Minutes
Administrative Board of Appeals
October 29, 2012

MEMBERS PRESENT:  
David Levy, Vice Chair  
Bode Labode  
Jim Weaver  
Jose Lopez

MEMBERS ABSENT:  
Ann O’Connor, Chair  
Steve Simmonds, Alternate  
Jana Samiev, Alternate

OTHERS PRESENT:  
RoseMarie Horvath, Law Department  
Kevin Denker, Planning Department  
Andrea Wisniewski, Recording Secretary

I. Roll Call

Mr. Levy called the meeting to order at 1:01 pm.

Mr. Denker asked that the board receive as Exhibit 1 in each of this meeting’s cases the contents of the City’s file on each case.

Mr. Levy acknowledged the contents of the City’s file as Exhibit 1 in each case.

II. Cases

12-8-63 From 8/27/2012  
Appeal Omaha Police Department notice of nuisance: Theresa M. Vacek, 5237 S 52nd St, 68117.

8/27/2012:  
Theresa Vacek appeared before the Board. Ms. Vacek stated that she had in her possession certified mail receipts that she would like to submit to the Board; however, these receipts were not submitted to the Board as exhibits.

Kenton Duncan, City of Omaha Code Inspector, stated that he had visited Ms. Vacek’s property at noon today. He reported that the white Chevy truck in question is still on the property and is not plated. Mr. Duncan also made note of two other unplated vehicles on the property, and submitted photos of the site to the Board (Exhibit #2).

Ms. Vacek stated that she is in the process of trying to get a clear title for her late husband’s truck. She stated that she is interested in selling the vehicle, and was unaware that the truck needed to have current license plates, since she wasn’t driving it. Ms. Vacek stated that the company that she and her late husband financed the truck through in Indiana went out of business. She has been attempting to get a title for the truck since her husband’s death. Ms. Vacek was advised by the Nebraska Department of Motor Vehicles to send a certified letter to the now-defunct Indiana title company. She was told that if the letter comes back unclaimed that she may make an application for a new title through the State of Nebraska. Ms. Vacek brought with her certified mail receipts showing that such a letter had been sent. Ms. Vacek stated that she didn’t realize that she was breaking the law; and asked the Board to give her more time to obtain a clear title for the vehicle in question.

Motion by Mr. Weaver to hold this case over to the October 29, 2012 meeting of the Administrative Board of Appeals, to take place in Room 702 of the Civic Center. Second by Mr. Lopez.

AYES: Weaver, Lopez, Levy, O’Connor

Motion carried 4-0.
10/29/2012:
Ms. Vacek was not present. Mr. Levy suggested that the Board give Ms. Vacek time to appear; this case was pushed to the end of the meeting. After the conclusion of all of the other cases on today’s agenda, Ms. Vacek was not present.

Officer James Stokes, Omaha Police Department, appeared before the Board. Offer Stokes stated that he would work with Ms. Vacek if there are any remaining issues with the registration on her vehicles. He acknowledged the fact that registering an out of state vehicle can take some additional time.

Motion to deny by Mr. Labode. Second by Mr. Lopez.

AYES: Labode, Weaver, Lopez, Levy

Motion carried 4-0.

12-8-56 From 8/27/2012
Appeal Omaha Police Department denial of firearm registration: Dustin A. Mackey, 5741 N 115th Cir, 68164.

8/27/2012:
Dustin A. Mackey, applicant, and Glenn Shapiro, attorney, appeared before the Board.

Sgt. Eric Nordby, Omaha Police Department, stated that Mr. Mackey had three offenses on his record which prevent him from registering a firearm in the City of Omaha. Mr. Mackey was convicted for carrying a concealed weapon in March of 2000. He was convicted for Possession of marijuana/Possession of paraphernalia in September of 2002. Mr. Mackey was again convicted for Possession of marijuana less than two ounces under South Dakota state statutes in August of 2006.

Glenn Shapiro, attorney, requested that the Board hold this case over to their next meeting. He stated that he intends to ask the court that Mr. Mackey’s convictions be set aside, but needs additional time to file such motions with the court system. Mr. Levy inquired as to whether sixty days would be enough time for Mr. Shapiro to have Mr. Mackey’s convictions set aside. Mr. Shapiro stated that thirty days might be enough time; however, sixty days would be more prudent. The Board Secretary informed those present that the Board’s October 29th, 2012 meeting would take place in Room 702 of the Civic Center. Mr. Shapiro made note of this change.

Motion by Mr. Levy to hold this case over to the October 29th, 2012 meeting of the Administrative Board of Appeals, to take place in Room 702 of the Civic Center. Second by Mr. Weaver.

AYES: Levy, Weaver, Lopez, O’Connor.

Motion carried 4-0.

10/29/2012:
Dustin A Mackey, applicant and Glenn Shapiro, attorney, appeared before the Board.

Sgt. Eric Nordby, Omaha Police Department, reviewed three offenses on Mr. Mackey’s record (please see minutes from August 27, 2012, above). Mr. Shapiro commented on his client’s offenses, and submitted copies of set-aside motions on two of the three offenses mentioned by Sgt. Nordby. In regards to the marijuana charge from South Dakota in 2006, Mr. Shapiro stated that this state does not have the same processes as Nebraska, which allow for convictions to be set aside. Mr. Shapiro concluded by stating that in looking at Omaha’s gun registration ordinance, he did not believe that his client’s remaining misdemeanor charge would be sufficient grounds to deny the appeal.
Mr. Weaver inquired as to whether Mr. Mackey’s South Dakota conviction for possession was for less than one ounce of the substance. Sgt. Nordby replied that he is unfamiliar with South Dakota law; however, this appears to be a low-grade misdemeanor charge. Mr. Shapiro agreed with this assessment.

Mr. Levy asked Mr. Shapiro what must be done in Nebraska in order to have a conviction set aside. Mr. Shapiro replied that you must show that no additional offenses have occurred since the offense, and that you did not receive jail time for the conviction. Mr. Levy asked Mr. Shapiro whether his client would be able to prove compliance with these standards if South Dakota had the same type of set-aside process as Nebraska. Mr. Shapiro asserted that his client would be able to meet those standards. In response to Mr. Weaver’s question. Sgt. Nordby replied that Mr. Mackey had had one traffic offense since his 2002 conviction; however, this was not prosecuted.

Motion to grant appeal by Mr. Labode. Second by Mr. Lopez.

AYES: Weaver, Lopez, Labode, Levy

Motion carried 4-0.

12-10-70
Appeal Omaha Police Department revocation of firearm registration: M.C. Stennis, 4929 N 52 St 68104.

M.C. Stennis appeared before the Board.

Sgt. Eric Nordby, Omaha Police Department, stated that Mr. Stennis’ application for registration of a firearm was rejected due to a CCW offense dating from April 12, 1995. Sgt. Nordby stated that Mr. Stennis has had no further contact with the law since the 1995 conviction. He commented that Mr. Stennis has a second firearm that he would like to register; this additional registration’s success depends on the outcome of today’s appeal.

Mr. Stennis stated that he had been target shooting with a friend at the time of the incident. He left his friend’s property, and was unaware of the regulations regarding how to transport his gun. On his way home, he was stopped by police. He stated that he has had no further contact with the law. Sgt. Nordby confirmed this statement.

Motion to grant appeal by Mr. Weaver, with the understanding that this approval includes both weapons mentioned above. Second by Mr. Labode.

AYES: Lopez, Labode, Weaver, Levy

Motion carried 4-0
Casey Michael Erwin appeared before the Board.

Sgt. Eric Nordby, Omaha Police Department, stated that the applicant’s request for registration of a firearm was rejected due to a conviction for possession of drug paraphernalia dating from August of 2010.

Mr. Erwin stated that his appeal is based on the fact that his conviction was for paraphernalia only; he has no convictions for controlled substances. Mr. Levy pointed out that the Omaha ordinance states that gun registration may be denied for violation of any laws of this state relating to controlled substances. Sgt. Nordby confirmed this statement and added that state statutes define the Controlled Substances Act of Nebraska to include the Drug Paraphernalia Law.

In response to Mr. Levy’s question, Sgt. Nordby stated that police responded to a fight involving a gun. Officers searching the vehicles of those present at the time discovered a bong in Mr. Erwin’s car. Sgt. Nordby clarified that the report does not indicate that Mr. Erwin was involved in the fight; however, he was present at the scene when officers arrived.

Mr. Labode commented that a bong or water pipe may be used to smoke tobacco only. Sgt. Nordby agreed with this statement, and added that a bong may be tested to see if it had been used to smoke marijuana. Mr. Labode asked Sgt. Nordby whether Mr. Erwin’s bong had been tested in such a manner. Sgt. Nordby replied that the officer’s report does not indicate that the item was tested for marijuana residue; however, Mr. Erwin was convicted on the drug paraphernalia offense. Mr. Erwin confirmed that his bong was not tested; he was ticketed and received a fine for the violation.

Mr. Levy asked Sgt. Nordby whether Mr. Erwin had had any other contact with the law since August 2010. Sgt. Nordby stated that Mr. Erwin was again cited for possession of drug paraphernalia two weeks after the original incident in August – this was dismissed by the courts. Mr. Erwin also had a couple of traffic incidents and an offense for minor in possession of alcohol.

Mr. Weaver asked Mr. Erwin to explain why he wanted to own a firearm. Mr. Erwin replied that he had grown up around guns. Both of his parents owned and used guns; his father was in the military. He would like to have a weapon for personal defense. Mr. Weaver asked Mr. Erwin to speak about the personal choices he has made in regards to marijuana and alcohol. Mr. Erwin replied that the minor in possession of alcohol charge stems from a situation in which he was not aware that there was alcohol in the truck of his vehicle when he was pulled over for a traffic violation. He stated that he has not let marijuana come too far back into his life.

Motion to deny appeal by Mr. Weaver. Second by Mr. Lopez.

AYES: Weaver, Lopez, Levy

NAYS: Labode

Motion carried 3-1. Appeal denied.
Robert M. Petersen appeared before the Board.

Sgt. Eric Nordby, Omaha Police Department, stated that the applicant’s request for registration of a firearm was rejected due to two issues. The first issue was a conviction for domestic violence dating from 2010. Mr. Petersen denied that he had committed the offense, maintaining that someone else had used his name and social security number. Mr. Petersen was able to prove to the Omaha Police Department that he had not committed the offense in question; currently, he is trying to clear his record with Sarpy County. Sgt. Nordby stated that Mr. Petersen also has a CCW conviction dating from 2002. In response to Mr. Weaver’s question, Sgt. Nordby stated that the altercation involved an argument between Mr. Petersen and his brother.

Mr. Petersen stated that he has been trying to better himself. He is beginning training in the heating and air conditioning field. He is also seeking custody of his daughter. In response to Mr. Levy’s question, Mr. Petersen stated that he has gotten his record cleared with Sarpy County, and could produce paperwork showing this to the Police Department. Sgt. Nordby commented that in his opinion, the domestic violence charge is not a matter of concern, as he is convinced that Mr. Petersen’s name was used by another person. Sgt. Nordby commented that the major item of concern to his department was the 2002 CCW conviction on Mr. Petersen’s record.

In response to Mr. Levy’s question, Mr. Peterson stated that he will begin a sixty week training program in the heating and air conditioning field starting next week. He does not currently have a job in the HVAC field; however, he has several potential job prospects once he begins school.

Motion to grant appeal by Mr. Labode. Second by Mr. Weaver.

AYES: Weaver, Lopez, Labode, Levy

Motion carried 4-0. Appeal granted.

James Harrell Jr. appeared before the Board.

Sgt. Eric Nordby, Omaha Police Department, stated that the applicant’s request for registration of a firearm was rejected due to a conviction for possession of marijuana less than one ounce dating from August 3rd, 2011.

Mr. Harrell stated that his conviction stems from the discovery of two roaches (the end pieces, or “butt” of a marijuana joint) that were discovered in the back of his vehicle. He stated that he was not aware at the time that the roaches were in the vehicle. He stated that he had taken responsibility for the roaches since they were in his vehicle. Mr. Harrell stated that he has always wanted to own a gun, citing his intention to use it for target practice and possibly for shooting into the air on New Year’s Eve.

In response to Mr. Levy’s question about the applicant’s record, Sgt. Nordby commented that Mr. Harrell’s record also contains an incident involving giving false information and driving on a suspended license in 1984. There has been no other contact between the law and Mr. Harrell. Mr. Weaver asked Sgt. Nordby whether anyone else at the scene was questioned in regards to the roaches in the backseat of the vehicle. Sgt. Nordby replied that no one else was present at the time of the incident. The officer smelled marijuana upon approaching the vehicle and asked to search the car. Mr. Harrell stated that he had consented to the vehicle search, and admitted responsibility for
The roaches as they were in his vehicle; however, he maintained that he had not been aware that they were present in the vehicle at the time of the incident. Mr. Harrell also pointed out that these two roaches would have contained far less than an ounce of marijuana. Mr. Labode asked the applicant how the marijuana came to be in his vehicle. Mr. Harrell postulated that the roaches may have been left there by some friends that had been visiting for Omaha Day. The Board cautioned Mr. Harrell that it is not permissible to shoot a gun into the air on New Year’s Eve; Mr. Harrell stated that he would not allow his weapon to be used for this purpose.

Motion to approve by Mr. Labode. Second by Mr. Weaver.

AYES: Lopez, Labode
NAY: Weaver, Levy

Motion failed 2-2; appeal denied.

Mr. Levy suggested that the Board could opt to hold this case over in the hopes that the next meeting would have a larger number of Board members present. Mr. Weaver asked that the Board vote again on the approval of Mr. Harrell’s appeal. Mr. Harrell asked the Board to reconsider their decision. Mr. Levy asked the Board whether they wished to make another motion at this time.

Motion to grant appeal by Mr. Labode. Second by Mr. Weaver.

AYES: Labode, Weaver, Lopez
NAY: Levy.

Motion carried 3-1. Appeal granted.

12-10-74
Appeal Omaha Police Department denial of firearm registration: Antonio L Manuel, 2544 N 16 St 68110.

Antonio L Manuel appeared before the Board.

Sgt. Eric Nordby, Omaha Police Department, stated that the applicant’s request for registration of a firearm was rejected due to a conviction for marijuana less than one ounce dating from June 2011.

Mr. Manuel stated his conviction for marijuana possession stems from an incident where a passenger in his vehicle had been smoking. This person left marijuana in the back of his vehicle – it was discovered during a traffic stop. He accepted responsibility due to the fact that it was his car.

Mr. Manuel stated that he would like to have a gun for protection. He added that he was recently awakened by someone trying to steal his central air unit in the middle of the night. He commented that his wife is a disabled veteran, and they don’t feel safe in in their neighborhood. He would like to have a firearm for the protection of his family.
In response to Mr. Levy's question, Sgt. Nordby reviewed Mr. Manuel's record. He commented that Mr. Manuel had an offense for driving under suspension; this went to warrant and was in place for sixteen years. Mr. Manuel responded to this statement, saying that he had come home from college due to personal issues. During this time, he received a DUI and was put in jail. Mr. Manuel stated that he missed a court date while in jail – this prompted a warrant being issued for failure to appear. He has since paid all fines associated with this incident.

Motion to grant appeal by Mr. Weaver. Second by Mr. Labode.

AYES: Weaver, Lopez, Labode

NAYS: Levy

Motion carried 3-1. Appeal granted.

12-10-75
Appeal Omaha Police Department denial of firearm registration: Kenneth Zweerink, 4208 Fowler Av 68111.

Kenneth Zweerink appeared before the Board.

Sgt. Eric Nordby, Omaha Police Department, stated that the applicant has several firearms registered to with the Police Department. Mr. Zweerink’s most recent for the registration of a firearm was rejected due to a conviction for CCW dating from 1993. Sgt. Nordby commented that he was not certain how Mr. Zweerink was able to receive registrations for his other firearms, as the CCW should have been grounds for denial. He confirmed that all is in order with Mr. Zweerink’s current registrations.

Mr. Zweerink stated that he is an avid outdoorsman, and enjoys both hunting and shooting. He added that he is a law-abiding citizen, and would like to be in compliance with City ordinance. As regards his CCW conviction, Mr. Zweerink stated that he had been delivering newspapers late at night. He was in the habit of bringing his gun with him on his paper route; his boss was aware of this and encouraged the practice. He was pulled over and his gun was discovered between the seats of the delivery van.

The Board Secretary commented that she had received no information regarding the revocation of Mr. Zweerink’s current firearm registrations. At the Board’s request, Sgt. Nordby read aloud a list of Mr. Zweerink’s current firearms registrations. He stated that these registrations are current and are in effect.

Motion to grant appeal by Mr. Weaver, with the understanding that this approval is for the denial of Mr. Zweerink’s most recent application for the registration of a firearm, and also for those firearms currently legally registered to Mr. Zweerink through the Police Department. Second by Mr. Lopez.

AYES: Lopez, Labode, Weaver, Levy

Motion carried 4-0. Appeal granted.
12-10-76
Appeal Omaha Police Department notices of nuisance: James Overton, 3701 N 30 St 68111.

Mr. Overton was not present. Officer James Stokes, Omaha Police Department, appeared before the Board. Officer Stokes stated that he had received several complaints regarding this property. Several vehicles were at this property which appear to have been purchased at police impound auctions. Officer Stokes said that he had run the license plates for these vehicles and had found them to be fictitious. Officer Stokes spoke with Mr. Overton, who claimed that he has plans to pave the lot in order to run an auto dealership at the property. Mr. Overton sells four to five vehicles per year from this site. Officer Stokes stated that the vehicles on this property have been removed by the applicant.

Motion to deny by Mr. Weaver. Second by Mr. Lopez.

AYES: Weaver, Lopez, Labode, Levy

Motion carried 4-0. Appeal denied.

12-10-77
Appeal Omaha Police Department notice of nuisance: Peter J. Townsend, re: 1336 S 30th St 68105.

Mr. Townsend was not present. Mr. Denker stated that the Code Enforcement Division inspected the property this morning; he submitted photos of a crushed rock parking area behind the property. Mr. Denker stated that he has not yet had a chance to pull aerial maps of the area; he suggested that the Board hold this case over to their November meeting in order to allow the City to further research the history of this property.

Motion to hold this case over to the November 26, 2012 meeting of the Administrative Board of Appeals by Mr. Lopez. Second by Mr. Labode.

AYES: Lopez, Labode, Weaver, Levy

Motion carried 4-0.

12-10-78
Appeal Public Works Department site plan denial (proposed McDonald’s location at 77th & Dodge Streets): Eric Kellogg, 105 S Fifth Av, Minneapolis, MN, 55401.

Vicky Stadther of McDonald’s, Troy Meyerson of Frazer Stryker PC LLO, and Eric Kellogg of Landform Engineering appeared before the Board. They were joined by Ryan Haas, Murthy Koti, and Todd Pfitzer of the Public Works Department and Rick E. Cunningham of the City Planning Department.

Mr. Haas spoke briefly about onsite drive thru stacking requirements, and how these requirements are designed in order to reduce the possibility of cars waiting in the drive thru lanes being required to stack up into surrounding roads and traffic. Mr. Haas stated that a number of problems arise when vehicles stack up into public roadways, and can present a hazard. Mr. Haas pointed out that McDonald’s and other fast food restaurants may choose to split their drive through lanes into two order points; however, there is no credit given for having two lanes. Each lane would be required to meet the 300 foot minimum requirement. Mr. Haas stated that onsite stacking requirements call for a minimum distance of 300 feet at this property; currently, the applicant’s proposed site plan only allows for 235 and 240 feet for onsite stacking in their drive thru lanes (Exhibit D).
Mr. Cunningham, Planning Director, City Planning Department, stated that his department has been working with the applicant to come up with an acceptable site plan. He stated that the project is located in an ACI (Area of Civic Importance) district, and thus has to meet certain design standards in regards to materials and design. He referenced Exhibit B, which showed a solution that had been negotiated at one time between the City Planning Department, The Public Works Department, and the applicant. This solution would bring the applicant much closer to the 300 feet minimum described by Mr. Haas. It also utilizes portable concrete bollards for access for their delivery truck. This solution has been rejected by the applicant. Mr. Cunningham concluded by stating that the Planning Department is opposed to the applicant’s appeal, as it is possible to arrive at a workable resolution to this issue.

Murthy Koti, City Traffic Engineer, Public Works Department, stated the onsite stacking requirements were reduced in order to provide some sort of built in relief for businesses whose stacking does not pose a safety hazard by being more than 300 feet from major traffic areas. He pointed out that this McDonald’s is located on Dodge Street, which is a state highway. This street carries a lot of traffic; to allow vehicles to stack out onto this highway would result in safety issues. Mr. Murthy stated that Dodge Street, as a state highway, is under the jurisdiction of the State of Nebraska. The State can take whatever action that they would deem necessary in order to deal with operational issues that may result from the restaurant’s operation, whether or not the Board chose to grant the applicant’s appeal today.

Todd Pfitzer, City Engineer, Public Works Department, stated that there have been four accidents on Dodge Street in the past two years due to cars stacking out from McDonald’s drive thru lanes. Mr. Pfitzer pointed out that as per the City Nuisance ordinance, the City Traffic Engineer (Mr. Koti) has the authority to rescind McDonald’s driveway permit if problems continue to occur. This authority is in addition to the Nebraska Department of Roads’ authority to deal with operational issues that may result from this restaurant’s operation.

Troy Meyerson, Frazer Stryker PC LLO, stated that McDonald's has given up access to Dodge Street in an effort to eliminate the possibility that cars would stack out onto that road. Access to this site will be located on 77th Circle, to the east of the Dodge Street entrance. Mr. Meyerson commented that it was his client’s belief that they meet the requirements for onsite stacking. He challenged the Public Works Department on their three hundred feet requirement; adding that their requirements do not state that this is the minimum footage required for fast food restaurants; rather it lists the number of vehicles that must be able to fit on the property without stacking out onto the street. Mr. Meyerson showed the Board a schematic which illustrated that the current site plan could house twelve vehicles on the lot without stacking out onto the street. He submitted a list of large vehicles (Exhibit 4). This list of vehicles illustrated the length of each of several popular large sports utility vehicles and trucks, with an average length of 17 feet. Mr. Meyerson maintained that the 25 foot minimum spacing required by Public Works was excessive. Mr. Meyerson compared stacking requirements in several cities that he believes to be comparable to Omaha, and argued that his client meets stacking requirements.

Mr. Haas responded to Mr. Meyerson’s comments. He stated that the minimum stacking requirements were based on the results of a recent engineering study. This study was performed in Omaha, and was meant to give the Public Works Department an accurate depiction as to the peak queues that could be expected in a variety of locations. He stated that it is not the size of the vehicle that matters in figuring stacking requirements, but rather, the total distance allowed for cars to stack on the site while waiting in queue at the drive thru. He stated that this particular McDonald’s is one of the worst offenders for vehicles queuing onto the street in the city. The current configuration has two access points to the location; Dodge Street and 77th Circle. The elimination of the Dodge Street access means that employees attempting to access the property or customers wishing to go into the restaurant may be forced to queue onto 77th Circle, as it may be blocked by those wanting to use the drive thru. 77th Circle empties onto Dodge Street; it also supports other traffic and businesses. Mr. Haas concluded by stating that the 77th Circle access point may promote a worse situation than the current configuration.
Mr. Cunningham spoke in regards to the approvals that this project has received from various other city boards, including the Urban Design Review Board. He stated that these approvals should not be confused with today’s waiver request, as stacking requirements fall under the jurisdiction of the Public Works Department. Mr. Koti pointed out that the 300 foot minimum stacking requirements is representative of average conditions. The McDonald’s at this location is in a high traffic zone, and is most likely a very busy location.

Eric Kellogg described the process that the applicant had gone through up to this point, and the challenges that they had faced in obtaining approvals for their design. He stated that McDonald’s would like to build the site this year, and asked that the Board approve their request so that this project could get under way. Mr. Meyerson asked the Board members to review the minimum requirements listed by Public Works, specifically in the wording of these regulations. He commented that there appears to be a great deal of room for interpretation in these regulations. Mr. Meyerson asked that the Board apply the regulations to this project as written in the minimum stacking requirements adopted by the Public Works Department, and not based on possible interpretation. Mr. Cunningham responded to Mr. Meyerson’s comment, pointing out that the minimum stacking requirements for this type of business employ an asterisk notation within the section. This notation delineates a design vehicle of 25 feet; using a formula of 12 vehicles times 25 feet, one arrives at a total of 300 feet, thus clearly defining the minimum stacking requirement. Mr. Meyerson argued that his client can provide space for 12 vehicles on their site with less than 300 feet of space.

Mr. Levy thanked those present for their contributions and turned to the Board for their comments. Mr. Labode stated that each party involved has spent a considerable amount of time studying these stacking requirements. He stated that he is familiar with this area of town, and has experienced firsthand the amount of traffic that stacks up at this site. He asked those present whether they have spent any time trying to work out a resolution to the situation. Mr. Cunningham stated that Exhibit E shows a facilitated compromise for this location; this compromise was later rejected by the applicant. Mr. Meyerson stated that Exhibit E presents numerous hardships to McDonalds, including potential drainage issues and workman’s compensation hazards. Mr. Kellogg stated that McDonald’s does not support the compromise reached by the City Planning Department.

After extensive discussion and debate regarding alternate configurations for the site, and discussion regarding other McDonald location in the area, Mr. Levy stated that it seemed clear to him that more time was needed for the applicant and the City to be able to work together to find an acceptable solution for the problem of onsite stacking at this location. Mr. Pfitzer stated that he was confident that the City and the applicant could reach a solution before the next ABA meeting which would not compromise one side or the other. Mr. Levy stated that he would entertain a motion to 1) grant the appeal, 2) deny the appeal or 3) to hold this case over to the next meeting with the idea that those present would reach an acceptable compromise. Mr. Weaver commented that he would like to hold this case over in the hopes that more Board members would be present if a final decision needed to be reached in this situation.

Motion to hold this case over to the November 26th meeting by Mr. Weaver. Second by Mr. Lopez.

AYES: Labode, Weaver, Lopez, Levy

Motion carried 4-0.
Following the conclusion of case 12-10-78, the Board took a short recess at 3:25 pm. Meeting resumed a few minutes later.

III. Discussion Item

Order to Show Cause Hearing:
12-7-54 (From 7/30/2012)
Appeal Nebraska Humane Society Reckless Owner declaration: Jonathon Rutten, 3232 N. 40th Av., 68111.

Mark Langan, Nebraska Humane Society, appeared before the Board. Mr. Langan reported to the Board that Mr. Rutten has not complied with all of the terms stipulated by the Board at the July 30th, 2012 meeting of the Administrative Board of Appeals:

From 7/30/2012 Minutes: Motion by Mr. Levy to grant the appeal for Reckless Owner declaration, subject to the following conditions: 1) that Mr. Rutten surrender Trina to the Nebraska Humane Society, and that he make no attempt to challenge her permanent surrender; 2) that Mr. Rutten attend “Owner Responsibility” and “Dog Behavior” classes offered by the Nebraska Humane Society by no later than September 30, 2012; and 3) that Mr. Rutten install a 6’ privacy fence on his property for the purpose of containing Bruno within twenty days. Second by Mr. Samiev.

Mr. Langan confirmed that Mr. Rutten surrendered his female American bulldog, Trina, to the Humane Society, and that she had been euthanized due to aggression issues. Mr. Langan stated that Mr. Rutten had attended an owner responsibility class and dog behavior classes as required. However, Mr. Langan reported that Mr. Rutten had not complied with the third part of the Board’s motion, which required him to erect a 6’ privacy fence on his property within twenty days. Mr. Langan stated that Mr. Rutten has instead chosen to erect a dog kennel on his property. He has covered this kennel with a tarp in order to block view of the dog. Mr. Langan submitted photos of the property which show this kennel in Mr. Rutten’s backyard; he added that Mr. Rutten reported to animal control officers that he cannot afford to erect a 6’ privacy fence in his backyard.

Mr. Langan stated that two other incidences involving Mr. Rutten and his dog Bruno have occurred since his appearance before the Board in July. The first incident occurred on August 1st, 2012 – one day after his appearance before the Board. The Humane Society received a call from Mr. Rutten’s mail carrier (who testified at the July 30th meeting – please see minutes), who claimed that Mr. Rutten had come outside of his house when he attempted to deliver mail to the property. According to the mail carrier, Mr. Spanky, Mr. Rutten stood with his dog in a threatening fashion, glaring at the postal worker. A citation was issued to Mr. Rutten for not having Bruno muzzled. At the time of this citation, animal control officers heard Mr. Rutten threaten the mail carrier. All mail service to Mr. Rutten’s house has been discontinued as a result of this incident. A trial was scheduled to take place regarding this incident today. Mr. Rutten failed to appear at this hearing, and a bench warrant was issued for his arrest.

A second incident occurred on October 1st. Mr. Rutten called the Nebraska Humane Society and asked them to come to his house. He stated that he was walking his dog down the street when the neighbor’s dog attacked his dog. Mr. Rutten claimed that his dog was muzzled; the neighbor disputed this fact. Mr. Langan stated that there was some debate over where the attack actually took place; the Humane Society learned from eyewitnesses that the neighbor’s dog has been unrestrained and issued citations accordingly.
After hearing the facts presented by Mr. Langan, the Board came to a general consensus that Mr. Rutten needed to appear before them in order to explain his actions since his appearance before them in July. Mr. Levy commented that it was disappointing to hear that Mr. Rutten has not availed himself appropriately of the chance given to him by the Board. In response to Mr. Denker’s question, Ms. Horvath stated that it was within the Board’s power to call Mr. Rutten back before them and to potentially revoke their earlier approval if they deemed it to be appropriate.

The Board Secretary asked Ms. Horvath how she can notify Mr. Rutten of the hearing on November 26th if mail service has been suspended. Mr. Denker offered to send one of his inspectors out to Mr. Rutten’s house to place the meeting notice on his front door.

Mr. Weaver stated that he was not in attendance at the July 30th meeting. He clarified that the main item up for discussion at the November 26th hearing would be the issue of the 6’ privacy fence. He asked Mr. Langan to speak in regards to the difference between a 6’ privacy fence and the kennel that has been erected on Mr. Rutten’s property. Mr. Langan responded that he had been told by the Board to install a 6’ privacy fence on his property; common sense would dictate that a kennel covered by a tarp differs from a privacy fence, which would cover the entire back yard. Mr. Langan stated that the structure erected on Mr. Rutten’s property does not meet his definition of a 6’ privacy fence. Mr. Levy asked whether there were any other issues besides the privacy fence which would be of concern and would also be under the Board’s jurisdiction. Mr. Langan confirmed that the only item under the Board’s jurisdiction at the November 26th meeting would be the matter of the 6’ privacy fence. He stated that he had informed the Board of the two incidences involving Mr. Rutten since his appearance before the Board in order to illustrate his uncooperativeness with other entities outside of the Administrative Board of Appeals.

Mr. Labode stated that at the time of his appearance before the Board in July, Mr. Rutten seemed to be willing to construct a 6’ privacy fence as directed. Mr. Labode stated that he would like to see Mr. Rutten reappear before the Board to explain why he did not implement the agreement reached at that meeting. Mr. Weaver countered that the structure on Mr. Rutten’s property does measure 6’ in height and contains Bruno; although the matter of “privacy” could be debated. Mr. Denker stated his belief that the City could produce a definition of “privacy fence” if needed. Mr. Levy stated that as the person who made the motion at the July 30th meeting, it had not been his intention to allow the structure now shown to be on Mr. Rutten’s property.

Mr. Lopez asked Mr. Langan for the date of his organization’s last contact with Mr. Rutten. Mr. Langan replied that NHS’ last contact with Mr. Rutten had been on October 1st. In response to Mr. Levy’s question, Mr. Langan stated that it could be up to a two year process (or longer) in order to convict Mr. Rutten as a Reckless Owner in the event that he avoids arrest for his warrant. Mr. Levy thanked Mr. Langan, adding that relying on Mr. Rutten’s warrant could result in a lengthy procedure. Mr. Langan agreed with that statement. Mr. Levy stated that the Board attempted to work with Mr. Rutten in July in order to allow him to keep his dog, and it now appears that Mr. Rutten is not holding up to his end of the bargain.

Mr. Labode made a motion to require Mr. Rutten to appear before the Board on November 26, 2012. Second by Mr. Levy.

AYES: Labode, Levy
NAYS: Lopez
ABSTAIN: Weaver

Motion carried 2-1-1.
IV. Approval of Minutes from September 24, 2012

Motion to approve by Mr. Weaver. Second by Mr. Labode.

AYES: Lopez, Labode, Weaver, Levy

Motion carried 4-0.

V. Discussion

VI. Adjournment

Meeting adjourned by mutual consent at 3:43 pm.

Andrea Wisniewski, Planning Department
Recording Secretary