy. Raven Investments' written appeal did not contest the Floodplain Committee's determination that NextEra complied with the ordinance's requirements. And, as outlined in your staff report, the Committee acted properly when it considered and approved NextEra's application, including by assigning two permit numbers. The proper scope of the Board's inquiry today is the same as before the Floodplain Committee: whether NextEra met the requirements of the ordinance. The answer is yes, and the Floodplain Committee's decision should be affirmed and Raven's appeal rejected.

NextEra's previous application was initially heard by the Floodplain Committee on July 17, 2023. While that application was recommended for approval by the City of Norman staff, there were concerns regarding NextEra's access to certain parcels, which resulted in a denial of the permit by the Committee and this Board. An appeal of that denial is still pending in District Court.

Since the prior application, NextEra obtained easements across all 37 parcels within floodplains in Norman. For this reason, a new application was accepted by the Floodplain Committee and approved. For 23 of the 37 parcels, including Raven's parcels, the Floodplain Committee determined that NextEra access is unqualified, meaning there were no landowner objections that were relevant to NextEra's access. Permit Number 684 was assigned to these parcels. As to the remaining 14 parcels, the Floodplain Permit Committee determined that NextEra has present access, but deemed NextEra's access qualified in that the landowners may have outstanding objections challenging NextEra's underlying use of eminent domain. Until the City verifies resolution of objections for those 14 parcels, the permit will not be effective. Permit Number 685 was assigned to these 14 parcels and remains in the hands of the City's staff today. Notably, just since the January 2nd committee meeting, NextEra has already resolved objections as to 6 of the 14 qualified parcels and submitted evidence of those resolutions to the City Attorney's Office. Of the remaining 8 qualified parcels, we have reached agreement in principle with landowners for 6 parcels, leaving only 2 parcels remaining, both owned by one landowner. NextEra is committed to reaching resolution with this one remaining landowner as soon as possible, but given the transmission project's necessary timeline, NextEra is grateful to the Committee for approving Permit Number 685, which allows for a careful parcel-by-parcel approach, allowing for this important public project to move forward.

We are here today because the Floodplain Committee determined that our application met the requirements for issuance. The permit was appealed for reasons unrelated to floodplain management. The threshold requirement for appealing a decision of the Floodplain Committee to this Board of Adjustment is stated in your City's section 36-533 of the ordinance, which provides that an appeal from the Floodplain Committee to Board of Adjustment "shall make its decision on the suitability of the proposed use in relation to the flood hazard." Raven's written appeal is based on arguments that are unrelated to floodplain management or the substance of the permit itself, arguing 1) NextEra lacks standing to request a permit; 2) that NextEra's new permit application was somehow stayed by the District Court appeal; 3) that the Floodplain Committee violated the Open Meetings Act. Again, Raven's arguments don't challenge the substance of the Committee's decision. And, as indicated in the staff report before you, Raven's non-substantive arguments are easily rebutted by staff and in our own written response.

First, as I explained earlier, since the prior application NextEra has obtained present legal access to all 37 parcels, subject to the floodplain permit. And obtaining this access amounted to a substantial change affecting the project and, thus, authorized the Committee to accept and approve the new floodplain permit application. The Committee's authority to accept new applications is not only legal, but it's common sense. It would be wasteful of the City's resources to be required to litigate an appeal in District Court concerning a prior permit that was denied for reasons that no longer exist. Moreover, NextEra's right to access properties in the floodplain cannot even be litigated in this forum. That issue was reserved for separate condemnation legal proceedings which remain totally separate from the City's administration of its floodplain permit program. Again, those matters are separate and aside from the City's administrative processes for floodplain permitting.

Second, NextEra enjoys present and unqualified access to Raven's properties, meaning Raven can make no objections in the condemnation case that could take away NextEra's present access to Raven's property. This is why the City Attorney's Office included Raven with the 23 parcels in Permit 684, to which NextEra has present and unqualified access. Raven's failure to challenge NextEra's access to its property in the proper condemnation proceedings does not mean it should raise those arguments before you in a floodplain permit hearing.

Third, the Committee was authorized to assign two permit numbers to the application instead of one and nothing in the City's ordinance prohibits it from doing so. The relief granted in Permits 684 and 685 was all requested within the underlying application. And, in fact, the floodplain ordinance at 36-533(f)(6) specifically states the Committee is authorized to issue "such permits" – plural – "as it deems necessary".

Fourth, Oklahoma's Open Meeting Act was complied with. The relief granted in the permits could have just as easily been combined into one permit number or into Permit 684a and 684b. The Committee's administrative assignment of two permit numbers had no impact at all on public notice. The Committee complied with all requirements of the Open Meeting Act.

Five, finally, Raven's appeal in this instance amounts to an abuse of the City's floodplain permit appeal process, because the appeal is not about floodplain management, but about Raven trying to maximize its bargaining power in unrelated proceedings as you heard during their presentation today.

The Board should reject this appeal based on Raven's tactics and not encourage developers in the future to intervene in unrelated floodplain permit processes as a means of gaining leverage in separate legal proceedings, such as their condemnation action.

In closing, the Floodplain Committee properly focused its scope of inquiry on whether NextEra's floodplain permit application complied with the requirements in the City of Norman's Floodplain Ordinance. NextEra's new application did and does comply with the ordinance, which is why the Committee accepted the new application and also why the Committee's careful review and discussion of the application led to a super-majority approval and issuance of Permits 684 and 685.

Again, we are grateful to the City of Norman staff for its recommendation of approval and the deliberate consideration of the Floodplain Committee in granting the application. I'll now turn over to NEET SW Project Director, Nick Furr to provide additional information about the project and compliance with the City's ordinance.

Nick Furr, Project Lead of this project. I'll give a brief overview of the project compliance with the Floodplain Ordiance, which is what we're here to discuss today.

As you're aware, the proposed project of the new 345 KV transmission line between Minco and Pleasant Valley Draper Substations was run through Grady, McClain and Cleveland Counties. NEET SW is building the project on behalf of the Southwest Power Pool, which is the regional transmission owner organization that oversees the operation of Oklahoma City's grid. The SPP determined the project will increase electrical reliability in central Oklahoma, reduce electrical transmission congestion, increase electric reliability, and lower costs for electric customers. The most cost-effective energy for western Oklahoma to higher population areas in central Oklahoma, including Norman. The SPP solicited bids to construct the transmission line. NextEra submitted the bid and was successful bidder. If NextEra was not selected to build the line, the line still would have been built by a separate company. Because NextEra was selected to build the line, the SPP is now relying on NextEra to make significant investments and perform all work necessary to insure the line's benefits are delivered to the public within the SPP timeframe.

NextEra's new floodplain permit application is the portion of the overhead electric transmission line that begins at the western boundary of the City of Norman, near West Robinson Street, and extends approximately .15 miles east of 48th Avenue NE. We've provided detailed floodplain related information in our application supported by extensive figures, plans, reports, and floodplain analysis, all establishing the floodplain impacts for the project would be minimal, and in many cases only temporary. The project meets the City of Norman's floodplain ordinance criteria and, as you are aware, staff recommended the approval of the application to the Floodplain Committee and to the Board.

Infrastructure within the floodplain includes 35 overhead electric transmission poles and temporary access roads. Of the 35 poles, the analysis indicated 33 will cause no rise in the base flood elevation, as Jason mentioned earlier. Modeling further indicated the remaining 2 poles will cause a rise of .12 inches, which is less than 1/8 of an inch, well within Norman's permitted range. Compensatory storage is also proposed in the floodplain to mitigate for fill added above. In particular, the transmission line has been designed to withstand flood events, provide savings by relieving congestion in the electric transmission grid, increased reliability of electrical grid helping minimize business interruptions, allows landowners to continue current land uses such as ranching, farming within the easement right-of-way and et cetera, meets the no-rise of the City ordinance as evidenced by the hydraulic studies contained within the application. Upon its careful review and analysis, staff recommended approval and the Floodplain Committee granted NEET SW's application.

As Jim noted earlier, we've heard concerns raised in previous meetings, so in addition to items related specifically to the City ordinances we've submitted information and documentation addressing those concerns in our application that was approved in January of this year. In particular, the application provides the supporting documentation that shows legal access on each floodplain parcel and clarifies that the project will only access parcels permitted by the City of Norman. The project has obtained other floodplain permits along the route and the City of Norman City Council has unanimously approved a road use agreement and has issued revocable permit for the project location within the City's rights-of-way, as well as earth change permit. The City has thoughtfully considered NextEra's request related to this project thus far, and we thank you for doing the same today.

If you have any outstanding questions regarding these and any other related items through our application, we have a whole team of knowledgeable folks that are happy to answer questions. With that, I'll turn it back to Jim for closing.

Mr. McCarty – I have just one question for you. You made a comment that they can ranch use underneath these transmission lines however they need. Does that include roads and maintaining it, mowing it?

Mr. Furr – Yes. We'll maintain the right-of-way, but basically we own the right-of-way – we have an easement. But it's still their land. We have other projects in farm areas where the cattle graze. We still let farming activities happen.

Mr. McCarty – Are you going to allow, just say, a new development to put a road underneath the power lines?

Mr. Furr – Yes. It's something we would want to review, just as part of the process, just to ensure safety and maintenance items. But having a road installed is not anything we'd ever be concerned about. I mean, we're crossing many roads already.

Jim Roth – We're certainly grateful for your time today. We ask that you allow this important public project to not be derailed by the appeal of one private property owner who is seeking to maximize bargaining power in an unrelated proceeding. They have sought a jury trial to litigate their claim for $6+ million more of value, as is their right. They shouldn't be entitled to highjack a City permitting process for a property valuation fight. We thank you for your consideration of the application. We thank the Floodplain Committee for recognizing the significant change in circumstances. If you'll recall last fall when we were here – or last summer – you remember discussing that the Floodplain Committee was concerned about access. At the time when last summer's application was filed, we had 21% parcel access. Today we stand with you, as we did on January 2, with 100%. The City's floodplain permit speaks to four separate parcels that are still litigated through Court that could flip that percentage, and we wouldn't be entitled to that permit. But for all the rest, those substantially changed circumstances have permitted us to seek that application and permitted the Chairman to determine that that significant change was enough to consider it, and the Floodplain Committee vetted it rather extensively.

Just quickly, a couple responses to Ms. Carpenter. I must admit, it's very rich for the applicant to accuse the City of violating the Open Meeting Act for a meeting they had notice to and attended. It's also rich to suggest the City administrative process can't decide to create two different permit numbers from one application, when she herself, on January 2 at the meeting, asked for a third permit to be considered, number 686. But, nonetheless, here we are and I agree with your City's Attorney, who suggested if it's indistinguishable, then you would have the right to reject it. This application was clearly distinguishable by showing access to 100% of the parcels affected, all 37 parcels within the floodplain process. I would encourage you to deny, reject under the posting for today, the appellant's appeal and allow this public process to go forward. We stand for questions.

Mr. McCarty – Ms. Muckala, could you clarify: Ms. Carpenter said we don't have the authority to even hear this. Could you explain? I feel like we do, but make sure that I understand that we do.

Ms. Muckala – She is speaking to a matter of jurisdiction and her argument is based on this highlighted language. She, in her presentation, put a lot of emphasis on stays all proceedings. Now, of course, you get to continue having monthly meetings; it's not staying the Board of Adjustment. You have to read further, and it says in the action

appealed from. So we're talking about proceedings relating to 675, the July application that was here before you. Again, if you see this as the same as 675, then it would seem a similar ruling is in order. If you see the additional information, it's not only the title information, but that's what I reviewed personally. If you see that as different and changing your opinion on whether you have the information you need to take action, then, no, I don't think you have a jurisdictional issue. Our permitting process allows permits to be brought and it is within the discretion to determine that. There was also a question of effect. No. Whatever decision you make will not make an action happen in District Court. Poof. It won't just happen. Parties will argue. There's going to be arguments regardless of what happens in appeals and other decisions that happen. We can't control that and we don't know what might happen in a District Court action. But, no, these are treated as two administratively different tracks here with the City of Norman.

Mr. Bigelow – For you, Beth, one other question. So, essentially, the recommendation from the staff that we got is the same as what the Floodplain Committee voted to approve. Is that correct?

Ms. Muckala – I'm going to ask which recommendation, because in the December staff report, there was already the recommendation that there be two groups treated, one with conditions, one without. Now, I modified that at the actual meeting, once I had completed my title review, to identify the parcels and to suggest the two permit numbers so that we could treat them administratively different with the conditions. Both of those recommendations were presented on January 2 to the Floodplain Permit Committee and the Committee opted to accept all of the recommendations given. And that recommendation is actually outlined word-for-word on page 4 of 8 of the City Legal Staff Report for this packet. I don't know if yours is in color, but I actually put what I added in red so you could see it. But if you pull up page 4 of 8, that's word-for-word what I presented, and the bold language are the specifics that I had added once I completed the title and other information review.

Mr. Bigelow – And that's my question. This recommendation that you make – this is essentially what the Floodplain Committee approved. Correct?

Ms. Muckala – Yes.

RESPONSE BY THE APPELANT: Ms. Carpenter – I'd like to clarify one thing. You asked whether or not the property owners could put roads and anything underneath. Of all the cases where NextEra is condemning the easement, the easement is exclusive and prohibits actions. The actual petition, which we provided to you in our March 4 packet, you all have, it's a tab in our packet of information – the petition is there and it explicitly states it's exclusive and they can keep all parties out of their easement, so that would prohibit the property owner from putting anything within the limits of the 150 foot easement. So that's actually exact different from what they stated.

Mr. McCarty – You're saying including a road?

Ms. Carpenter – Correct. Yes. Because it's exclusive and they can prohibit others from being in that easement. So of all the ones they're condemning. They have separate agreements with parties where they have an easement form that would allow that, but in all of the condemnation ones the petition states specifically an exclusive easement.

Secondly, I would ask you to consider the effect of what you all are about to potentially do. If you vote to approve this permit, then that means NextEra goes out and starts working, potentially, tomorrow. So in the District Court case, where we are litigating the matter of whether or not they should obtain a floodplain permit, there would be nothing to litigate. They'd be out there working. There would be nothing for the District Court to consider, because you all have issued a floodplain permit. It's not like we're dealing with two different properties that you've issued it as to one property and not the others, and so therefore the District Court can consider this other property. Effectively, if you allow them to submit a second application while the matter of the first application is on appeal, you're doing away with your appeals process. You're saying the only thing that gets stayed is if the permit would have initially been approved. But any time an appeal happens, if the original permit was denied and they come in and file another application and just submit some additional documents, that you all consider it, you've done away with your appeals process for any application or permit denied. The intent and the effect of what you're about to do – or what approving this permit would do is do away with Municipal Code 36-570. It says all proceedings and the action appealed. If you let them file another permit, they're getting a second bite of the apple.

Mr. McCarty – I have one other question for you. Your client – what properties do they have? I saw a map. That are actually affected by the floodplain?

Ms. Carpenter – So we have five properties that are being condemned as part of the NextEra line, and one property is what has been affected by the floodplain – that is in the floodplain. Excuse me, two properties are in the floodplain. There is a property at Franklin and 48th, and there is property at 48th and Rock Creek. So those two properties. The proposed development in that area would allow for us, as the developer, to go in and take flood remediation steps as necessary that allow for us to maintain proper drainage in our development as we continue to develop for residential or commercial purposes, which is what the property was acquired for. So them coming in now and putting a line through and taking all of the trees potentially changes how we would have to mitigate those flood issues on our development. Those are things that were not presented when they presented 687. Those are things that they could have presented in the District Court case that we would be litigating. Those are things that we would have taken depositions and done discovery on and the whole litigation process, which is being thwarted by the fact that they just come in and file another permit.

Mr. Roth – Mr. Chairman, might I offer some thoughts to a few of the last comments? And, regarding the easement, if you'd like to hear from the real estate lawyer – it's handled by another firm – they can speak to that question about the roads, the condemnation, and the exclusivity question, if you'd like. Hall Estill is here. Our firm, because this is wholly different from the valuation and condemnation issues, is not handling that aspect, but I do know that they're present.

Mr. McCarty – I'm sure all the easements are written different. But from what she said is that it's not going to be allowed, and what you're saying and what your team is saying is that you have allowed it or will allow it.

Mr. Roth – Each parcel is negotiated differently. I think the condemnations that reached toward settlement, obviously, have some negotiated terms in them. So, again, I would refer to a Hall Estill attorney that might be able to speak specific. I don't know if she

was referring to their own parcels or offering reaction to easements she hasn't seen herself. But, again, I think you'd need to hear that from NextEra's counsel.

Mr. McCarty – I don't think I need to hear it. Do you guys? We appreciate that.

Mr. Roth – And then on the point, if I could, regarding the stay and that you would be undoing your ordinance. Hyperbole aside, I would just encourage you to lean on your own Municipal Counselor's office. The code that is at reference on the screen above you is specific to permit 675, as Ms. Muckala said. That proceeding is stayed. And, as a reminder, that was NextEra's appeal because of a denial associated with access. That underlying condition that necessitated the appeal no longer exists, and that's why the substantial change was entertained by the Floodplain Committee and grant in permit 684 and 685. I just wanted to make that point – that stay applies to 675 and is respected today.

AUDIENCE PARTICIPATION: None

DISCUSSION AND ACTION BY THE BOARD OF ADJUSTMENT:

Motion made by Worster, seconded by Bigelow, to uphold the decision of the Floodplain Permit Committee and reject the appeal.

Voting Yea: Worster, Webb, Bigelow, McCarty

The motion to uphold the decision of the Floodplain Permit Committee and reject the appeal passed by a vote of 4-0.

Mr. McCarty announced that there is a 10-day appeal period before the Board's decision is final.

MISCELLANEOUS COMMENTS

Mr. McCarty thanked everyone for attending and providing input to the proceeding.

ADJOURNMENT

There being no further business and no objection, the meeting adjourned at 4:01 p.m.

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Secretary, Board of Adjustment