

City of Oxford
Community Development Department
STAFF REPORT

Board of Zoning Appeals

Case # BZA-12-2013

Date – December 18, 2013

APPLICATION

Applicant:	Patrick O'Neill / Benjamin, Yocum & Heather, LLC
Location:	711 South College Ave
Owner:	Brad Fread

Action Requests:	Approve Appeal of Administrator's Decision
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INTRODUCTION

Typically, the Board of Zoning Appeals considers requests for variances from the Zoning Code requirements. However, occasionally, a decision is made by city staff that is alleged to be made in error. Section 1129.11 contains provisions for a person to appeal such a decision to the BZA. The appeal procedure is different than a variance, in that there are not codified decision criteria. Therefore, the BZA will need to consider all the circumstances as well as understand the zoning codes in question. Excerpted below is the complete code relating to the appeal process.

1129.11 APPEALS OF ADMINISTRATOR'S DECISION.

The aggrieved party may appeal the decision of the Zoning Administrator to the Board of Zoning Appeals.

- (a) The Board of Zoning Appeals shall have the power to hear and decide appeals where it is alleged there is error in any order, requirements, decision or determination made by an administrative official in the enforcement of the Zoning Ordinance. In exercising its powers to review administrative decisions, the Board may, in conforming with the provisions of the statute and of this Zoning Ordinance, reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination as the Board of Zoning Appeals determines, and to that end shall have all powers of the office from whom the appeal is taken. The appeal shall:
- (1) Cite specific provisions of this Zoning Ordinance that are alleged to have been interpreted in error of the specific decisions or action being appealed and the grounds on which the appeal is being made;
 - (2) Include any required application fee in an amount set by the City;
 - (3) Include such other information as the City or the Board may reasonably require; and
 - (4) Include a statement as to why the appellant has standing to pursue the appeal from the administrative action by a statement of the way in which the administrative action adversely affects the appellant

BACKGROUND

A related appeal was heard in 2011 for this same property. This was BZA case 2011-06. In that case, the staff denied the right of a three-family use of the property, because the use had not maintained continuity as required by nonconforming use codes. Therefore it had lapsed and was required to comply with the

current land use requirement of single-family. The denial of the three-family use was ultimately upheld by the BZA. This decision did not get appealed to a higher court.

Below is a timeline of recent events for the particular case at hand:

July 19, 2013 – Variance application received from Mr. O’Neill requesting a hearing at the BZA to allow a three-family use in a single-family zone

August 14, 2013 – City staff sent a refund and notice to Mr. O’Neill that the requested variance could not be considered because the request was considered a “use” variance, which is strictly prohibited by Section 1139.01(a).

September 23, 2013 – Mr. O’Neill submitted an Appeal of Administrator’s Decision to be placed on a BZA agenda.

September 30, 2013 – City staff notified Mr. O’Neill that the appeal application did not cite the specific code believed to have been interpreted in error. Therefore it was incomplete.

October 10, 2013 – Mr. O’Neill submitted a supplementary letter explaining his rationale and specifying the code in question, followed up by a phone conversation.

ANALYSIS

The code regarding the general requirements for Variances is excerpted below. The code section in question is bolded and underlined.

1139.01 GENERAL .

- (a) Purpose. A variance permits variation from the strict interpretation of this Code so that no specific provision prevents development of a specific site that would otherwise not be possible and that would satisfy the general intent of the Code.
Use variances are prohibited.
- (b) Variance Requirement. Each variance shall be granted according to the provisions of this chapter.
- (c) Effect of Variance.
 - (1) A variance shall be valid only for the specific use, site, location, and provision for which it is granted and changes to the use and site that change the facts upon which it was granted shall be strictly interpreted.
 - (2) A variance does not expire, but becomes invalid if the use, site, or location is changed in some way that changes the facts upon which it was granted.
 - (3) An action or construction that is undertaken following the granting of a variance does not create a nonconformity. A variance actually changes the specific provisions of the Code as they pertain to a specific use, site, and location.

Staff comments: In discussion with the applicant, the applicant believes that the variance request is not a change of use, because it is still within the broad category of “residential.” Consequently, the use is not requested to change from residential to commercial, or residential to industrial, etc.

Based on the history of administering the Oxford Zoning Code, since the single, two and three family uses are listed separately in the zoning district use lists, throughout all residential districts; staff believes that the correct decision was already made and that the decision to not consider the requested variance, should be upheld.

SUMMARY

Please note that this is not a public hearing and the focus of the BZA should be on the interpretation of the code.

SUBMITTED BY: Sam Perry
Sam Perry, Planner
Community Development Department

DATE: December 10, 2013

LETTER OF AGENCY

To Whom It May Concern:

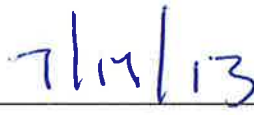
Please be advised that Patrick M. O'Neill of Benjamin, Yocum & Heather, LLC has permission to represent our interest with the City of Oxford and act on our behalf for any application/hearing/appeal regarding the request for a variance for our property located at 711-711 ½ South College Avenue, Oxford, Ohio 45056.

Thank you,

Signed: _____



Brad Fread - Owner



Date

PATRICK M. O'NEILL

DIRECT E-MAIL: PMONEILL@BYHLAW.COM

October 10, 2013

VIA E-MAIL sperry@cityofoxford.org

Mr. Sam Perry
Planner
City of Oxford
101 East High Street
Oxford, OH 45056-1887

RE: Petition for Appeal of Administrator's Decision 711-711 1/2 South College Avenue, Oxford, Ohio 45056

Dear Sam:

Pursuant to your e-mail of September 30, 2013, please accept this correspondence supplementation of my letter of September 27, 2013 to Jung-Han Chen, Community Development Director of the City of Oxford, Ohio enclosing Randy G. Fread and Brad Fread's (the "Freads") Petition of their Appeal of the Administrator's Decision of August 23, 2013 denying the Freads' July 19, 2013 Application for Variance for the above-referenced property.

Your e-mail asserts that the Petition is incomplete "because criteria 1129.11(a)(1) was not addressed." I respectfully disagree with that conclusion. Section 1129.11(a)(1) provides;

1129.11 APPEALS OF ADMINISTRATOR'S DECISION.

The aggrieved party may appeal the decision of the Zoning Administrator to the Board of Zoning Appeals.

(a) The Board of Zoning Appeals shall have the power to hear and decide appeals where it is alleged there is error in any order, requirements, decision or determination made by an administrative official in the enforcement of the Zoning Ordinance. In exercising its powers to review administrative decisions, the Board may, in conforming with the provisions of the statute and of this Zoning Ordinance, reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination as the Board of Zoning Appeals determines, and to that end shall have all powers of the office from whom the appeal is taken. The appeal shall:

(1) Cite specific provisions of this Zoning Ordinance that are alleged to have been interpreted in error of the specific decisions or action being appealed and the grounds on which the appeal is being made;

Contained in the Freads' Petition are multiple, specific references to a number of sections of the Codified Ordinances of Oxford, Ohio which the Freads believe have been interpreted in error, including Sections 1133.01, 1137.04, 1139.01, 1139.02 and 1143.03. In short, the Freads have complied with express, direct language of the Code Section 1129.11 by citing to specific provisions of the Zoning Ordinance they believe to be interpreted in error by the Administrator. They are entitled to have this matter heard by the Board of Zoning Appeals.

I am aware that the Administrator claims that pursuant to Section 1139.01 the Freads are not entitled to the requested variance because it constitutes a "use variance" but that is a substantive argument, one to be made at a Board of Zoning Appeals Hearing, and not as some kind of procedural prohibition from having an Appeals Hearing. The Freads cited to specific sections of Zoning Ordinance as required by Code Section 1129.11. Please forward their Petition to Board of Zoning Appeals as required by Ohio law.

If the City of Oxford's Administrator's Office fails in its statutory duty to forward the Petition to the Board of Zoning Appeals, the Freads will avail themselves to all remedies afforded by Ohio law, including but not limited to seeking a *writ of mandamus* in accordance with Ohio Revised Code Section 2731.01 with the Butler County Common Pleas Court compelling the Administrator's Office to forward the Petition and the Board of Zoning Appeals to hold a hearing and rule on the same. Obviously I would prefer to avoid such a scenario.

Finally, I am of the opinion that the City of Oxford's attempt to deny "use variances" will be unsuccessful at the Common Pleas Court should the Board of Zoning Appeals affirm the decision of the Administrator. First, the term "use variance" is undefined by Section 1139.01. I understand "use" as employed in zoning regulations to distinguish between residential, industrial, commercial, etc. Second, the designation and its enforcement are arbitrary and capricious. The City continues to allow multi-family residences in Zoning District R-1MS. Allowing my clients' property to continue as a multi-family residence will not change the character of zoned district. Further, the designated district currently permits day care facilities, shared housing for the elderly and bed and breakfasts, again, all multi-family uses. If the Board of Zoning Appeals denies my clients' Petition, we further believe that such a denial will constitute a "taking" for which my clients will be entitled to compensation.

Please forward the Freads' Petition to the Board of Zoning Appeals as submitted.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

BENJAMIN, YOCUM & HEATHER, LLC

/s/ Patrick M. O'Neill

Patrick M. O'Neill

PMO/lrw

cc: Jung-Han Chen, AICP, via e-mail
Stephen M. McHugh, Esq.
Mr. Brad Fread, via e-mail
Thomas R. Yocum, Esq., via e-mail

Sam Perry

From: Sam Perry
Sent: Monday, September 30, 2013 11:59 AM
To: 'pmoneill@byhlaw.com'
Cc: Jung-Han Chen; Lynn Taylor
Subject: Fread Property appeal of administrator's decision

Patrick,

We received your appeal application, however its current status is "Incomplete" because criteria 1129.11(a)(1) was not addressed. Here is a code excerpt below:

1129.11 APPEALS OF ADMINISTRATOR'S DECISION.

The aggrieved party may appeal the decision of the Zoning Administrator to the Board of Zoning Appeals.

(a) The Board of Zoning Appeals shall have the power to hear and decide appeals where it is alleged there is error in any order, requirements, decision or determination made by an administrative official in the enforcement of the Zoning Ordinance. In exercising its powers to review administrative decisions, the Board may, in conforming with the provisions of the statute and of this Zoning Ordinance, reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination as the Board of Zoning Appeals determines, and to that end shall have all powers of the office from whom the appeal is taken. The appeal shall:

(1) Cite specific provisions of this Zoning Ordinance that are alleged to have been interpreted in error of the specific decisions or action being appealed and the grounds on which the appeal is being made;

(2) Include any required application fee in an amount set by the City;

(3) Include such other information as the City or the Board may reasonably require; and

(4) Include a statement as to why the appellant has standing to pursue the appeal from the administrative action by a statement of the way in which the administrative action adversely affects the appellant

(Ord. 2947. Passed 3-6-07.)

Sam Perry

Planner

City of Oxford

Community Development Department

101 East High Street | Oxford, Ohio 45056

p. (513) 524-5204 | f. (513) 524-5266

sperry@cityofoxford.org | <http://www.cityofoxford.org>

NOTICE: This email communication is informal in nature and is for general guidance and information purposes only. It is not intended to serve as an administrative ruling, decision, determination, or interpretation by the Community Development Department. If you have a question relating to a specific permit application, variance request, interpretation of the Oxford Planning and Zoning Code, or other matter requiring administrative action, please direct a written inquiry to the Community Development Department, 101 East High Street, Oxford, OH 45056.

PATRICK M. O'NEILL

DIRECT E-MAIL: PMONEILL@BYHLAW.COM

September 27, 2013

Jung-Han Chen, AICP
Community Development Director
City of Oxford, Ohio
101 E. High St.
Oxford, OH 45056

RE: Petition for Appeals of Administrator's Decision

Dear Mr. Chen,

Please be advised the undersigned represents Randy G. Fread and Brad Fread, owners of the above-referenced real property. The Freads appeal the August 23, 2013 denial of their July 19, 2013 Application for Variance submitted to the City of Oxford. Enclosed please find originals and seven (7) copies of the following:

- Petition for Appeals of Administrator's Decision
- Letter of Agency
- Plat of Survey/Site Plan of the Subject Property
- A list of names and mailing addresses of all property owners believed to be within 200 feet of the Subject Property.
- City of Oxford denial letter.

Also enclosed is a check in the amount of \$50.00 for the filing fee.

Pursuant to Chapter 1139 of the Codified Ordinances of Oxford, Ohio, and the requirements as set forth in the Appeal, please allow the following to serve as a narrative statement which explains how the proposed variance satisfies the Decision Standards as set forth in the Ordinance and/or Petition;

- A. The property in question will not yield a reasonable return without the variance requested. While there may be some beneficial use of the real property, the best and most efficient use of the property will not be realized without the requested variance.
- B. The variance is not substantial. There are numerous other real property locations within Zoning District R1MS which are presently non-conforming and Petitioner is only requesting what other owners/residents already possess, namely, a multi-family residence in the Zoning District.

- C. The essential character of the neighborhood will not be altered by granting Petitioner the requested variance nor would adjoining properties suffer a substantial detriment as a result of the variance.
- D. The requested variance will not affect, adversely or otherwise, the delivery of governmental services.
- E. The Petitioner did not purchase the property knowing of the zoning restriction.
- F. A variance is the only manner by which Petitioner's predicament can be obviated as the City of Oxford's Board of Zoning Appeals has previously denied his Appeal of Administrator's Decision of Petitioner's request to allow for the continuance of a non-conforming three-family rental, purportedly in accordance with Chapter 1137 of the Codified Ordinances of Oxford, Ohio.
- G. Substantial justice would be achieved by granting the variance requested inasmuch as Petitioner would then enjoy the same rights as other real property owners in District R1MS who have multi-family properties in the District.

Please place this matter on the next proposed Board of Zoning Appeals meeting at which the action is requested. If you have any questions, please do not hesitate to contact me.

Very truly yours,

BENJAMIN, YOCUM & HEATHER, LLC



Patrick M. O'Neill

PMO/lrw

Encls.

cc, via e-mail, w/out attachments:

Mr. Brad Fread

Thomas R. Yocum, Esq.

Petition for Appeals of Administrator's Decision

City of Oxford, Ohio

REQUIRED INFORMATION

Name of Petitioner: Patrick M. O'Neill, Esq. (see attached).
 (Attach a letter of agency if the applicant is not the property owner.)

Mailing Address: 300 Pike Street, Ste. 500, Cincinnati, OH 45202

Telephone Number(s): (513) 721-5672

Name of Property Owner: Brad Fread; Randy G. Fread

Mailing Address: 5591 Windermere Lane, Fairfield, OH 45014

Telephone Number(s): 513-317-8722; 513-829-9191

Requested Variance: Permit a multi-family residential variance in the
 (Indicate nature of variance Oxford, Ohio Zoning District RLMS Codified
 and applicable section(s) Ordinances of Oxford, Ohio - Planning and Zoning
 of the Zoning Code.) Code Sec. 113301; 1137.04; 1139.01; 1139.02; 1143.03

Location of Requested Variance: 711-711 1/2 South College Avenue, Oxford, OH 45056

Legal Description: see attached.

Zoning District: RLMS

Total Acreage: _____ Acres

Existing Use of Site: Single Family

Proposed Use: (if applicable) Multi-family use, a total of three units
A description of operations, including type of goods sold, services performed, and expected number of customers, clientele, delivery, and service vehicles, and the hours of operation.

REQUIRED INFORMATION

Eight complete sets of all information shall be submitted with an application. The Zoning Administrator may modify this requirement based upon the type of materials included. The applicant is encouraged to contact the Zoning Administrator prior to submitting an application to discuss the submission requirement. If any information is submitted in color or on non-standard paper, more copies may be required.

- (1) Cite specific provisions of this Zoning Ordinance that are alleged to have been interpreted in error of the specific decisions or action being appealed and the grounds on which the appeal is being made;
- (2) Include any required application fee in an amount set by the City;
- (3) Include such other information as the City or the Board may reasonably require; and
- (4) Include a statement as to why the appellant has standing to pursue the appeal from the administrative action by a statement of the way in which the administrative action adversely affects the appellant
- (5) OTHER - Photographs of the existing use and its surroundings and other information regarding the proposed use, site, or surrounding area as may be pertinent to the application or required by the Board of Zoning Appeals, including but not limited to site plans and elevation drawings.
- (6) On a separate sheet, provide the names and mailing addresses of all property owners within 200 feet of all boundaries of the property in question, giving lot numbers and house numbers. (This information is available at the Butler County Auditor's Office.)

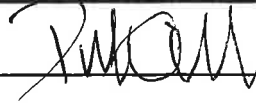
Submit this application with required attachments and a **\$50.00 filing fee**, made payable to the City of Oxford, to the office of the Community Development Director, Municipal Building, 101 East High Street, Oxford, Ohio 45056. Any questions should be directed to the Community Development Department at (513) 524-5204. The application will be placed on the next possible agenda.

NOTE: Notification and publication requirements must be adhered to. Submit materials 35 days prior to the proposed Board of Zoning Appeals meeting at which the action is requested.

INCOMPLETE APPLICATIONS WILL NOT BE ACCEPTED

SIGNATURE OF APPLICANT: _____

Date: _____



9/23/13

PRINTED NAME OF APPLICANT: _____

Patrick M. O'Neill

FEE / RECEIPT

\$50 Fee Paid / Receipt Number: _____

19300.8



August 14, 2013

ATTN: Patrick O'Neill, Esq.
Benjamin, Yocum & Heather, LLC
300 Pike Street
Suite 500
Cincinnati, Ohio 45202

RE: 711 S. College Ave; 711-1/2 S. College Ave; 135 W. Central Ave

We have received your July 19th application for a Variance to permit a multi-family residence at the above address(es). The property is zoned R1MS. Oxford Code Section **§1143.03** sets forth allowable uses for the R1MS district. Multi-family use is not a permitted use for the district. Additionally, the City of Oxford Zoning code prohibits use variances. Therefore, your variance application is refused based on the code section highlighted below.

- Oxford Code **§1139.01(a)**: Purpose. A variance permits variation from the strict interpretation of this Code so that no specific provision prevents development of a specific site that would otherwise not be possible and that would satisfy the general intent of the Code. **Use variances are prohibited.**

Additionally, you may find it helpful to review the attached past correspondence relating to this issue:

- The 2011 use variance denial letter from the Oxford BZA
- Two letters of refusal from the Zoning Administrator from August 2011
- A 2007 letter from our office documenting the rental permit inactivity

Under the provisions of Oxford Code § 1129.11, any aggrieved party may appeal the decision of the Zoning Administrator to the Board of Zoning Appeals. An application form is enclosed.

Feel free to contact me should you or your client have any questions or need additional information. Enclosed is the refunded \$400.00 application fee.

Sincerely,

Sam Perry
Planner

sperry@cityofoxford.org

S:\shared\BZA\2013\711 S. College refusal of variance application.docx

Page 1 of 1

PATRICK M. O'NEILL

DIRECT E-MAIL: PMONEILL@BYHLAW.COM

July 19, 2013

Jung-Han Chen, AICP
Community Development Director
City of Oxford, Ohio
101 E. High St.
Oxford, OH 45056

**RE: Petition for Zoning Variance:
711-711 ½ South College Ave., Oxford, OH 45056**

Dear Mr. Chen,

Please be advised the undersigned represents Randy G. Fread and Brad Fread, owners of the above-referenced real property. The Freads seek a variance to permit a multi-family residence in Oxford, Ohio Zoning District R1MS. Enclosed please find originals and seven (7) copies of the following:

- Petition for Zoning Variance
- Letter of Agency
- Plat of Survey/Site Plan of the Subject Property
- A list of names and mailing addresses of all property owners believed to be within 200 feet from the Subject Property.

Also enclosed is a check in the amount of \$400.00 for the application fee.

Pursuant to Chapter 1139 of the Codified Ordinances of Oxford, Ohio, and the requirements as set forth in the Petition, please allow the following to serve as a narrative statement which explains how the proposed variance satisfies the Decision Standards as set forth in the Ordinance and/or Petition;

- A. The property in question will not yield a reasonable return without the variance requested. While there may be some beneficial use of the real property, the best and most efficient use of the property will not be realized without the requested variance.
- B. The variance is not substantial. There are numerous other real property locations within Zoning District R1MS which are presently non-conforming and Petitioner is only requesting what others already have, namely a multi-family residence in the Zoning District.

- C. The essential character of the neighborhood will not be altered by granting Petitioner the requested variance nor would adjoining properties suffer a substantial detriment as a result of the variance.
- D. The requested variance will not affect, adversely or otherwise, the delivery of governmental services.
- E. The Petitioner did not purchase the property knowing of the zoning restriction.
- F. A variance is the only manner by which Petitioner's predicament can be obviated as the City of Oxford's Board of Zoning Appeals has previously denied his Appeal of Administrator's Decision of Petitioner's request to allow for the continuance of a non-conforming three-family rental, purportedly in accordance with Chapter 1137 of the Codified Ordinances of Oxford, Ohio.
- G. Substantial justice would be achieved by granting the variance requested inasmuch as Petitioner would then enjoy the same rights as other real property owners in District R1MS who have multi-family properties in the District.

Please place this matter on the next proposed Board of Zoning Appeals meeting at which the action is requested. If you have any questions, please do not hesitate to contact me.

Very truly yours,

BENJAMIN, YOCUM & HEATHER, LLC



Patrick M. O'Neill

PMO/lrw

Encls.

cc, via e-mail, w/out attachment:

Mr. Brad Fread

Thomas R. Yocum, Esq.

NOTES AND REFERENCES

NORTH BASED ON STATE PLANE
COORDINATES NAD 83 OHIO SOUTH
ZONE.

DEED REFERENCES

D.B. 7126 PG. 1490
D.B. 7498 PG. 802
D.B. 1630 PG. 470
D.B. 7384 PG. 2352
D.B. 6807 PG. 1088
D.B. 7228 PG. 451
D.B. 7228 PG. 455
D.B. 1701 PG. 216
D.B. 6559 PG. 2214
D.B. 1664 PG. 129
D.B. 5100 PG. 265
D.B. 5100 PG. 265
D.B. 5894 PG. 411
D.B. 7230 PG. 2244
D.B. 1603 PG. 86
AND DEEDS AS SHOWN.

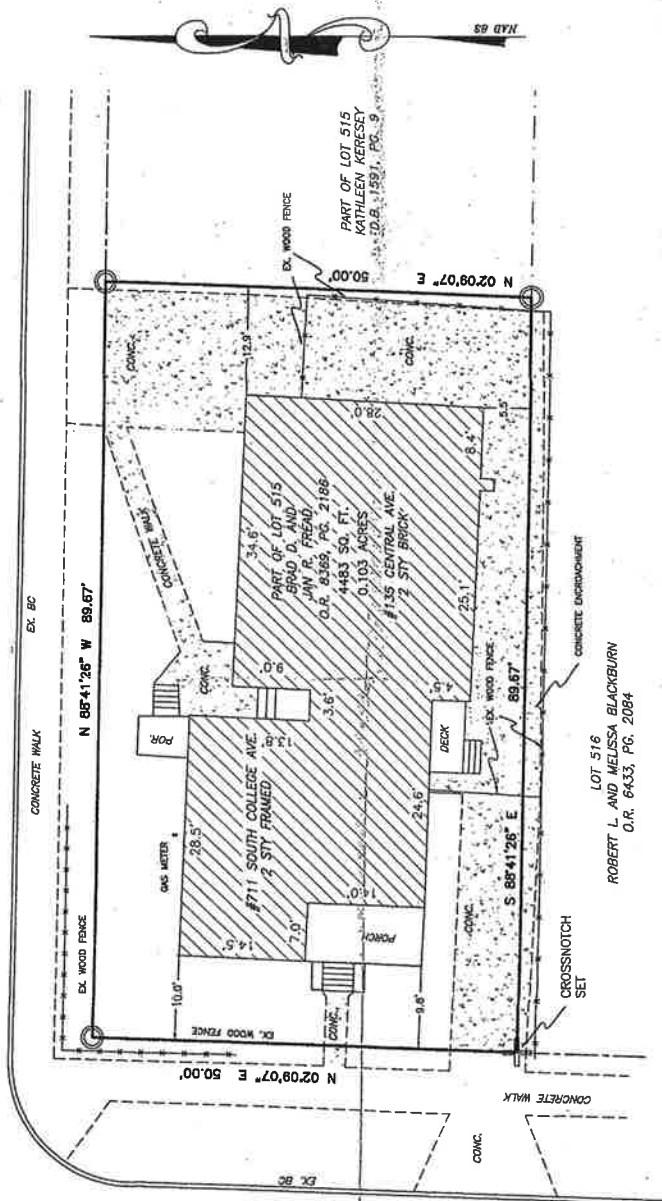
SURVEY REFERENCES

VOL. 2 PG. 132
VOL. 4 PG. 21
VOL. 4 PG. 181
P.E. 129 AB

○ DENOTES 5/8" REBAR SET
UNLESS OTHERWISE NOTED

CENTRAL AVE. (50' R/W)

COLLEGE AVENUE (66' R/W)



I HEREBY CERTIFY THAT ALL MEASUREMENTS AND MONUMENTS SET AND/OR FOUND
AS SHOWN. CURVE DISTANCES ARE MEASURED ON THE ARC. ALL WORK PERFORMED
IN ACCORDANCE WITH THE "MINIMUM STANDARDS FOR BOUNDARY SURVEYS IN THE STATE
OF OHIO."

DAVID DOUGLAS SMITH
PROFESSIONAL SURVEYOR NO. 7121



DAVID DOUGLAS SMITH, P.S.
510 BLAIRSTOWN DR.
SPRINGFIELD, OHIO 45506
P.E. 7121



PROJECT TITLE:
711 SOUTH COLLEGE AVE.
PART OF LOT 515
CITY OF OXFORD
BUTLER COUNTY, OHIO
FOR
BRAD FRED

NO.	REVISIONS	DATE	BY	AMOUNT	A/C
	SCALE	1" = 20'			
	DATE	4/29/2013			
	NOTES				
	PROJECT NO.	23014			

PLAT OF SURVEY