

BZA 36-64 - Clarkson Construction Co.
requests variance for borrow pit in
an area E of Broadway, bet. McArthur
& 43rd St. So.

POSTED
8-24-64

ACTION

<i>Bk</i>	COMMITTEE	<i>Apply</i>	DATE
		<i>appealed to City Com 9-22-64</i>	<i>9-9-64</i>
		<i>M.A.P.C. referred to Secy. for report</i>	
		B&B /B. CO. C.	

Sept 8

STATE OF KANSAS
SEDGWICK COUNTY
FILED FOR RECORD AT
12:15 P.M.
OCT 28 1964
23094
RUFUS E. DEERING
REGISTER OF DEEDS

Original Compared
With Record
RESOLUTION NO. BZA 36-64

WHEREAS, the Clarkson Construction Company, 4133 Gardner Avenue, Station "F", Kansas City 20, Missouri, by Lester Wilkinson, Attorney, 3521 West 21st Street, Wichita, Kansas, pursuant to Section 2.12.590.2, Code of the City of Wichita, has applied for a variance from the strict application of the enforcement provisions of the Zoning Ordinance, to use property as a borrow pit in the construction of Highway I-35W, said property being generally located in an area south of McArthur Road and east of Broadway between McArthur Road and 43rd Street South, and legally described as:

The South half of Lot 9, all of Lots 10 and 11, Riverside Gardens, in the City of Wichita, Sedgwick County, Kansas; and

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, at the special meeting of September 8, 1964, the Secretary observed that a quorum of the members of the Board of Zoning Appeals was not present, and declared the public hearing continued until Wednesday, September 9, 1964, at 2 p.m. in Room 401 City Building Annex, 104 South Main, Wichita, Kansas; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of September 9, 1964, consider said application; and

WHEREAS, the Board of Zoning Appeals determined that it had proper jurisdiction to consider said variance request, under the provisions of Section 2.12.590.2, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has determined that the variance desired arises from some condition which is unique and which is not ordinarily found in the same zoning district in that this area is known to be underlaid with gravel, whereas many areas throughout the city do not possess such a characteristic, and further, the application area adjoins an existing borrow pit and would amount to an extension or continuation of an existing lake, and further, the application area is in close proximity to the proposed route of the new highway (Canal Route - I-35W), and will result in less burden, not only to the contractor in less hauling distance, but less burden to the general public at large in controlling the transportation of this fill material to the site of construction; and

WHEREAS, the Board of Zoning Appeals has determined that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents, provided that proper conditions are instituted and respected against the proposed use and provided adequate controls are exercised; and

WHEREAS, the Board of Zoning Appeals has determined that the strict application of the enforcement provisions of the Zoning Ordinance will constitute unnecessary hardship upon the property owner represented in the appeal, due to the fact that according to the evidence submitted there is not a sufficient demand to utilize this area for single family development at this time; and

350

Art Johnson
425 Beacon Bldg

MISC BOOK 547 PAGE 175

WHEREAS, the Board of Zoning Appeals has determined that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare inasmuch as not to grant the request could very possibly adversely affect certain portions of the public interest; and

WHEREAS, as shown above, each of the four conditions required by Section 2.12,590.2, Code of the City of Wichita to be present before a variance can be granted, has been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals of the City of Wichita, that the Superintendent of Central Inspection be and is hereby authorized and directed to issue the appropriate permit for the operation and maintenance of a borrow pit on the tract of land specifically described as follows:

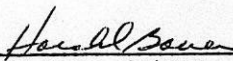
The south half of Lot 9, all of Lots 10 and 11, Riverside Gardens, in the City of Wichita, Sedgwick County, Kansas. Generally located in an area south of McArthur Road and east of Broadway between McArthur Road and 43rd Street South,

subject to the following conditions:

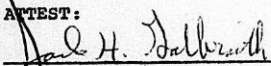
1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (See Conditional Use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.
3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (See Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes shall consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover, planted and maintained in accordance with a high standard of maintenance.

- p3
6. Conditions 1 through 4 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 4 above.
 7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition #2 above, and vegetative cover for slopes and maintenance of such vegetative cover as required in #5 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk for a term of five years subsequent to the time the borrow pit operation has been completed.
 8. A restrictive covenant running with the land for 25 years should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary landfill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner, the purchaser, and the governing body of the City of Wichita, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

ADOPTED AT WICHITA, KANSAS, this 9th day of September,
1964.


Harold Bauer, Chairman

ATTEST:


Jack H. Galbraith
Secretary

LESTER WILKINSON
ATTORNEY AT LAW
WICHITA 3-9877
3521 WEST TWENTY-FIRST STREET N
P. O. Box 2179
WICHITA 1, KANSAS

October 13, 1964

Mr. Glen E. Lytle
Superintendent of Central Inspection
City Building Annex
104 S. Main Street
Wichita, Kansas 67202

Dear Mr. Lytle:

RE Resolution No. BZA 36-64

In connection with the requirements set forth in the resolution of the Board of Zoning Appeals of the City of Wichita in the above styled matter, I hand you herewith certified copy of a letter written by me to the Clerk of the City of Wichita upon which they have stamped their Receipt as of today of the "Verifax" copy of the Bond deposited by the Clarkson Construction Company with the State Highway Commission and the original of a \$2,000.00 Bond, a copy of which I enclose herewith.

I believe that this complies with Items 6 and 7 of the Resolution of the Board of Zoning Appeals.

I submitted to Mr. Arthur Johnson, attorney for the Board of Zoning Appeals, the restrictive covenant that I am placing in all of the deeds conveying to the Clarkson Construction Company the property involved in its application for a variance permitting it to use said property as a "borrow pit". Mr. Johnson gave his approval to this restrictive covenant which is compliance on the part of the Clarkson Construction Company, Inc. with Item 8 of the Resolution.

I believe that this is all that is required at this time in order to receive from your office an appropriate letter for operation and maintenance of a "borrow pit" as set forth in the letter of Mr. Galbraith to me dated October 7, 1964. If there is anything further required, please advise me.

Very truly yours,

Lester Wilkinson
LESTER WILKINSON

LW/b

Enc.

CC: Jack H. Galbraith
City Building Annex
Wichita, Kansas



October 7, 1964

Mr. Lester Wilkinson, Attorney
3521 West 21st Street
Wichita, Kansas

Dear Mr. Wilkinson:

Re: Case No. BZA 36-64

This is to advise you that at the meeting of the Board of City Commissioners held on October 6, 1964, the decision of the Board of Zoning Appeals to grant a variance for the use of property located generally on the south side of McArthur Road between Sunflower and Alfalfa Streets for a borrow pit in conjunction with the construction of the Canal Route, was upheld. The decision had been appealed to the City Commission by Tom Harley, on behalf of Louise Recklebe.

In view of the confirmation of the Board's decision by the City Commission, we are enclosing herewith a copy of the resolution adopted by the Board of Zoning Appeals, which authorizes the Superintendent of Central Inspection to issue an appropriate letter for operation and maintenance of a borrow pit on subject property, subject to conditions specified in the resolution.

Very truly yours,

Jack H. Galbraith
Secretary

JHG:JWH:ber
Attachment

cc: The Clarkson Construction Company
4133 Gardner Avenue, Station "F"
Kansas City 20, Missouri

Thomas Harley, Attorney
Bitting Building

Glen Lytle, Superintendent of
Central Inspection

The City of Wichita

CITY BUILDING ANNEX • TELEPHONE AMherst 2-8211

WICHITA, KANSAS

BOARD OF ZONING APPEALS
Office of Secretary

September 25, 1964

Board of City Commissioners
City Building
Wichita, Kansas

Gentlemen:

Re: Case No. BZA 36-64

Under the provisions of Section 2.12.610 of the Code of the City of Wichita, an appeal from a decision of the Board of Zoning Appeals has been filed for consideration by the Board of City Commissioners.

At a special meeting of the Board of Zoning Appeals, on September 9, 1964, the Board approved a request made by the Clarkson Construction Company for a variance to permit the use of property generally located on the south side of McArthur Road between Sunflower and Alfalfa Streets for a borrow pit in conjunction with the construction of I-35W (Canal Route.)

As provided by the Code, Mr. Tom Harley, acting as agent for Louise Recklebe, an adjoining property owner who protested the granting of the permit for construction of the borrow pit, has appealed the decision of the Board of Zoning Appeals. Mr. Harley indicates in his letter of appeal that the decision of the Board to approve the variance was in error for the following reasons:

"The Board of Zoning Appeals has no jurisdiction under the ordinance. The request is not a variance, but an exception. The granting of the permit or request adversely affects the rights of appellant who is an adjacent property owner. The granting of the permit or request adversely affects public health, safety, morals, order, property, convenience and general welfare."

As indicated in the Secretary's report included in the minutes of the September 9 meeting, the Secretary recommended that the Board not take jurisdiction and that the variance be denied on the grounds




Page 2 - Board of City Commissioners
September 25, 1964

that this is a "use variance" and would be an usurpation of the legislative power of the governing body. However, the Board of Zoning Appeals took jurisdiction, based upon advice from legal counsel for the Board that the Board has jurisdiction to consider "use variances", and granted the variance subject to certain conditions and requirements (see minutes).

In considering the variance, the Board recognized that there were no provisions in the Zoning Ordinance which specifically mentioned borrow pits or offered any controls to protect the public interest. Consequently, in order to alleviate the hardship of the applicant, the Board granted the variance and also requested the Secretary of the Board to prepare an amendment to the Zoning Ordinance which would provide the Board of Zoning Appeals the authority to grant as an "Exception" permits for the location of borrow pits within the City and which provisions would contain adequate controls to protect the public interest.

The complete recommendation of the Secretary that the variance be denied and the reasons of the Board for recommending that the variance be granted, are not shown in this letter but are contained in the minutes of the September 9 meeting which are attached to this report.

Respectfully submitted,



Harold Bauer
Chairman

HB:JHG:ber

Attachments - Minutes of September 9, 1964
Resolution

R E S O L U T I O N N O . B Z A 3 6 - 6 4

WHEREAS, the Clarkson Construction Company, 4133 Gardner Avenue, Station "F", Kansas City 20, Missouri, by Lester Wilkinson, Attorney, 3521 West 21st Street, Wichita, Kansas, pursuant to Section 2.12.590.2, Code of the City of Wichita, has applied for a variance from the strict application of the enforcement provisions of the Zoning Ordinance, to use property as a borrow pit in the construction of Highway I-35W, said property being generally located in an area south of McArthur Road and east of Broadway between McArthur Road and 43rd Street South, and legally described as:

The South half of Lot 9, all of Lots 10 and 11, Riverside Gardens, in the City of Wichita, Sedgwick County, Kansas; and

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, at the special meeting of September 8, 1964, the Secretary observed that a quorum of the members of the Board of Zoning Appeals was not present, and declared the public hearing continued until Wednesday, September 9, 1964, at 2 p.m. in Room 401 City Building Annex, 104 South Main, Wichita, Kansas; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of September 9, 1964, consider said application; and

WHEREAS, the Board of Zoning Appeals determined that it had proper jurisdiction to consider said variance request, under the provisions of Section 2.12.590.2, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has determined that the variance desired arises from some condition which is unique and which is not ordinarily found in the same zoning district in that this area is known to be underlaid with gravel, whereas many areas throughout the city do not possess such a characteristic, and further, the application area adjoins an existing borrow pit and would amount to an extension or continuation of an existing lake, and further, the application area is in close proximity to the proposed route of the new highway (Canal Route - I-35W), and will result in less burden, not only to the contractor in less hauling distance, but less burden to the general public at large in controlling the transportation of this fill material to the site of construction; and

WHEREAS, the Board of Zoning Appeals has determined that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents, provided that proper conditions are instituted and respected against the proposed use and provided adequate controls are exercised; and

WHEREAS, the Board of Zoning Appeals has determined that the strict application of the enforcement provisions of the Zoning Ordinance will constitute unnecessary hardship upon the property owner represented in the appeal, due to the fact that according to the evidence submitted there is not a sufficient demand to utilize this area for single family development at this time; and

WHEREAS, the Board of Zoning Appeals has determined that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare inasmuch as not to grant the request could very possibly adversely affect certain portions of the public interest; and

WHEREAS, as shown above, each of the four conditions required by Section 2.12.590.2, Code of the City of Wichita to be present before a variance can be granted, has been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals of the City of Wichita, that the Superintendent of Central Inspection be and is hereby authorized and directed to issue the appropriate permit for the operation and maintenance of a borrow pit on the tract of land specifically described as follows:

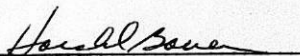
The south half of Lot 9, all of Lots 10 and 11, Riverside Gardens, in the City of Wichita, Sedgwick County, Kansas. Generally located in an area south of McArthur Road and east of Broadway between McArthur Road and 43rd Street South,

subject to the following conditions:

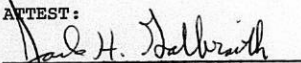
1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (See Conditional Use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.
3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (See Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes shall consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover, planted and maintained in accordance with a high standard of maintenance.

6. Conditions 1 through 4 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 4 above.
7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition #2 above, and vegetative cover for slopes and maintenance of such vegetative cover as required in #5 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk for a term of five years subsequent to the time the borrow pit operation has been completed.
8. A restrictive covenant running with the land for 25 years should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary landfill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner, the purchaser, and the governing body of the City of Wichita, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

ADOPTED AT WICHITA, KANSAS, this 9th day of September, 1964.


Harold Bauer, Chairman

ATTEST:


Jack H. Galbraith
Secretary

BOARD OF ZONING APPEALS

MINUTES

SEPTEMBER 9, 1964

A special meeting of the Board of Zoning Appeals was held on Wednesday, September 9, 1964, at 2 p.m. in Room 401 City Building Annex, 104 South Main, Wichita, Kansas, at which time the following members were present: Harold Bauer, Chairman, Claude Moore, Kenneth Hartstein, Charles D. Anderson and Harold Irwin. Also present were Arthur Johnson, Assistant City Attorney, Jack Galbraith, Secretary, James Howe and Berniece Rathke of the Planning staff. Chairman Bauer presided.

1. Case No. BZA 36-64 - The Clarkson Construction Company requests Variance pursuant to Section 2.12.590.2, Code of the City of Wichita, to use the following described property as a borrow pit: The South half of Lot 9, all of Lots 10 and 11, Riverside Gardens. Generally located in an area south of McArthur Road and east of Broadway between McArthur Road and 43rd Street South.

GALBRAITH pointed out the area on the map and submitted the following staff report:

GENERAL DESCRIPTION

The property represented in this application is generally on the east side of both Broadway and the Interstate between McArthur Road and 43rd Street South.

The property in question is zoned "AA" Single Family. The existing zoning to the east, south and west is "AA" and north is "AA" and "C" Commercial.

The property in question is currently under cultivation. The existing land use to the west is vacant; south is vacant; east is single family and vacant; and north is single family.

REQUEST

The request is for a variance pursuant to Section 2.12.590.2, Code of the City of Wichita, to permit the use of the property included in this application for a borrow pit in conjunction with the construction of I-35W (Canal Route.)

JURISDICTION

The ordinance creating a Board of Zoning Appeals granted the Board jurisdiction to hear three types of cases - appeals, variances and exceptions. The Secretary feels that the intent of the ordinance insofar as it relates to variances, was to allow the Board to modify

such requirements as height, setback, lot area, lot width and similar requirements to the zoning ordinance, and not to allow the granting of permission to use property in a different manner or a different use than that permitted in the zoning ordinance. To allow a different use than that specified in the zoning ordinance would be, in effect, the amendment of the zoning ordinance by a board not having legislative power or authority to do so. Since uses to be established in any specific zone are established by the City Commission by adoption of an ordinance as a legislative act, it is the opinion of the Secretary that the granting would be a legislative act capable of being exercised only by the City Commission and not within the jurisdiction of the Board of Zoning Appeals.

Richard F. Babcock, one of the leading legal authorities on planning, zoning and the proper use of the variance, in his review of present zoning ordinances and resolutions, states that "the zoning ordinance for the City of Wichita does not expressly prohibit use variances, but such a prohibition can be implied from the prohibition of use exceptions and the enumeration of the types of variances that may be granted."

Babcock further points out in his recommendations that:

"Variances and exceptions should not be confused or treated alike as they are in the present ordinances. A variance is a discretionary privilege which is granted because the application of the zoning ordinances has created an unusual difficulty or a hardship for a particular property owner that was not anticipated. The exception is a technique for allowing uses that are anticipated, but as to which a fact-finding body must determine that the landowner has established that in his case the conditions applicable to the exception have been met. Variances are a form of relief from the strict provisions of the ordinances. Exceptions are really a form of deferred judgment on a particular use for which requests are anticipated, and for which provision is made in the zoning ordinance.

"Use exceptions not specifically authorized and use variances should be expressly forbidden. It is our view that if a change in use is warranted, then a change in zoning is warranted. It is a rare case indeed when a property owner can show that he is entitled to a variation because he alone faces a peculiar problem in developing his land for its zoned purposes."

The only section of the zoning ordinance which now permits borrow pits is the "C" Commercial section and the other less restrictive sections of the ordinance.

In this instance, the applicant chose not to apply for a "C" Commercial classification but, rather, applied for a variance to allow a borrow pit in an "AA" Single family district.

In the opinion of the Secretary, the zoning ordinance cannot and should not be amended through the granting of use variances. Therefore, based upon the foregoing review, it is the opinion and recommendation of the Secretary that the Board of Zoning Appeals does not have jurisdiction in this case.

In Case No. BZA 5-60, the Board of Zoning Appeals did grant a use variance for a borrow pit similar to the one requested in this application.

Another interesting viewpoint is that the Board is a quasi-judicial body rather than an administrative or legislative body. If the act of permitting a use which is otherwise not permitted can properly be termed a legislative act (and this happens when the City Commission adopts or legislates an ordinance changing or establishing use categories in the zoning code), then what right does the Board have in performing the same function as the legislative body? The statutes clearly provide for the manner in which a zoning ordinance and district classification and amendments thereto can be established. Consequently, is the act of granting a use variance a quasi-judicial act?

The Secretary is of the opinion that the proper procedure for the applicant to follow in this instance is to either:

1. Apply for a change in zoning to a "C" Commercial classification where borrow pits are permitted as a use by right; or
2. Request that the zoning ordinance be amended to permit borrow pits through one of the following techniques:
 - a. in all zoning districts as a matter of right;
 - b. as a special exception within designated zones, subject to conditions outlined in the ordinance;
 - c. in special use districts, such as a sand and gravel or natural resource zone; perhaps excluding some or all other uses.

ADDITIONAL COMMENTS ON JURISDICTION

If the Board should determine that it has jurisdiction to consider use variances, then all four conditions must be found to exist before the variance may be granted.

1. That the variance arises from such condition which is unique and which is not ordinarily found in the same zoning district.
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.
3. That the strict application of the enforcement provisions of the zoning ordinance will constitute unnecessary hardship upon the property owner represented in the appeal.
4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare.

The applicant has submitted a statement of justification which is included as Attachment #1 to this report.

UNIQUENESS

The attorney for the applicant has indicated in his statement of justification that the variance desired arises from such condition which is unique and not ordinarily found in the same zoning district inasmuch as a portion of the property owned by the applicant was used for a borrow pit in conjunction with construction of the I-235 bypass. He also points out that this borrow pit was operated in accordance with the requirements placed upon it by the County Commission as recommended by the Wichita-Sedgwick County Metropolitan Area Planning Commission. He further points out that this particular borrow pit was approved when it was in the county (the property has since been annexed to the city), and was previously under the jurisdiction of the County Zoning Resolution, which allows borrow pits in any zoning district (as a conditional use) when the location is approved by the County Commission. He goes on to point out that this request is particularly unique inasmuch as there is no such comparable provision in the zoning ordinance of the City of Wichita which permits borrow pits. It is also suggested that the applicant did not wish to apply for "C" zoning since it was his feeling that to grant "C" zoning in this area for a borrow pit would be in violation of the Planning Commission's policy against "spot zoning" and further, "C" zoning permits a large number of uses which would be detrimental to the entire area around the applicant's property and would also be objectionable to other nearby property owners.

The Secretary is of the opinion that uniqueness should be considered as to the physical characteristics of the property concerned. If this criteria is used, there appears to be nothing which is

exceptionally unique about the physical characteristics of the property in question. There is, however, a unique physical characteristic concerning the land directly to the west, which has been used as a borrow pit. On several occasions in the past few months, the Board has considered uniqueness as to the use of the property rather than to its physical characteristics. If this definition is used, uniqueness can probably be found to exist on the basis of a proposed use suggested by the applicant. However, extreme care should be exercised in using this criteria for uniqueness, since this makes almost every piece of property in the city unique.

ADJACENT PROPERTY

It is the opinion of the Secretary that if the proper controls are exercised, the granting of the variance should in no way adversely affect adjacent property owners.

HARDSHIP

The attorney for the applicant suggests that the applicant will be burdened with an unnecessary hardship if the variance is not granted inasmuch as he has a contract with the State Highway Department which he must fulfill.

The Secretary has taken the position that hardship exists if the property cannot be used for the purpose for which it is zoned.

It is the Secretary's opinion that if the variance is granted, the applicant would be enjoying a privilege that would not be mutually enjoyed by other property owners in the same zoning district since borrow pits are not permitted as a "use by right" in the "AA" district.

PUBLIC INTEREST

The Secretary agrees with the applicant in that the granting of the variance should in no way adversely affect the public interest, provided appropriate conditions related to public health and safety are established as a condition of approval.

It is the Secretary's opinion that all four conditions necessary to the granting of a variance (hardship) have not been found to exist. Therefore, it is recommended that the variance be denied in that an adequate showing has not been made by the applicant in his justification of hardship.

However, in the event the Board takes jurisdiction and finds all four conditions do exist and wishes to approve the variance, the Secretary recommends that the variance be approved, subject to the following conditions and requirements:

1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (see conditional use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.
3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (see Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes should consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover.
6. Conditions 1 through 5 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 5 above.
7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition

#2 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk until such time as the borrow pit operation has been completed.

8. A restrictive covenant running with the land for 25 years should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary land-fill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner and the purchaser, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

The question of whether or not the Board could assume jurisdiction in this case for a "use variance" was referred to Mr. Johnson, for his legal opinion. JOHNSON said that it was his opinion the Board has jurisdiction to grant a use variance in spite of the contrary view taken by the professional staff. He based his opinion on a recent decision handed down by the Kansas Supreme Court which involved the County Board of Zoning Appeals, and it was his opinion that under the definition laid down in that case, it would be applicable to jurisdiction of the City of Wichita Board of Zoning Appeals.

ANDERSON pointed out also that if this Board grants a variance for a borrow pit, certain conditions for its operation can be imposed thereon for the operation, such as slopes, depth, fencing and screening, whereas under the "C" zoning classification wherein a borrow pit could be allowed, there would be no method of enacting performance standards as to operation. Further, when the use of the property as a borrow pit is completed, it is still "AA" zoning.

MR. JOHNSON suggested that it would be desirable to refer this matter to the City Commission for possible change in the ordinance to authorize this Board to grant such uses as a borrow pit as an exception rather than as a variance.

IRWIN ARRIVED.

MOTION: HARTSTEIN moved, MOORE seconded and it carried unanimously that the Board take jurisdiction in this case, in view of the opinion and interpretation of Legal Counsel.

LESTER WILKINSON, attorney for the applicant, spoke in support of this request. He pointed out that the applicant made the low bid on a portion of the grading work to be done on the south end of the Canal Route around McArthur Road. He referred to the fact that the area adjacent on the west to subject area was previously approved as a borrow pit under the County Zoning Resolution as a Conditional Use Permit.

It was the feeling of the Attorney that the uniqueness factor is met by reason of the fact that the necessary fill material is close to the site where it is needed and which permitted the applicant to be the low bidder. He considered it unique also because if this use is permitted it would result in combining this area with the lake to the west already created by the previous borrow pit, resulting in one large lake, rather than two small ones apart from each other. He referred also to the proposed development surrounding the one large lake for residential use, and an architect's drawing of the residential lots facing the lake was shown.

MR. WILKINSON pointed out further that the applicant has complied in all respects with conditions and requirements established under the Conditional Use Permit for the borrow pit to the west, and that they are willing to comply with conditions as suggested in the Secretary's recommendation in this case.

MR. WILKINSON felt that there would be no hardship to adjacent owners because a great deal of the land within 200 feet of subject property is owned by the applicant and various other people who are interested in it being developed as a borrow pit and eventually being used for residential use. The attorney pointed out that one of the conditions suggested by the Secretary provides that after its use as a borrow pit it cannot be used as a sand pit, sanitary landfill or trash dumping site for 25 years, which should provide protection for anyone owning property in the general area. MR. WILKINSON pointed out also that this is only an enlargement of the existing borrow pit and that excavation will begin on the east side of the present pit and continue east into subject area only as far as needed. He stated that he doubted if it would be any farther than about half way across the area included in the application.

The attorney referred to the architect's drawing of the eventual residential development, and pointed out that the one large lake is to be the nucleus, with residences facing into the lake, similar to other developments of a similar nature in the metropolitan area.

When questioned as to hardship to the applicant if this request is not granted, MR. WILKINSON pointed out that the applicant has based his low bid with the State on the hope that this request

would be approved and since it is in close proximity to the site where the fill material is needed, it would create a hardship to the applicant if he is forced to go farther away for the material needed to fulfill his contract.

MR. WILKINSON pointed out that it would be against the public interest if the applicant is forced to go a longer distance for the fill material because of the hazards of hauling on the streets. He noted that the proposed development would create a desirable residential area which would benefit the general public.

MR. CLARKSON said they own the existing borrow pit to the west of subject property, which was used in construction of I-235, but that it is not of sufficient size to accommodate their existing needs. He pointed out that when the new contract arose for construction of I-35W, it seemed desirable to obtain the subject property to the east since it was immediately west of the existing borrow pit. He also noted that they actually purchased more than will be needed for the current contract, in order to provide for the proposed residential development. Because of this unique situation, Clarkson Construction Company bid was \$60,000 less than the nearest other bidder. It was his feeling that this low bid is definitely of benefit to the local community, the State and Federal governments who are financing the Canal Route construction.

MR. CLARKSON stated that the grading work for which his company is responsible is integrated with other construction along this highway route and any delay in performing under their contract would delay bids on paving which must be taken at an early date and in proper season. It was his feeling that because of their unique position in owning the other borrow pit, they have an opportunity where all can benefit - the lake can be enlarged, improvement made of the area around it and developed residentially and at the same time provide necessary grading for the State at a figure considerably below any other bid that was received.

When questioned, Mr. Clarkson said he had read the Secretary's report and the suggested conditions, and that they appear to be the same as were applicable on the adjacent borrow pit, and that he is willing to comply with them in this case.

In discussing the proposed residential development, Mr. Clarkson pointed out that what is depicted at this time is general in nature, and that they would expect to adhere to any requirements or conditions in the development in order to result in a desirable area for development.

JAKE LOHRAMP, owner of property in the area, said he was in favor of this request. It was his feeling that the proposed eventual development would be desirable, and if this request is not approved, then the borrow pit lake already created would be a blight in the area.

TOM HARLEY, attorney representing Louise Recklebe, 1305 East McArthur, owner of the 20 acres adjacent on the east to subject property, spoke in opposition. He pointed out that while the eventual development of this area as proposed by the applicant, might be desirable, there is absolutely no guarantee that the development will occur. It is a hope in the future. It was Mr. Harley's feeling that the request is an exception rather than a variance, and with respect to adverse affect on adjacent property, it was his feeling that a hole in the ground such as would result would definitely be detrimental, in spite of compliance with conditions as suggested by the Secretary.

MR. HARLEY felt there was nothing unique about this situation since there have been low bids made before, but his client should not be made to suffer because of the applicant's low bid, and his client should not be made to sacrifice the value of her property just to save the applicant the cost of additional hauling of fill material to the site of construction.

The attorney stressed the fact that there is nothing to guarantee the proposed residential development, and further, the restrictions as proposed guarantee proper operation only during the time it is being used as a borrow pit. Further, it is possible that his client might some day wish to subdivide her property for residential use. With the borrow pit close-by (and if the proposed lake front residential area does not materialize as proposed by the applicant), then it would be very detrimental to the sale of such home sites. MR. HARLEY agreed, when questioned, that IF the applicant develops the area as shown with residences facing the lake area, it would increase values in the general area, but since there is no means of being certain of the development, it cannot be depended upon.

In discussing this matter with Mr. Harley it was brought out that his client's property lies to the east of Sunflower, which is the north-south road to the east of the development proposed by the applicant. He stated that his client's property is used agriculturally (for truck gardening) at this time. In considering the proposed conditions to any approval, it was pointed out that this general area is all underlaid with gravel and that the water level fluctuates as the Big River level fluctuates. MR. WILKINSON stated that as late as the morning prior to this meeting, Mr. Harley's client had told his client (Mr. Clarkson) that she had no objections as long as the subject property is restricted from ever becoming a dump.

MR. CLARKSON assured the Board that while their eventual residential development may not be exactly as depicted at this time, it will conform to proper subdivision requirements, depending on

circumstances at that time. He stated also that the water table in this area is from 6 to 8 feet below ground level, and that in excavating it is necessary to install pumps to pump the water out so that they can proceed with removal of dirt.

HARTSTEIN WAS EXCUSED FROM THE MEETING

Water table level and proposed platting of the eventual residential area was briefly discussed. It was noted that right of way dedications for Sunflower Street would have to be adjusted so far as dedications from Clarkson and from the owner of the property to the east (Louise Recklebe) is concerned.

MOTION: IRWIN moved, ANDERSON seconded and it carried unanimously that the variance desired arises from some condition which is unique and which is not ordinarily found in the same zoning district in that this area is known to be underlaid with gravel whereas many other areas throughout the city do not possess such a characteristic, and further, the application area adjoins an existing borrow pit and would amount to an extension or continuation of an existing lake and further, it is in close proximity to the proposed route of the new highway (Canal Route - I-35W), and will result in less burden not only to the contractor in less hauling distance, but less burden to the general public at large in controlling the transportation of this fill material to the site of construction.

MOTION: ANDERSON moved, MOORE seconded and it carried unanimously that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents provided that proper conditions are instituted and respected against the proposed use and provided adequate controls are exercised.

IRWIN stated that it would not adversely affect adjacent property owners because of the location of the existing lake and further this is just an extension of the existing borrow pit which brings it a little closer to the east, but in his opinion, would not adversely affect adjoining property.

MOTION: ANDERSON moved, IRWIN seconded and it carried unanimously that the strict application of the enforcement provisions of the zoning ordinance will constitute unnecessary hardship upon

the property owner represented in the appeal due to the fact that according to the evidence submitted there is not a sufficient demand to utilize this area for single family development at this time.

MOTION: MOORE moved, ANDERSON seconded and it carried unanimously that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare inasmuch as not to grant the request could very possibly adversely affect certain portions of the public interest.

IRWIN said he could see where it might adversely affect the public health and safety unless certain restrictions - fencing, etc. are made a condition to approval. The Chairman pointed out that conditions to approval will be covered in the overall motion.

In considering overall approval or denial of this application, MOORE asked the staff if there were other matters of a similar nature now pending, and whether action on this particular case might set a precedent. GALBRAITH said that no other applications or proposed applications have been discussed with the staff at this time. It was anticipated, however, that similar requests might come about as construction of the Canal Route progresses to the north. MR. CLARKSON said he doubted if many such requests would arise since the State will probably provide the area for extraction on all areas north of the Arkansas River.

The suggested conditions to approval were discussed in detail and it was agreed that maintenance of the borrow pit area should be continued 5 years after the borrow pit use ceases (#7) and that the bond required in #7 should be made applicable to #5 as well as #2. It was agreed that the City of Wichita should be made a party to the restrictive covenant proposed in #8. Other wording with regard to proper maintenance was suggested and approved.

MOTION: ANDERSON moved, MOORE seconded and it carried unanimously that inasmuch as the four conditions required by Section 2.12.590.2, Code of the City of Wichita to be present before a variance can be granted, has been found to exist, that this request for a use variance be approved, subject to the following

1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (See Conditional Use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.
3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (See Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slopes of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes shall consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover, planted and maintained in accordance with a high standard of maintenance.
6. Conditions 1 through 4 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 4 above.

7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition #2 above, and vegetative cover for slopes and maintenance of such vegetative cover as required in #5 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk for a term of five years subsequent to the time the borrow pit operation has been completed.

8. A restrictive covenant running with the land for 25 years should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary landfill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner, the purchaser, and the governing body of the City of Wichita, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

(The resolution is not shown as a part of the minutes as mailed but is made a part of the permanent record of Board proceedings on file in the Secretary's office.)

MOTION: ANDERSON moved, MOORE seconded and it carried unanimously that the Secretary be directed to convey to the Planning Commission the desire of the Board of Zoning Appeals that the Planning Commission consider amending the zoning ordinance with respect to borrow pits, possibly by granting the Board of Zoning Appeals authority to grant such a use as an exception, subject to certain conditions.

MOTION: MOORE moved, IRWIN seconded and it carried unanimously that by action in this particular case, it is not intended that a precedent with respect to granting of use variances for borrow pits in an "AA" zoning classification be established.

Meeting adjourned about 4:10 p.m.

Jack H. Galbraith
Secretary

The City of Wichita

CITY BUILDING ANNEX • TELEPHONE AMherst 2-8211

WICHITA, KANSAS

BOARD OF ZONING APPEALS
Office of Secretary

September 25, 1964

Board of City Commissioners
City Building
Wichita, Kansas

Gentlemen:

Re: Case No. BZA 36-64

Under the provisions of Section 2.12.610 of the Code of the City of Wichita, an appeal from a decision of the Board of Zoning Appeals has been filed for consideration by the Board of City Commissioners.

At a special meeting of the Board of Zoning Appeals, on September 9, 1964, the Board approved a request made by the Clarkson Construction Company for a variance to permit the use of property generally located on the south side of McArthur Road between Sunflower and Alfalfa Streets for a borrow pit in conjunction with the construction of I-35W (Canal Route.)

As provided by the Code, Mr. Tom Harley, acting as agent for Louise Recklebe, an adjoining property owner who protested the granting of the permit for construction of the borrow pit, has appealed the decision of the Board of Zoning Appeals. Mr. Harley indicates in his letter of appeal that the decision of the Board to approve the variance was in error for the following reasons:

"The Board of Zoning Appeals has no jurisdiction under the ordinance. The request is not a variance, but an exception. The granting of the permit or request adversely affects the rights of appellant who is an adjacent property owner. The granting of the permit or request adversely affects public health, safety, morals, order, property, convenience and general welfare."

As indicated in the Secretary's report included in the minutes of the September 9 meeting, the Secretary recommended that the Board not take jurisdiction and that the variance be denied on the grounds



Page 2 - Board of City Commissioners
September 25, 1964

that this is a "use variance" and would be an usurpation of the legislative power of the governing body. However, the Board of Zoning Appeals took jurisdiction, based upon advice from legal counsel for the Board that the Board has jurisdiction to consider "use variances", and granted the variance subject to certain conditions and requirements (see minutes).

In considering the variance, the Board recognized that there were no provisions in the Zoning Ordinance which specifically mentioned borrow pits or offered any controls to protect the public interest. Consequently, in order to alleviate the hardship of the applicant, the Board granted the variance and also requested the Secretary of the Board to prepare an amendment to the Zoning Ordinance which would provide the Board of Zoning Appeals the authority to grant as an "Exception" permits for the location of borrow pits within the City and which provisions would contain adequate controls to protect the public interest.

The complete recommendation of the Secretary that the variance be denied and the reasons of the Board for recommending that the variance be granted, are not shown in this letter but are contained in the minutes of the September 9 meeting which are attached to this report.

Respectfully submitted,



Harold Bauer
Chairman

HB:JHG:ber

Attachments - Minutes of September 9, 1964
Resolution

BOARD OF ZONING APPEALS

MINUTES

SEPTEMBER 9, 1964

A special meeting of the Board of Zoning Appeals was held on Wednesday, September 9, 1964, at 2 p.m. in Room 401 City Building Annex, 104 South Main, Wichita, Kansas, at which time the following members were present: Harold Bauer, Chairman, Claude Moore, Kenneth Hartstein, Charles D. Anderson and Harold Irwin. Also present were Arthur Johnson, Assistant City Attorney, Jack Galbraith, Secretary, James Howe and Berniece Rathke of the Planning staff. Chairman Bauer presided.

1. Case No. BZA 36-64 - The Clarkson Construction Company requests Variance pursuant to Section 2.12.590.2, Code of the City of Wichita, to use the following described property as a borrow pit: The South half of Lot 9, all of Lots 10 and 11, Riverside Gardens. Generally located in an area south of McArthur Road and east of Broadway between McArthur Road and 43rd Street South.

GALBRAITH pointed out the area on the map and submitted the following staff report:

GENERAL DESCRIPTION

The property represented in this application is generally on the east side of both Broadway and the Interstate between McArthur Road and 43rd Street South.

The property in question is zoned "AA" Single Family. The existing zoning to the east, south and west is "AA" and north is "AA" and "C" Commercial.

The property in question is currently under cultivation. The existing land use to the west is vacant; south is vacant; east is single family and vacant; and north is single family.

REQUEST

The request is for a variance pursuant to Section 2.12.590.2, Code of the City of Wichita, to permit the use of the property included in this application for a borrow pit in conjunction with the construction of I-35W (Canal Route.)

JURISDICTION

The ordinance creating a Board of Zoning Appeals granted the Board jurisdiction to hear three types of cases - appeals, variances and exceptions. The Secretary feels that the intent of the ordinance insofar as it relates to variances, was to allow the Board to modify

such requirements as height, setback, lot area, lot width and similar requirements to the zoning ordinance, and not to allow the granting of permission to use property in a different manner or a different use than that permitted in the zoning ordinance. To allow a different use than that specified in the zoning ordinance would be, in effect, the amendment of the zoning ordinance by a board not having legislative power or authority to do so. Since uses to be established in any specific zone are established by the City Commission by adoption of an ordinance as a legislative act, it is the opinion of the Secretary that the granting would be a legislative act capable of being exercised only by the City Commission and not within the jurisdiction of the Board of Zoning Appeals.

Richard F. Babcock, one of the leading legal authorities on planning, zoning and the proper use of the variance, in his review of present zoning ordinances and resolutions, states that "the zoning ordinance for the City of Wichita does not expressly prohibit use variances, but such a prohibition can be implied from the prohibition of use exceptions and the enumeration of the types of variances that may be granted."

Babcock further points out in his recommendations that:

"Variances and exceptions should not be confused or treated alike as they are in the present ordinances. A variance is a discretionary privilege which is granted because the application of the zoning ordinances has created an unusual difficulty or a hardship for a particular property owner that was not anticipated. The exception is a technique for allowing uses that are anticipated, but as to which a fact-finding body must determine that the landowner has established that in his case the conditions applicable to the exception have been met. Variances are a form of relief from the strict provisions of the ordinances. Exceptions are really a form of deferred judgment on a particular use for which requests are anticipated, and for which provision is made in the zoning ordinance.

"Use exceptions not specifically authorized and use variances should be expressly forbidden. It is our view that if a change in use is warranted, then a change in zoning is warranted. It is a rare case indeed when a property owner can show that he is entitled to a variation because he alone faces a peculiar problem in developing his land for its zoned purposes."

The only section of the zoning ordinance which now permits borrow pits is the "C" Commercial section and the other less restrictive sections of the ordinance.

In this instance, the applicant chose not to apply for a "C" Commercial classification but, rather, applied for a variance to allow a borrow pit in an "A" Single family district.

In the opinion of the Secretary, the zoning ordinance cannot and should not be amended through the granting of use variances. Therefore, based upon the foregoing review, it is the opinion and recommendation of the Secretary that the Board of Zoning Appeals does not have jurisdiction in this case.

In Case No. BZA 5-60, the Board of Zoning Appeals did grant a use variance for a borrow pit similar to the one requested in this application.

Another interesting viewpoint is that the Board is a quasi-judicial body rather than an administrative or legislative body. If the act of permitting a use which is otherwise not permitted can properly be termed a legislative act (and this happens when the City Commission adopts or legislates an ordinance changing or establishing use categories in the zoning code), then what right does the Board have in performing the same function as the legislative body? The statutes clearly provide for the manner in which a zoning ordinance and district classification and amendments thereto can be established. Consequently, is the act of granting a use variance a quasi-judicial act?

The Secretary is of the opinion that the proper procedure for the applicant to follow in this instance is to either:

1. Apply for a change in zoning to a "C" Commercial classification where borrow pits are permitted as a use by right; or
2. Request that the zoning ordinance be amended to permit borrow pits through one of the following techniques:
 - a. in all zoning districts as a matter of right;
 - b. as a special exception within designated zones, subject to conditions outlined in the ordinance;
 - c. in special use districts, such as a sand and gravel or natural resource zone; perhaps excluding some or all other uses.

ADDITIONAL COMMENTS ON JURISDICTION

If the Board should determine that it has jurisdiction to consider use variances, then all four conditions must be found to exist before the variance may be granted.

1. That the variance arises from such condition which is unique and which is not ordinarily found in the same zoning district.
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.
3. That the strict application of the enforcement provisions of the zoning ordinance will constitute unnecessary hardship upon the property owner represented in the appeal.
4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare.

The applicant has submitted a statement of justification which is included as Attachment #1 to this report.

UNIQUENESS

The attorney for the applicant has indicated in his statement of justification that the variance desired arises from such condition which is unique and not ordinarily found in the same zoning district inasmuch as a portion of the property owned by the applicant was used for a borrow pit in conjunction with construction of the I-235 bypass. He also points out that this borrow pit was operated in accordance with the requirements placed upon it by the County Commission as recommended by the Wichita-Sedgwick County Metropolitan Area Planning Commission. He further points out that this particular borrow pit was approved when it was in the county (the property has since been annexed to the city), and was previously under the jurisdiction of the County Zoning Resolution, which allows borrow pits in any zoning district (as a conditional use) when the location is approved by the County Commission. He goes on to point out that this request is particularly unique inasmuch as there is no such comparable provision in the zoning ordinance of the City of Wichita which permits borrow pits. It is also suggested that the applicant did not wish to apply for "C" zoning since it was his feeling that to grant "C" zoning in this area for a borrow pit would be in violation of the Planning Commission's policy against "spot zoning" and further, "C" zoning permits a large number of uses which would be detrimental to the entire area around the applicant's property and would also be objectionable to other nearby property owners.

The Secretary is of the opinion that uniqueness should be considered as to the physical characteristics of the property concerned. If this criteria is used, there appears to be nothing which is

exceptionally unique about the physical characteristics of the property in question. There is, however, a unique physical characteristic concerning the land directly to the west, which has been used as a borrow pit. On several occasions in the past few months, the Board has considered uniqueness as to the use of the property rather than to its physical characteristics. If this definition is used, uniqueness can probably be found to exist on the basis of a proposed use suggested by the applicant. However, extreme care should be exercised in using this criteria for uniqueness, since this makes almost every piece of property in the city unique.

ADJACENT PROPERTY

It is the opinion of the Secretary that if the proper controls are exercised, the granting of the variance should in no way adversely affect adjacent property owners.

HARDSHIP

The attorney for the applicant suggests that the applicant will be burdened with an unnecessary hardship if the variance is not granted inasmuch as he has a contract with the State Highway Department which he must fulfill.

The Secretary has taken the position that hardship exists if the property cannot be used for the purpose for which it is zoned.

It is the Secretary's opinion that if the variance is granted, the applicant would be enjoying a privilege that would not be mutually enjoyed by other property owners in the same zoning district since borrow pits are not permitted as a "use by right" in the "AA" district.

PUBLIC INTEREST

The Secretary agrees with the applicant in that the granting of the variance should in no way adversely affect the public interest, provided appropriate conditions related to public health and safety are established as a condition of approval.

It is the Secretary's opinion that all four conditions necessary to the granting of a variance (hardship) have not been found to exist. Therefore, it is recommended that the variance be denied in that an adequate showing has not been made by the applicant in his justification of hardship.

However, in the event the Board takes jurisdiction and finds all four conditions do exist and wishes to approve the variance, the Secretary recommends that the variance be approved, subject to the following conditions and requirements:

1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (see conditional use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.
3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (see Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes should consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good seed cover.
6. Conditions 1 through 5 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 5 above.
7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition

#2 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk until such time as the borrow pit operation has been completed.

8. A restrictive covenant running with the land for 25 years should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary land-fill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner and the purchaser, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

The question of whether or not the Board could assume jurisdiction in this case for a "use variance" was referred to Mr. Johnson, for his legal opinion. JOHNSON said that it was his opinion the Board has jurisdiction to grant a use variance in spite of the contrary view taken by the professional staff. He based his opinion on a recent decision handed down by the Kansas Supreme Court which involved the County Board of Zoning Appeals, and it was his opinion that under the definition laid down in that case, it would be applicable to jurisdiction of the City of Wichita Board of Zoning Appeals.

ANDERSON pointed out also that if this Board grants a variance for a borrow pit, certain conditions for its operation can be imposed thereon for the operation, such as slopes, depth, fencing and screening, whereas under the "C" zoning classification wherein a borrow pit could be allowed, there would be no method of enacting performance standards as to operation. Further, when the use of the property as a borrow pit is completed, it is still "AA" zoning.

MR. JOHNSON suggested that it would be desirable to refer this matter to the City Commission for possible change in the ordinance to authorize this Board to grant such uses as a borrow pit as an exception rather than as a variance.

IRWIN ARRIVED.

MOTION: HARTSTEIN moved, MOORE seconded and it carried unanimously that the Board take jurisdiction in this case, in view of the opinion and interpretation of Legal Counsel.

LESTER WILKINSON, attorney for the applicant, spoke in support of this request. He pointed out that the applicant made the low bid on a portion of the grading work to be done on the south end of the Canal Route around McArthur Road. He referred to the fact that the area adjacent on the west to subject area was previously approved as a borrow pit under the County Zoning Resolution as a Conditional Use Permit.

It was the feeling of the Attorney that the uniqueness factor is met by reason of the fact that the necessary fill material is close to the site where it is needed and which permitted the applicant to be the low bidder. He considered it unique also because if this use is permitted it would result in combining this area with the lake to the west already created by the previous borrow pit, resulting in one large lake, rather than two small ones apart from each other. He referred also to the proposed development surrounding the one large lake for residential use, and an architect's drawing of the residential lots facing the lake was shown.

MR. WILKINSON pointed out further that the applicant has complied in all respects with conditions and requirements established under the Conditional Use Permit for the borrow pit to the west, and that they are willing to comply with conditions as suggested in the Secretary's recommendation in this case.

MR. WILKINSON felt that there would be no hardship to adjacent owners because a great deal of the land within 200 feet of subject property is owned by the applicant and various other people who are interested in it being developed as a borrow pit and eventually being used for residential use. The attorney pointed out that one of the conditions suggested by the Secretary provides that after its use as a borrow pit it cannot be used as a sand pit, sanitary landfill or trash dumping site for 25 years, which should provide protection for anyone owning property in the general area. MR. WILKINSON pointed out also that this is only an enlargement of the existing borrow pit and that excavation will begin on the east side of the present pit and continue east into subject area only as far as needed. He stated that he doubted if it would be any farther than about half way across the area included in the application.

The attorney referred to the architect's drawing of the eventual residential development, and pointed out that the one large lake is to be the nucleus, with residences facing into the lake, similar to other developments of a similar nature in the metropolitan area.

When questioned as to hardship to the applicant if this request is not granted, MR. WILKINSON pointed out that the applicant has based his low bid with the State on the hope that this request

would be approved and since it is in close proximity to the site where the fill material is needed, it would create a hardship to the applicant if he is forced to go farther away for the material needed to fulfill his contract.

MR. WILKINSON pointed out that it would be against the public interest if the applicant is forced to go a longer distance for the fill material because of the hazards of hauling on the streets. He noted that the proposed development would create a desirable residential area which would benefit the general public.

MR. CLARKSON said they own the existing borrow pit to the west of subject property, which was used in construction of I-235, but that it is not of sufficient size to accommodate their existing needs. He pointed out that when the new contract arose for construction of I-35W, it seemed desirable to obtain the subject property to the east since it was immediately west of the existing borrow pit. He also noted that they actually purchased more than will be needed for the current contract, in order to provide for the proposed residential development. Because of this unique situation, Clarkson Construction Company bid was \$60,000 less than the nearest other bidder. It was his feeling that this low bid is definitely of benefit to the local community, the State and Federal governments who are financing the Canal Route construction.

MR. CLARKSON stated that the grading work for which his company is responsible is integrated with other construction along this highway route and any delay in performing under their contract would delay bids on paving which must be taken at an early date and in proper season. It was his feeling that because of their unique position in owning the other borrow pit, they have an opportunity where all can benefit - the lake can be enlarged, improved made of the area around it and developed residentially and at the same time provide necessary grading for the State at a figure considerably below any other bid that was received.

When questioned, Mr. Clarkson said he had read the Secretary's report and the suggested conditions, and that they appear to be the same as were applicable on the adjacent borrow pit, and that he is willing to comply with them in this case.

In discussing the proposed residential development, Mr. Clarkson pointed out that what is depicted at this time is general in nature, and that they would expect to adhere to any requirements or conditions in the development in order to result in a desirable area for development.

JAKE LOHKAMP, owner of property in the area, said he was in favor of this request. It was his feeling that the proposed eventual development would be desirable, and if this request is not approved, then the borrow pit lake already created would be a blight in the area.

TOM HARLEY, attorney representing Louise Recklebe, 1305 East McArthur, owner of the 20 acres adjacent on the east to subject property, spoke in opposition. He pointed out that while the eventual development of this area as proposed by the applicant, might be desirable, there is absolutely no guarantee that the development will occur. It is a hope in the future. It was Mr. Harley's feeling that the request is an exception rather than a variance, and with respect to adverse affect on adjacent property, it was his feeling that a hole in the ground such as would result would definitely be detrimental, in spite of compliance with conditions as suggested by the Secretary.

MR. HARLEY felt there was nothing unique about this situation since there have been low bids made before, but his client should not be made to suffer because of the applicant's low bid, and his client should not be made to sacrifice the value of her property just to save the applicant the cost of additional hauling of fill material to the site of construction.

The attorney stressed the fact that there is nothing to guarantee the proposed residential development, and further, the restrictions as proposed guarantee proper operation only during the time it is being used as a borrow pit. Further, it is possible that his client might some day wish to subdivide her property for residential use. With the borrow pit close-by (and if the proposed lake front residential area does not materialize as proposed by the applicant), then it would be very detrimental to the sale of such home sites. MR. HARLEY agreed, when questioned, that IF the applicant develops the area as shown with residences facing the lake area, it would increase values in the general area, but since there is no means of being certain of the development, it cannot be depended upon.

In discussing this matter with Mr. Harley it was brought out that his client's property lies to the east of Sunflower, which is the north-south road to the east of the development proposed by the applicant. He stated that his client's property is used agriculturally (for truck gardening) at this time. In considering the proposed conditions to any approval, it was pointed out that this general area is all underlaid with gravel and that the water level fluctuates as the Big River level fluctuates. MR. WILKINSON stated that as late as the morning prior to this meeting, MR. Harley's client had told his client (Mr. Clarkson) that she had no objections as long as the subject property is restricted from ever becoming a dump.

MR. CLARKSON assured the Board that while their eventual residential development may not be exactly as depicted at this time, it will conform to proper subdivision requirements, depending on

circumstances at that time. He stated also that the water table in this area is from 6 to 8 feet below ground level, and that in excavating it is necessary to install pumps to pump the water out so that they can proceed with removal of dirt.

HARTSTEIN WAS EXCUSED FROM THE MEETING

Water table level and proposed platting of the eventual residential area was briefly discussed. It was noted that right of way dedications for Sunflower Street would have to be adjusted so far as dedications from Clarkson and from the owner of the property to the east (Louise Recklebe) is concerned.

MOTION: IRWIN moved, ANDERSON seconded and it carried unanimously that the variance desired arises from some condition which is unique and which is not ordinarily found in the same zoning district in that this area is known to be underlaid with gravel whereas many other areas throughout the city do not possess such a characteristic, and further, the application area adjoins an existing borrow pit and would amount to an extension or continuation of an existing lake and further, it is in close proximity to the proposed route of the new highway (Canal Route - I-35W), and will result in less burden not only to the contractor in less hauling distance, but less burden to the general public at large in controlling the transportation of this fill material to the site of construction.

MOTION: ANDERSON moved, MOORE seconded and it carried unanimously that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents provided that proper conditions are instituted and respected against the proposed use and provided adequate controls are exercised.

IRWIN stated that it would not adversely affect adjacent property owners because of the location of the existing lake and further this is just an extension of the existing borrow pit which brings it a little closer to the east, but in his opinion, would not adversely affect adjoining property.

MOTION: ANDERSON moved, IRWIN seconded and it carried unanimously that the strict application of the enforcement provisions of the zoning ordinance will constitute unnecessary hardship upon

the property owner represented in the appeal due to the fact that according to the evidence submitted there is not a sufficient demand to utilize this area for single family development at this time.

MOTION: MOORE moved, ANDERSON seconded and it carried unanimously that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare inasmuch as not to grant the request could very possibly adversely affect certain portions of the public interest.

IRWIN said he could see where it might adversely affect the public health and safety unless certain restrictions - fencing, etc. are made a condition to approval. The Chairman pointed out that conditions to approval will be covered in the overall motion.

In considering overall approval or denial of this application, MOORE asked the staff if there were other matters of a similar nature now pending, and whether action on this particular case might set a precedent. CALBRAITH said that no other applications or proposed applications have been discussed with the staff at this time. It was anticipated, however, that similar requests might come about as construction of the Canal Route progresses to the north. MR. CLARKSON said he doubted if many such requests would arise since the State will probably provide the area for extraction on all areas north of the Arkansas River.

The suggested conditions to approval were discussed in detail and it was agreed that maintenance of the borrow pit area should be continued 5 years after the borrow pit use ceases (#7) and that the bond required in #7 should be made applicable to #5 as well as #2. It was agreed that the City of Wichita should be made a party to the restrictive covenant proposed in #8. Other wording with regard to proper maintenance was suggested and approved.

MOTION: ANDERSON moved, MOORE seconded and it carried unanimously that inasmuch as the four conditions required by Section 2.12.590.2, Code of the City of Wichita to be present before a variance can be granted, has been found to exist, that this request for a use variance be approved, subject to the following

1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (See Conditional Use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.
3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (See Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes shall consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover, planted and maintained in accordance with a high standard of maintenance.
6. Conditions 1 through 4 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 4 above.

7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition #2 above, and vegetative cover for slopes and maintenance of such vegetative cover as required in #5 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk for a term of five years subsequent to the time the borrow pit operation has been completed.

8. A restrictive covenant running with the land for 25 years should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary land fill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner, the purchaser, and the governing body of the City of Wichita, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

(The resolution is not shown as a part of the minutes as mailed but is made a part of the permanent record of Board proceedings on file in the Secretary's office.)

MOTION: ANDERSON moved, MOORE seconded and it carried unanimously that the Secretary be directed to convey to the Planning Commission the desire of the Board of Zoning Appeals that the Planning Commission consider amending the zoning ordinance with respect to borrow pits, possibly by granting the Board of Zoning Appeals authority to grant such a use as an exception, subject to certain conditions.

MOTION: MOORE moved, BENKIN seconded and it carried unanimously that by action in this particular case, it is not intended that a precedent with respect to granting of use variances for borrow pits in an "AA" zoning classification be established.

Meeting adjourned about 4:10 p.m.

Jack H. Galbraith
Secretary

RESOLUTION NO. BZA 36-64

WHEREAS, the Clarkson Construction Company, 4133 Gardner Avenue, Station "B", Kansas City 20, Missouri, by Lester Wilkinson, Attorney, 3521 West 21st Street, Wichita, Kansas, pursuant to Section 2.12.590.2, Code of the City of Wichita, has applied for a variance from the strict application of the enforcement provisions of the Zoning Ordinance, to use property as a borrow pit in the construction of Highway I-35W, said property being generally located in an area south of McArthur Road and east of Broadway between McArthur Road and 43rd Street South, and legally described as:

The South half of Lot 9, all of Lots 10 and 11, Riverside Gardens, in the City of Wichita, Sedgwick County, Kansas; and

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, at the special meeting of September 8, 1964, the Secretary observed that a quorum of the members of the Board of Zoning Appeals was not present, and declared the public hearing continued until Wednesday, September 9, 1964, at 2 p.m. in Room 401 City Building Annex, 104 South Main, Wichita, Kansas; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of September 9, 1964, consider said application; and

WHEREAS, the Board of Zoning Appeals determined that it had proper jurisdiction to consider said variance request, under the provisions of Section 2.12.590.2, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has determined that the variance desired arises from some condition which is unique and which is not ordinarily found in the same zoning district in that this area is known to be underlaid with gravel, whereas many areas throughout the city do not possess such a characteristic, and further, the application area adjoins an existing borrow pit and would amount to an extension or continuation of an existing lake, and further, the application area is in close proximity to the proposed route of the new highway (Canal Route - I-35W), and will result in less burden, not only to the contractor in less hauling distance, but less burden to the general public at large in controlling the transportation of this fill material to the site of construction; and

WHEREAS, the Board of Zoning Appeals has determined that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents, provided that proper conditions are instituted and respected against the proposed use and provided adequate controls are exercised; and

WHEREAS, the Board of Zoning Appeals has determined that the strict application of the enforcement provisions of the Zoning Ordinance will constitute unnecessary hardship upon the property owner represented in the appeal, due to the fact that according to the evidence submitted there is not a sufficient demand to utilize this area for single family development at this time; and

WHEREAS, the Board of Zoning Appeals has determined that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare inasmuch as not to grant the request could very possibly adversely affect certain portions of the public interest; and

WHEREAS, as shown above, each of the four conditions required by Section 2.12.590.2, Code of the City of Wichita to be present before a variance can be granted, has been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals of the City of Wichita, that the Superintendent of Central Inspection be and is hereby authorized and directed to issue the appropriate permit for the operation and maintenance of a borrow pit on the tract of land specifically described as follows:

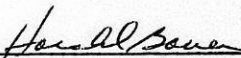
The south half of Lot 9, all of Lots 10 and 11, Riverside Gardens, in the City of Wichita, Sedgwick County, Kansas. Generally located in an area south of McArthur Road and east of Broadway between McArthur Road and 43rd Street South,

subject to the following conditions:

1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (See Conditional Use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.
3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (See Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes shall consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover, planted and maintained in accordance with a high standard of maintenance.

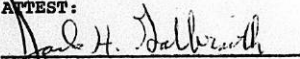
6. Conditions 1 through 4 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 4 above.
7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition #2 above, and vegetative cover for slopes and maintenance of such vegetative cover as required in #5 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk for a term of five years subsequent to the time the borrow pit operation has been completed.
8. A restrictive covenant running with the land for 25 years should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary land-fill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner, the purchaser, and the governing body of the City of Wichita, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

ADOPTED AT WICHITA, KANSAS, this 9th day of September,
1964.



Harold Bauer, Chairman

ATTEST:



Jack H. Galbraith
Secretary

September 25, 1964

Board of Zoning Appeals Members
Wichita, Kansas

Gentlemen:

Re: Case No. BEA 36-64

Attached is a copy of the letter which I have dictated for Harold Bauer's signature on the Board of Zoning Appeals case on the borrow pit, which has been appealed to the City Commission. We discussed this matter with Bob Lakin, our Assistant Planning Director, and it was his feeling that the staff had already made its recommendation and report, which was originally submitted to the Board. Consequently, it was his feeling that this letter should come from the Chairman of the Board rather than the Secretary.

I would like for you to review the letter and let us know whether or not it appears to be satisfactory. Please let us know by next Wednesday, because it will be necessary that we have this letter, and a copy of the minutes, along with the Secretary's report, in the City Manager's office by next Thursday noon, so that it can be put on the City Commission agenda for October 6.

If we do not hear from you by next Wednesday, we will assume that the letter meets with your agreement.

If you have any questions, please feel free to call.

Very truly yours,

Jack E. Galbraith
Secretary

JHG:JWH:ber
Attachments

September 25, 1964

Board of Zoning Appeals Members
Wichita, Kansas

Gentlemen:

Re: Case No. BEA 36-64

Attached is a copy of the letter which I have dictated for Harold Bauer's signature on the Board of Zoning Appeals case on the borrow pit, which has been appealed to the City Commission. We discussed this matter with Bob Lakin, our Assistant Planning Director, and it was his feeling that the staff had already made its recommendation and report, which was originally submitted to the Board. Consequently, it was his feeling that this letter should come from the Chairman of the Board rather than the Secretary.

I would like for you to review the letter and let us know whether or not it appears to be satisfactory. Please let us know by next Wednesday, because it will be necessary that we have this letter, and a copy of the minutes, along with the Secretary's report, in the City Manager's office by next Thursday noon, so that it can be put on the City Commission agenda for October 6.

If we do not hear from you by next Wednesday, we will assume that the letter meets with your agreement.

If you have any questions, please feel free to call.

Very truly yours,

Jack H. Galbraith
Secretary

JHG:JWH:ber
Attachments

September 25, 1964

Board of City Commissioners
City Building
Wichita, Kansas

Gentlemen:

Re: Case No. BEA 36-64

Under the provisions of Section 2.12.610 of the Code of the City of Wichita, an appeal from a decision of the Board of Zoning Appeals has been filed for consideration by the Board of City Commissioners.

At a special meeting of the Board of Zoning Appeals, on September 9, 1964, the Board approved a request made by the Clarkson Construction Company for a variance to permit the use of property generally located on the south side of McArthur Road between Sunflower and Alfalfa Streets for a borrow pit in conjunction with the construction of I-35W (Canal Route.)

As provided by the Code, Mr. Tom Harley, acting as agent for Louise Becklebe, an adjoining property owner who protested the granting of the permit for construction of the borrow pit, has appealed the decision of the Board of Zoning Appeals. Mr. Harley indicates in his letter of appeal that the decision of the Board to approve the variance was in error for the following reasons:

"The Board of Zoning Appeals has no jurisdiction under the ordinance. The request is not a variance, but an exception. The granting of the permit or request adversely affects the rights of appellant who is an adjacent property owner. The granting of the permit or request adversely affects public health, safety, morals, order, property, convenience and general welfare."

As indicated in the Secretary's report included in the minutes of the September 9 meeting, the Secretary recommended that the Board not take jurisdiction and that the variance be denied on the grounds

**Page 2 - Board of City Commissioners
September 25, 1964**

that this is a "use variance" and would be an usurpation of the legislative power of the governing body. However, the Board of Zoning Appeals took jurisdiction, based upon advice from legal counsel for the Board that the Board has jurisdiction to consider "use variances", and granted the variance subject to certain conditions and requirements (see minutes).

In considering the variance, the Board recognized that there were no provisions in the Zoning Ordinance which specifically mentioned borrow pits or offered any controls to protect the public interest. Consequently, in order to alleviate the hardship of the applicant, the Board granted the variance and also requested the Secretary of the Board to prepare an amendment to the Zoning Ordinance which would provide the Board of Zoning Appeals the authority to grant as an "Exception" permits for the location of borrow pits within the City and which provisions would contain adequate controls to protect the public interest.

The complete recommendation of the Secretary that the variance be denied and the reasons of the Board for recommending that the variance be granted, are not shown in this letter but are contained in the minutes of the September 9 meeting which are attached to this report.

Respectfully submitted,

Harold Bauer
Chairman

HB:JHG:ber

Attachments

September 21, 1964

Mr. Lester Wilkinson, Attorney
3521 East 21st Street
Wichita, Kansas

Dear Mr. Wilkinson:

Re: Case No. BEA 36-64

On September 15, 1964, we advised you that the Board of Zoning Appeals had approved subject application for a variance to permit a borrow pit on property located generally on the east side of both Broadway and the Interstate between McArthur Road and 43rd Street South, subject to certain conditions.

We also advised that the Board's decision might be appealed to the City Commission provided that such appeal was filed on or before September 21, 1964. The City Clerk has advised us that an appeal was filed in his office on September 15, 1964, by Tom Harley, Attorney, on behalf of Louise Recklebs, for the following reasons:

"The Board of Zoning Appeals has no jurisdiction under the ordinance. The request is not a variance, but an exception. The granting of the permit or request adversely affects the rights of appellant who is an adjacent property owner. The granting of the permit or request adversely affects public health, safety, morals, order, property, convenience and general welfare."

The appeal will be submitted to the City Commission on September 22, 1964, at which time it will be referred to the Board of Zoning Appeals for a report to the Board of City Commissioners, disclosing in what respect the application and facts offered in support thereof met or failed to meet the necessary requirements.

Page 2 - Lester Wilkinson
September 21, 1964

We will advise you when the Board of Zoning Appeal's report will be submitted to the City Commissioners for a hearing of this case.

Very truly yours,

Jack H. Galbraith
Secretary

JHG:JWH:ber

cc: The Clarkson Construction Company
4133 Gardner Avenue, Station "F"
Kansas City 20, Missouri

Thomas Harley, Attorney
Bitting Building

Robert G. Finch
City Clerk

Glen Lytle, Superintendent
of Central Inspection

Desire to bring problem of borrow
pits in city limits to attention of PC

SECRETARY'S REPORT

CASE NO. BZA 36-64

GENERAL DESCRIPTION

The property represented in this application is generally on the east side of both Broadway and the Interstate between McArthur Road and 43rd Street South.

The property in question is zoned "AA" Single Family. The existing zoning to the east, south and west is "AA" and north is "AA" and "C" Commercial.

The property in question is currently under cultivation. The existing land use to the west is vacant; south is vacant; east is single family and vacant; and north is single family.

REQUEST

The request is for a variance pursuant to Section 2.12.590.2, Code of the City of Wichita, to permit the use of the property included in this application for a borrow pit in conjunction with the construction of I-35W (Canal Route.)

JURISDICTION

The ordinance creating a Board of Zoning Appeals granted the Board jurisdiction to hear three types of cases - appeals, variances and exceptions. The Secretary feels that the intent of the ordinance insofar as it relates to variances, was to allow the Board to modify such requirements as height, setback, lot area, lot width and similar requirements to the zoning ordinance, and not to allow the granting of permission to use property in a different manner or a different use than that permitted in the zoning ordinance. To allow a different use than that specified in the zoning ordinance would be, in effect, the amendment of the zoning ordinance by a board not having legislative power or authority to do so. Since uses to be established in any specific zone are established by the City Commission by adoption of an ordinance as a legislative act, it is the opinion of the Secretary that the granting would be a legislative act capable of being exercised only by the City Commission and not within the jurisdiction of the Board of Zoning Appeals.

Richard F. Babcock, one of the leading legal authorities on planning, zoning and the proper use of the variance, in his review of present zoning ordinances and resolutions, states that "the zoning ordinance for the City of Wichita does not expressly prohibit

Keep for file

use variances, but such a prohibition can be implied from the prohibition of use exceptions and the enumeration of the types of variances that may be granted."

Babcock further points out in his recommendations that:

"Variances and exceptions should not be confused or treated alike as they are in the present ordinances. A variance is a discretionary privilege which is granted because the application of the zoning ordinances has created an unusual difficulty or a hardship for a particular property owner that was not anticipated. The exception is a technique for allowing uses that are anticipated, but as to which a fact-finding body must determine that the landowner has established that in his case the conditions applicable to the exception have been met. Variances are a form of relief from the strict provisions of the ordinances. Exceptions are really a form of deferred judgment on a particular use for which requests are anticipated, and for which provision is made in the zoning ordinance.

"Use exceptions not specifically authorized and use variances should be expressly forbidden. It is our view that if a change in use is warranted, then a change in zoning is warranted. It is a rare case indeed when a property owner can show that he is entitled to a variation because he alone faces a peculiar problem in developing his land for its zoned purposes."

The only section of the zoning ordinance which now permits borrow pits is the "C" Commercial section and the other less restrictive sections of the ordinance.

In this instance, the applicant chose not to apply for a "C" Commercial classification but, rather, applied for a variance to allow a borrow pit in an "AA" Single family district.

In the opinion of the Secretary, the zoning ordinance cannot and should not be amended through the granting of use variances. Therefore, based upon the foregoing review, it is the opinion and recommendation of the Secretary that the Board of Zoning Appeals does not have jurisdiction in this case.

In Case No. BZA 5-60, the Board of Zoning Appeals did grant a use variance for a borrow pit similar to the one requested in this application.

Another interesting viewpoint is that the Board is a quasi-judicial body rather than an administrative or legislative body. If the act of permitting a use which is otherwise not permitted can properly be termed a legislative act (and this happens when the City Commission adopts or legislates an ordinance changing or establishing use categories in the zoning code), then what right does the Board have in performing the same function as the legislative body? The statutes clearly provide for the manner in which a zoning ordinance and district classification and amendments thereto can be established. Consequently, is the act of granting a use variance a quasi-judicial act?

The Secretary is of the opinion that the proper procedure for the applicant to follow in this instance is to either:

1. Apply for a change in zoning to a "C" Commercial classification where borrow pits are permitted as a use by right; or
2. Request that the zoning ordinance be amended to permit borrow pits through one of the following techniques:
 - a. in all zoning districts as a matter of right;
 - b. as a special exception within designated zones, subject to conditions outlined in the ordinance;
 - c. in special use districts, such as a sand and gravel or natural resource zone; perhaps excluding some or all other uses;

ADDITIONAL COMMENTS ON JURISDICTION

If the Board should determine that it has jurisdiction to consider use variances, then all four conditions must be found to exist before the variance may be granted.

1. That the variance arises from such condition which is unique and which is not ordinarily found in the same zoning district.
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.
3. That the strict application of the enforcement provisions of the zoning ordinance will constitute unnecessary hardship upon the property owner represented in the appeal.

4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare.

The applicant has submitted a statement of justification which is included as Attachment #1 to this report.

UNIQUENESS

The attorney for the applicant has indicated in his statement of justification that the variance desired arises from such condition which is unique and not ordinarily found in the same zoning district inasmuch as a portion of the property owned by the applicant was used for a borrow pit in conjunction with construction of the I-235 bypass. He also points out that this borrow pit was operated in accordance with the requirements placed upon it by the County Commission as recommended by the Wichita-Sedgwick County Metropolitan Area Planning Commission. He further points out that this particular borrow pit was approved when it was in the county (the property has since been annexed to the city), and was previously under the jurisdiction of the County Zoning Resolution, which allows borrow pits in any zoning district (as a conditional use) when the location is approved by the County Commission. He goes on to point out that this request is particularly unique inasmuch as there is no such comparable provision in the zoning ordinance of the City of Wichita which permits borrow pits. It is also suggested that the applicant did not wish to apply for "C" zoning since it was his feeling that to grant "C" zoning in this area for a borrow pit would be in violation of the Planning Commission's policy against "spot zoning" and further "C" zoning permits a large number of uses which would be detrimental to the entire area around the applicant's property and would also be objectionable to other nearby property owners.

The Secretary is of the opinion that uniqueness should be considered as to the physical characteristics of the property concerned. If this criteria is used, there appears to be nothing which is exceptionally unique about the physical characteristics of the property in question. There is, however, a unique physical characteristic concerning the land directly to the west, which has been used as a borrow pit. On several occasions in the past few months, the Board has considered uniqueness as to the use of the property rather than to its physical characteristics. If this definition is used, uniqueness can probably be found to exist on the basis of a proposed use suggested by the applicant. However, extreme care should be exercised in using this criteria for uniqueness, since this makes almost every piece of property in the city unique.

ADJACENT PROPERTY

It is the opinion of the Secretary that if the proper controls are exercised, the granting of the variance should in no way adversely affect adjacent property owners.

HARDSHIP

The attorney for the applicant suggests that the applicant will be burdened with an unnecessary hardship if the variance is not granted inasmuch as he has a contract with the State Highway Department which he must fulfill.

The Secretary has taken the position that hardship exists if the property cannot be used for the purpose for which it is zoned.

It is the Secretary's opinion that if the variance is granted, the applicant would be enjoying a privilege that would not be mutually enjoyed by other property owners in the same zoning district since borrow pits are not permitted as a "use by right" in the "AA" district.

PUBLIC INTEREST

The Secretary agrees with the applicant in that the granting of the variance should in no way adversely affect the public interest, provided appropriate conditions related to public health and safety are established as a condition of approval.

It is the Secretary's opinion that all four conditions necessary to the granting of a variance (hardship) have not been found to exist. Therefore, it is recommended that the variance be denied in that an adequate showing has not been made by the applicant in his justification of hardship.

However, in the event the Board takes jurisdiction and finds all four conditions do exist and wishes to approve the variance, the Secretary recommends that the variance be approved, subject to the following conditions and requirements:

1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
- A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines

*Heated
Deep
12 ft.*
*January 21,
by ordinance 20*

and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (see conditional use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.

3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (see Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.

4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.

5. Vegetative cover for slopes ^{shall} consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover, ^{planted and maintained in accordance with a continuing high standard of maintenance.}

6. ^{Conditions 1 through 5 above} shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper performance to conditions as established in items 1 through ~~4~~ above.

7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition #2 above, ^{and the amount to be provided for same} said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk until such time as ~~the borrow pit operation has been completed.~~

5 years beyond the time the borrow pit operation has been completed

and for maintenance of vegetative cover as provided in condition #5.

8. A restrictive covenant running with the land for 25 years, should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary landfill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner and the purchaser, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

jurisdiction

petition moves and more records
jurisdiction

Lester Wilkinson appearing for Clarkson Dev. Co.
W. E. Clarkson

Jake Locksump

Sam Norley, atty & Laurie Nerklke

1. unique - so that it is underlain with gravel, adjacent slating borrow pit and would adjoin and empty lake and in close proximity to 1-35W

Anderson

2. - provided proper conditions are exercised and respected already take there and is just an extension. JB

Anderson

3. ~~land~~ presently zoned for the use proposed. land cannot be used for "AA" zoning.

Moore

4. not to grant the request possibly could adversely affect certain segments of public interest further certain conditions be imposed.

BOARD OF ZONING APPEALS

AGENDA

SEPTEMBER 9, 1964

A special meeting of the Board of Zoning Appeals will be held on Wednesday, September 9, 1964, at 2 p.m. in Room 401 City Building Annex, 104 South Main, Wichita, Kansas, at which time the following items will be considered:

1. Case No. BZA 36-64

Applicant: The Clarkson Construction Company

Request: Variance

Reason: To permit the use of the property for a borrow pit in conjunction with the construction of I-35W (Canal Route)

Location: Generally located on the east side of both Broadway and the Interstate between McArthur Road and 43rd Street South

Existing zoning: "AA" Single Family

2. Other Matters.

Jack H. Galbraith
Secretary

Board of Zoning Appeals

September 18, 1964

Robert G. Finch, City Clerk

Jack H. Galbraith, Secretary

Case No. BZA 36-64

Attached is a copy of Resolution No. BZA 36-64, covering action taken by the Board of Zoning Appeals on September 9, 1964, in connection with the above numbered case. An appeal may be filed in your office on or before September 21, 1964. If an appeal is filed, please advise.

JHG:ber

Attachment

APPEAL TO
BOARD OF CITY COMMISSIONERS

FROM

DECISION OF BOARD OF ZONING APPEALS

Sept 15, 1964
39

I. Name of Appellant Louise Recklebe
Mailing Address 1305 E. McArthur Phone JA 4-3664
Name of Agent Tom Harley
Mailing Address 408 Bitting Building Phone AM 2-7479

II. Appellant herein appeals from the decision of the Board of Zoning Appeals relating to Case Number BZA-36-64 in which The Clarkson Construction Company applied for a variance for a barrow pit in conjunction with the construction of Highway I-35W

(describe variance or exception requested in original application)
East Broadway between McArthur Road & 43rd Street South
for property located at _____ (address) and legally
S 1/2 of Lot 9 & all of 10 & 11, Block(s) _____, Riverside Gardens

Addition. The Board of Zoning Appeals decision to approve
(deny, approve) the application was in error and should be reversed

for the following reasons: The Board of Zoning Appeals has no jurisdiction under the ordinance. The request is not a variance, but an exception. The granting of the permit or request adversely affects the rights of appellant who is an adjacent property owner. The granting of the permit or request adversely affects public health, safety, morals, order, property, convenience and general welfare.

Louise Recklebe
Appellant Louise Recklebe
/s/ Tom Harley
Authorized Agent

OFFICE USE ONLY:

This appeal from a decision rendered by the Board of Zoning Appeals was received in the Office of the City Clerk at 1:35 (a.m., p.m.) Sept 15 1964 (date).

Signed _____

Title _____

September 15, 1964

Mr. Lester Wilkinson, Attorney
3521 East 21st Street
Wichita, Kansas

Dear Mr. Wilkinson:

Re: BZA Case No. 36-64

This is to advise you that at a special meeting of the Board of Zoning Appeals of the City of Wichita, the above request for a variance to permit a borrow pit in an area generally located on the east side of both Broadway and the Interstate between McArthur Road and 43rd Street South, was considered on September 9, 1964.

It was the decision of the Board to approve this request, subject to the following conditions:

1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (See Conditional Use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.

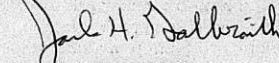
3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (See Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes shall consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover, planted and maintained in accordance with a high standard of maintenance.
6. Conditions 1 through 4 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 4 above.
7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition #2 above, and vegetative cover for slopes and maintenance of such vegetative cover as required in #5 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk for a term of five years subsequent to the time the borrow pit operation has been completed.
8. A restrictive covenant running with the land for 25 years should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary landfill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner, the purchaser, and the governing body of the City of Wichita, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

Page 3 - Lester Wilkinson, Attorney
September 15, 1964

Section 2.12.610 of the Code of the City of Wichita provides that the decision of the Board of Zoning Appeals shall be final unless it is appealed to the Board of City Commissioners within ten days of the date of the Board's action. Accordingly, an appeal could be filed in this case on or before September 21, 1964.

Subsequent to the expiration of the appeal period, you will be advised whether or not an appeal has been filed. If none has been filed, the decision of the Board will be final and the Superintendent of Central Inspection will be in a position to issue the appropriate permit.

Very truly yours,



Jack H. Galbraith
Secretary

JHG:JWH:ber

cc: The Clarkson Construction Company
4133 Gardner Avenue, Station "F"
Kansas City 20, Missouri

Robert G. Finch, City Clerk

Glen Lytle, Superintendent of
Central Inspection

Thomas Harley, Attorney
Bitting Building

SECRETARY'S REPORT

CASE NO. BZA 36-64

GENERAL DESCRIPTION

The property represented in this application is generally on the east side of both Broadway and the Interstate between McArthur Road and 43rd Street South.

The property in question is zoned "AA" Single Family. The existing land use to the east, south and west is "AA" and north is "AA" and "C" Commercial.

The property in question is currently under cultivation. The existing land use to the west is vacant; south is vacant; east is single family and vacant; and north is single family.

REQUEST

The request is for a variance pursuant to Section 2.12.590.2, Code of the City of Wichita, to permit the use of the property included in this application for a borrow pit in conjunction with the construction of I-35W (Canal Route.)

JURISDICTION

The ordinance creating a Board of Zoning Appeals granted the Board jurisdiction to hear three types of cases - appeals, variances and exceptions. The Secretary feels that the intent of the ordinance insofar as it relates to variances, was to allow the Board to modify such requirements as height, setback, lot area, lot width and similar requirements to the zoning ordinance, and not to allow the granting of permission to use property in a different manner or a different use than that permitted in the zoning ordinance. To allow a different use than that specified in the zoning ordinance would be, in effect, the amendment of the zoning ordinance by a board not having legislative power or authority to do so. Since uses to be established in any specific zone are established by the City Commission by adoption of an ordinance as a legislative act, it is the opinion of the Secretary that the granting would be a legislative act capable of being exercised only by the City Commission and not within the jurisdiction of the Board of Zoning Appeals.

Richard F. Babcock, one of the leading legal authorities on planning, zoning and the proper use of the variance, in his review of present zoning ordinances and resolutions, states that "the zoning ordinance for the City of Wichita does not expressly prohibit

use variances, but such a prohibition can be implied from the prohibition of use exceptions and the enumeration of the types of variances that may be granted."

Babcock further points out in his recommendations that:

"Variances and exceptions should not be confused or treated alike as they are in the present ordinances. A variance is a discretionary privilege which is granted because the application of the zoning ordinances has created an unusual difficulty or a hardship for a particular property owner that was not anticipated. The exception is a technique for allowing uses that are anticipated, but as to which a fact-finding body must determine that the landowner has established that in his case the conditions applicable to the exception have been met. Variances are a form of relief from the strict provisions of the ordinances. Exceptions are really a form of deferred judgment on a particular use for which requests are anticipated, and for which provision is made in the zoning ordinance.

"Use exceptions not specifically authorized and use variances should be expressly forbidden. It is our view that if a change in use is warranted, then a change in zoning is warranted. It is a rare case indeed when a property owner can show that he is entitled to a variation because he alone faces a peculiar problem in developing his land for its zoned purposes."

The only section of the zoning ordinance which now permits borrow pits is the "C" Commercial section and the other less restrictive sections of the ordinance.

In this instance, the applicant chose not to apply for a "C" Commercial classification but, rather, applied for a variance to allow a borrow pit in an "AA" Single family district.

In the opinion of the Secretary, the zoning ordinance cannot and should not be amended through the granting of use variances. Therefore, based upon the foregoing review, it is the opinion and recommendation of the Secretary that the Board of Zoning Appeals does not have jurisdiction in this case.

In Case No. BZA 5-60, the Board of Zoning Appeals did grant a use variance for a borrow pit similar to the one requested in this application.

Another interesting viewpoint is that the Board is a quasi-judicial body rather than an administrative or legislative body. If the act of permitting a use which is otherwise not permitted can properly be termed a legislative act (and this happens when the City Commission adopts or legislates an ordinance changing or establishing use categories in the zoning code), then what right does the Board have in performing the same function as the legislative body? The statutes clearly provide for the manner in which a zoning ordinance and district classification and amendments thereto can be established. Consequently, is the act of granting a use variance a quasi-judicial act?

The Secretary is of the opinion that the proper procedure for the applicant to follow in this instance is to either:

1. Apply for a change in zoning to a "C" Commercial classification where borrow pits are permitted as a use by right; or
2. Request that the zoning ordinance be amended to permit borrow pits through one of the following techniques:
 - a. in all zoning districts as a matter of right;
 - b. as a special exception within designated zones, subject to conditions outlined in the ordinance;
 - c. in special use districts, such as a sand and gravel or natural resource zone; perhaps excluding some or all other uses;

ADDITIONAL COMMENTS ON JURISDICTION

If the Board should determine that it has jurisdiction to consider use variances, then all four conditions must be found to exist before the variance may be granted.

1. That the variance arises from such condition which is unique and which is not ordinarily found in the same zoning district.
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.
3. That the strict application of the enforcement provisions of the zoning ordinance will constitute unnecessary hardship upon the property owner represented in the appeal.

4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare.

The applicant has submitted a statement of justification which is included as Attachment #1 to this report.

UNIQUENESS

The attorney for the applicant has indicated in his statement of justification that the variance desired arises from such condition which is unique and not ordinarily found in the same zoning district inasmuch as a portion of the property owned by the applicant was used for a borrow pit in conjunction with construction of the I-235 bypass. He also points out that this borrow pit was operated in accordance with the requirements placed upon it by the County Commission as recommended by the Wichita-Sedgwick County Metropolitan Area Planning Commission. He further points out that this particular borrow pit was approved when it was in the county (the property has since been annexed to the city), and was previously under the jurisdiction of the County Zoning Resolution, which allows borrow pits in any zoning district (as a conditional use) when the location is approved by the County Commission. He goes on to point out that this request is particularly unique inasmuch as there is no such comparable provision in the zoning ordinance of the City of Wichita which permits borrow pits. It is also suggested that the applicant did not wish to apply for "C" zoning since it was his feeling that to grant "C" zoning in this area for a borrow pit would be in violation of the Planning Commission's policy against "spot zoning" and further "C" zoning permits a large number of uses which would be detrimental to the entire area around the applicant's property and would also be objectionable to other nearby property owners.

The Secretary is of the opinion that uniqueness should be considered as to the physical characteristics of the property concerned. If this criteria is used, there appears to be nothing which is exceptionally unique about the physical characteristics of the property in question. There is, however, a unique physical characteristic concerning the land directly to the west, which has been used as a borrow pit. On several occasions in the past few months, the Board has considered uniqueness as to the use of the property rather than to its physical characteristics. If this definition is used, uniqueness can probably be found to exist on the basis of a proposed use suggested by the applicant. However, extreme care should be exercised in using this criteria for uniqueness, since this makes almost every piece of property in the city unique.

ADJACENT PROPERTY

It is the opinion of the Secretary that if the proper controls are exercised, the granting of the variance should in no way adversely affect adjacent property owners.

HARDSHIP

The attorney for the applicant suggests that the applicant will be burdened with an unnecessary hardship if the variance is not granted inasmuch as he has a contract with the State Highway Department which he must fulfill.

The Secretary has taken the position that hardship exists if the property cannot be used for the purpose for which it is zoned.

It is the Secretary's opinion that if the variance is granted, the applicant would be enjoying a privilege that would not be mutually enjoyed by other property owners in the same zoning district since borrow pits are not permitted as a "use by right" in the "AA" district.

PUBLIC INTEREST

The Secretary agrees with the applicant in that the granting of the variance should in no way adversely affect the public interest, provided appropriate conditions related to public health and safety are established as a condition of approval.

It is the Secretary's opinion that all four conditions necessary to the granting of a variance (hardship) have not been found to exist. Therefore, it is recommended that the variance be denied in that an adequate showing has not been made by the applicant in his justification of hardship.

However, in the event the Board takes jurisdiction and finds all four conditions do exist and wishes to approve the variance, the Secretary recommends that the variance be approved, subject to the following conditions and requirements:

1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines

and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (see conditional use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.

3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (see Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes should consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover.
6. Conditions 1 through 5 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 5 above.
7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition #2 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk until such time as the borrow pit operation has been completed.

8. A restrictive covenant running with the land for 25 years, should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary landfill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner and the purchaser, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

SECRETARY'S REPORT
SECRETARY'S REPORT

CASE NO. BZA 36-64

GENERAL DESCRIPTION

The property represented in this application is generally on the east side of both Broadway and the Interstate between McArthur Road and 43rd Street South.

The property in question is zoned "AA" Single Family. The existing zoning to the east, south and west is "AA" and north is "AA" and "c" Commercial.

The property in question is currently under cultivation. The existing land use to the west is vacant; south is vacant; east is single family and vacant; and north is single family.

REQUEST

The request is for a variance pursuant to Section 2.12.590.2, Code of the City of Wichita, to permit the use of the property included in this application for a borrow pit in conjunction with the construction of I-35W (Canal Route.)

DISCUSSION

The ordinance creating a Board of Zoning Appeals granted the Board jurisdiction to hear three types of cases - appeals, variances and exceptions. The Secretary feels that the intent of the ordinance insofar as it relates to variances, was to allow the Board to modify such requirements as height, setback, lot area, lot width and similar requirements to the zoning ordinance, and not to allow the granting of permission to use property in a different manner or a different use than that permitted in the zoning ordinance. To allow a different use than that specified in the zoning ordinance would be, in effect, the amendment of the zoning ordinance by a board not having legislative power or authority to do so. Since uses to be established in any specific zone are established by the City Commission by adoption of an ordinance as a legislative act, it is the opinion of the Secretary that the granting would be a legislative act capable of being exercised only by the City Commission and not within the jurisdiction of the Board of Zoning Appeals.

Richard F. Babcock, one of the leading legal authorities on planning, zoning and the proper use of the variance, in his review of present zoning ordinances and resolutions, states that "the zoning ordinance for the City of Wichita does not expressly prohibit

Page 2 - Secretary's Report
Case No. BZA 36-64

use variances, but such a prohibition can be implied from the prohibition of use exceptions and the enumeration of the types of variances that may be granted."

Babcock further points out in his recommendations that:

"Variances and exceptions should not be confused or treated alike as they are in the present ordinances. A variance is a discretionary privilege which is granted because the application of the zoning ordinances has created an unusual difficulty or a hardship for a particular property owner that was not anticipated. The exception is a technique for allowing uses that are anticipated, but as to which a fact-finding body must determine that the landowner has established that in his case the conditions applicable to the exception have been met. Variances are a form of relief from the strict provisions of the ordinances. Exceptions are really a form of deferred judgment on a particular use for which requests are anticipated, and for which provision is made in the zoning ordinance.

"Use exceptions not specifically authorized and use variances should be expressly forbidden. It is our view that if a change in use is warranted, then a change in zoning is warranted. It is a rare case indeed when a property owner can show that he is entitled to a variation because he alone faces a peculiar problem in developing his land for its zoned purposes."

The only section of the zoning ordinance which now permits borrow pits is the "C" Commercial section and the other less restrictive sections of the ordinance.

In this instance, the applicant chose not to apply for a "C" Commercial classification but, rather, applied for a variance to allow a borrow pit in an "AA" Single family district.

In the opinion of the Secretary, the zoning ordinance cannot and should not be amended through the granting of use variances. Therefore, based upon the foregoing review, it is the opinion and recommendation of the Secretary that the Board of Zoning Appeals does not have jurisdiction in this case.

In Case No. BZA 5-60, the Board of Zoning Appeals did grant a use variance for a borrow pit similar to the one requested in this application.

Page 3 - Secretary's Report
Case No. BZA 36-64

Another interesting viewpoint is that the Board is a quasi-judicial body rather than an administrative or legislative body. If the act of permitting a use which is otherwise not permitted can properly be termed a legislative act (and this happens when the City Commission adopts or legislates an ordinance changing or establishing use categories in the zoning code), then what right does the Board have in performing the same function as the legislative body? The statutes clearly provide for the manner in which a zoning ordinance and district classification and amendments thereto can be established. Consequently, is the act of granting a use variance a quasi-judicial act?

The Secretary is of the opinion that the proper procedure for the applicant to follow in this instance is to either:

1. Apply for a change in zoning to a "C" Commercial classification where borrow pits are permitted as a use by right; or
2. Request that the zoning ordinance be amended to permit borrow pits through one of the following techniques:
 - a. in all zoning districts as a matter of right;
 - b. as a special exception within designated zones, subject to conditions outlined in the ordinance;
 - c. in special use districts, such as a sand and gravel or natural resource zone; perhaps excluding some or all other uses.

ADDITIONAL COMMENTS ON JURISDICTION

If the Board should determine that it has jurisdiction to consider use variances, then all four conditions must be found to exist before the variance may be granted.

1. That the variance arises from such condition which is unique and which is not ordinarily found in the same zoning district.
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.
3. That the strict application of the enforcement provisions of the zoning ordinance will constitute unnecessary hardship upon the property owner represented in the appeal.

Page 4 - Secretary's Report
Case No. BZA 36-64

4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare.

The applicant has submitted a statement of justification which is included as Attachment #1 to this report.

UNIQUENESS

The attorney for the applicant has indicated in his statement of justification that the variance desired arises from such condition which is unique and not ordinarily found in the same zoning district inasmuch as a portion of the property owned by the applicant was used for a borrow pit in conjunction with construction of the I-235 bypass. He also points out that this borrow pit was operated in accordance with the requirements placed upon it by the County Commission as recommended by the Wichita-Sedgwick County Metropolitan Area Planning Commission. He further points out that this particular borrow pit was approved when it was in the county (the property has since been annexed to the city), and was previously under the jurisdiction of the County Zoning Resolution, which allows borrow pits in any zoning district (as a conditional use) when the location is approved by the County Commission. He goes on to point out that this request is particularly unique inasmuch as there is no such comparable provision in the zoning ordinance of the City of Wichita which permits borrow pits. It is also suggested that the applicant did not wish to apply for "C" zoning since it was his feeling that to grant "C" zoning in this area for a borrow pit would be in violation of the Planning Commission's policy against "spot zoning" and further "C" zoning permits a large number of uses which would be detrimental to the entire area around the applicant's property and would also be objectionable to other nearby property owners.

The Secretary is of the opinion that uniqueness should be considered as to the physical characteristics of the property concerned. If this criteria is used, there appears to be nothing which is exceptionally unique about the physical characteristics of the property in question. There is, however, a unique physical characteristic concerning the land directly to the west, which has been used as a borrow pit. On several occasions in the past few months, the Board has considered uniqueness as to the use of the property rather than to its physical characteristics. If this definition is used, uniqueness can probably be found to exist on the basis of a proposed use suggested by the applicant. However, extreme care should be exercised in using this criteria for uniqueness, since this makes almost every piece of property in the city unique.

Page 5 - Secretary's Report
Case No. BZA 36-64

ADJACENT PROPERTY

It is the opinion of the Secretary that if the proper controls are exercised, the granting of the variance should in no way adversely affect adjacent property owners.

HARDSHIP

The attorney for the applicant suggests that the applicant will be burdened with an unnecessary hardship if the variance is not granted inasmuch as he has a contract with the State Highway Department which he must fulfill.

The Secretary has taken the position that hardship exists if the property cannot be used for the purpose for which it is zoned.

It is the Secretary's opinion that if the variance is granted, the applicant would be enjoying a privilege that would not be mutually enjoyed by other property owners in the same zoning district since borrow pits are not permitted as a "use by right" in the "AA" district.

PUBLIC INTEREST

The Secretary agrees with the applicant in that the granting of the variance should in no way adversely affect the public interest, provided appropriate conditions related to public health and safety are established as a condition of approval.

It is the Secretary's opinion that all four conditions necessary to the granting of a variance (hardship) have not been found to exist. Therefore, it is recommended that the variance be denied in that an adequate showing has not been made by the applicant in his justification of hardship.

However, in the event the Board takes jurisdiction and finds all four conditions do exist and wishes to approve the variance, the Secretary recommends that the variance be approved, subject to the following conditions and requirements:

1. The earth should be extracted to a minimum depth of two (2) feet below the normal water table, as determined by the Wichita-Sedgwick County Health Department.
2. A 42" to 48" V-mesh wire or chain link fence of a minimum height of 58", and topped by two strands of barbed wire, (as required in Ordinance No. 27-273 of the Code of the City of Wichita), shall be erected along the north, east, south and west property lines

Page 6 - Secretary's Report
Case No. BZA 36-64

and may provide for reasonable access gates installed at the height of the fence, which gates shall be locked at all times except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity, and further provided that in no case shall the fence be erected closer than 15 feet to the actual excavation. Said fence shall be kept in good repair. However, in the event it should be the desire of the applicant to join the borrow pit west of the west property line (see conditional use CU-35), to subject borrow pit, said fence shall be erected so as to completely enclose both borrow pits.

3. Excavation shall not approach any closer than 200 feet of the east and south property lines, nor any closer than 25 feet to the north or west property lines, as set forth in the application, except that no excavation shall approach nearer than sixty (60) feet to the center line of any platted street. However, in the event it should be the desire of the applicant to join the borrow pit to the west of the west property line (see Conditional Use CU-35), to subject borrow pit, then the west excavation setback requirement shall not be required.
4. The side slope of the excavation shall be no more steep than five horizontal to one vertical.
5. Vegetative cover for slopes should consist of a short, perennial drought resistant grass or combination of grasses, which permit the establishment of a good sod cover.
6. Conditions 1 through 5 above shall be made subject of the performance bond presented by the contractor to the State Highway Commission, and a copy of said performance bond shall be filed with the City Clerk's office to ensure proper conformance to conditions as established in items 1 through 5 above.
7. A further separate performance bond shall be filed in the office of the City Clerk to cover separately and apart, the erection and maintenance of the fence as required in condition #2 above. Said bond shall be in the amount of \$2,000 and shall run in the favor of the City of Wichita. Said bond shall remain on file in the office of the City Clerk until such time as the borrow pit operation has been completed.

Page 7 - Secretary's Report
Case No. BZA 36-64

8. A restrictive covenant running with the land for 25 years, should be made a part of the deed from the present owner to Clarkson Construction Company, the purchaser, which covenant shall restrict the future use of the borrow pit area from use in the future as a sand pit, sanitary landfill, and trash dumping (after the present borrow operation has ceased.) If this is not made a part of the deed, then a contract should be prepared between the present owner and the purchaser, setting forth the above restrictions, which restrictions are made for the benefit of the public generally, and adjoining property owners, and filed of record at the time the deed is recorded and before the permit for the borrow pit is issued.

ORDINANCE NO. 27-273

AN ORDINANCE ESTABLISHING STANDARDS OF PUBLIC SAFETY AND REQUIRING THE FENCING OF BORROW PITS, SAND PITS AND GRAVEL PITS WITHIN THE CITY OF WICHITA, KANSAS.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:

SECTION 1: DEFINITIONS. Unless otherwise specified herein, the following officers, parties and terms shall be defined as follows:

- (1) "City" shall mean the City of Wichita, Sedgwick County, Kansas.
- (2) "Superintendent of Central Inspection" shall mean the Superintendent of the Division of Central Inspection of the Department of Public Works of the City of Wichita, Kansas, or his duly authorized representative.
- (3) "Person" shall mean a natural person, legal entity or organization including, but not limited to, an individual, firm, association, joint stock company, syndicate, joint venture, partnership or corporation.
- (4) "Owner" shall mean any person, who, alone, or jointly or severally with others:
 - (a) Shall have record legal title to any premises presently or in the future being operated as a borrow pit, sand pit or gravel pit, with or without accompanying actual possession thereof; or,

- (b) Shall have charge of any such premises as owner, agent of the owner, executor, administrator, trustee, or guardian of the estate of the owner, lessee, tenant or anyone having the right of use of such borrow pit, sand pit, or gravel pit under authority of the legal titleholder.
- (5) "Premises" shall mean a lot, plot or parcel of land being operated as, or previously operated as, a site for the operation of a borrow pit, sand pit or gravel pit, and in which water is ponded or trapped.
- (6) "Borrow Pit" shall mean a pit or bank from which material is taken, or has been taken, for use in filling or embanking or other similar uses and in which water is ponded or trapped.
- (7) "Sand-Gravel Pit" shall mean an excavation from which sand or gravel is removed, or has been removed, and in which water is ponded or trapped.

SECTION 2: REGULATION OF BORROW PITS, SAND PITS AND GRAVEL

PITS. It is hereby declared to be unlawful for any person to operate or maintain within the City of Wichita any borrow pit, sand pit or gravel pit unless the following conditions of operation, maintenance and public protection are established and maintained by the owner of such premises:

- (1) A good and sufficient fence shall be constructed so as to completely enclose said borrow pit, sand pit or gravel pit.
- (2) In no case shall the construction of the fence be within 15 feet of the actual excavation at all points of said excavation and such fence may provide for reasonable access gates installed at the

height of the fence, which gates shall be locked except during working hours when the pit is being used for the removal of sand, gravel or filling material or other business activity. Such fence shall be maintained in good repair.

- (3) Such fences shall be a minimum height of fifty-eight inches (58") and shall be of the following types construction:

- (a) A V-mesh wire or chain link fence; or,
- (b) A 42" to 48" V-mesh wire or chain link fence with two or more strands of barbed wire; or,
- (c) A solid metal or solid masonry fence; or,
- (d) A wood fence which may have cracks or openings not in excess of five percent (5%) of the area of such fence.

- (4) Provided, however, that fences existing at the time of the taking effect of this ordinance shall be inspected by the Superintendent of Central Inspection and approved or disapproved by him, or he shall make requirements to have substantial compliance with the above section (3), a, b, c, and d. In such cases the owners shall have the right to appeal the decision of the Superintendent of Central Inspection, and approval of existing facilities by either said Superintendent of Central Inspection or a majority of the City Commissioners shall be deemed compliance with this ordinance.

SECTION 3: Any violation of this ordinance is to be deemed a misdemeanor.

*2x4 mesh
42" - 48"
5 strands*

SECTION 4: Any continued violation of the foregoing provisions of this ordinance shall be regarded as a public nuisance and in addition to the remedy of prosecution as provided in this ordinance, the Superintendent of Central Inspection is hereby authorized, empowered and directed to abate or suppress any such nuisance

- (1) For the purpose of carrying out the provisions of this section, the Superintendent of Central Inspection is hereby authorized to enter into or upon any premises occupied by a borrow pit, sand pit or gravel pit, for the purpose of making an examination and to determine whether or not a nuisance exists.
- (2) If, upon investigation, the Superintendent of Central Inspection determines that a nuisance does exist, he shall, after giving proper notice as provided in Section 5 of this ordinance, proceed to cause the nuisance to be abated or suppressed in order that the site comply with the requirements of Section 2 of this ordinance, and to tax the costs thereof against the lot or tract of ground upon which the nuisance is located and maintained as provided by law.

SECTION 5: Whenever the Superintendent of Central Inspection shall determine that there has been a continuing violation of any provisions of this ordinance constituting a public nuisance, he shall give notice of such alleged violation to the person or persons responsible therefor, as hereinafter provided. Such notices shall conform to the following:

- (1) They shall be in writing;
- (2) The violations alleged to exist or to have been committed shall be itemized;
- (3) They shall provide time for correction of the violation, such time not to exceed thirty (30) days;
- (4) They shall be addressed to and served upon the owner and occupants of the premises, if there be any such occupants.
- (5) Provided, that such notices shall be deemed properly served upon such owner, operator, or occupant if a copy thereof is sent by certified mail to his last known address; provided further, if the notice cannot be conveniently served by the aforescribed method of service, service of the notice is to be made upon such person or persons by at least one publication in the official newspaper of the City of Wichita, Kansas, such publication to contain the conditions of notice.

SECTION 6: Any person who shall, without the consent of the owner or occupant, enter upon the premises after all gates of such fence have been closed and locked, shall be guilty of a misdemeanor.

SECTION 7: This ordinance shall be in force and effect from and after its passage, approval and publication once in the official city paper.

ADOPTED at Wichita, Kansas, this 16th day of July, 1963.

Gerald F. Byrd Gerald F. Byrd
MAYOR

ATTEST:

C. H. Funk

C. H. Funk
City Clerk

CASE NO. BZA 36-64

1964

9, 1964:

15 NOTICES MAILED AUGUST 20, FOR MEETING OF SEPTEMBER ~~22nd 1964~~

The Clarkson Construction Company
4133 Gardner Avenue, Station "F"
Kansas City 20, Missouri

Leo T. Zeller
527 South McComas

Lester Wilkinson
3521 West 21st Street

Louise Recklebe
1305 East McArthur

John Anglin
Minnie Anglin
920 East 43rd Street South

Albert Lohkamp
Monett, Missouri

Marguerite Lohkamp
1127 East McArthur Road

Gertrude Lipke
George Lipke
2720 West 63 Street

Herman and Cecelia Lohkamp
Conway Springs, Kansas

Frank Zeller
Villa Maria Care Home
Mulvane, Kansas

Henry Zeller
R.F.D.
Olpe, Kansas

Carl Zeller
3859 South Meridian

Josephine Zeller Krause
2582 South Mosley

John Zeller
3100 West Douglas

Teresa Zeller Smarsh
R.F.D.
Cheney, Kansas

BOARD OF ZONING APPEALS
Room 402 City Building Annex
104 South Main
Wichita, Kansas

August 20, 1964

NOTICE TO ADJOINING PROPERTY OWNERS

Case No. BZA 36-64

An application has been filed by The Clarkson Construction Company, 4133 Gardner Avenue, Station "F", Kansas City, 20, Missouri, by Lester Wilkinson, attorney, 3521 West 21st Street, Wichita, Kansas, pursuant to Section 2.12.590, Code of the City of Wichita, requesting a variance to permit the use of the following described property for a borrow pit in conjunction with the construction of Highway I-35W:

The South half of Lot 9, all of Lots 10 and 11, Riverside Gardens, in the City of Wichita, Sedgwick County, Kansas. Generally located in an area east of Broadway and in an area between McArthur Road and 43rd Street South.

This application has been assigned Case No. BZA 36-64, and will be considered by the Board of Zoning Appeals at its meeting on Wednesday, September 9, 1964, at 2 p.m. in Room 401 City Building Annex, 104 South Main, Wichita, Kansas, at which time you may appear, if you so desire, either in person or by agent or attorney.

Jack H. Galbraith
Secretary

BOARD OF ZONING APPEALS
Room 402 City Building Annex
104 South Main
Wichita, Kansas

August 20, 1964

NOTICE TO ADJOINING PROPERTY OWNERS

Case No. BZA 36-64

An application has been filed by The Clarkson Construction Company, 4133 Gardner Avenue, Station "F", Kansas City, 20, Missouri, by Lester Wilkinson, attorney, 3521 West 21st Street, Wichita, Kansas, pursuant to Section 2.12.590, Code of the City of Wichita, requesting a variance to permit the use of the following described property for a borrow pit in conjunction with the construction of Highway I-35W:

The South half of Lot 9, all of Lots 10 and 11, Riverside Gardens, in the City of Wichita, Sedgwick County, Kansas. Generally located in an area east of Broadway and in an area between McArthur Road and 43rd Street South.

This application has been assigned Case No. BZA 36-64, and will be considered by the Board of Zoning Appeals at its meeting on Wednesday, September 2, 1964, at 2 p.m. in Room 401 City Building Annex, 104 South Main, Wichita, Kansas, at which time you may appear, if you so desire, either in person or by agent or attorney.

Jack H. Galbraith
Secretary

BOARD OF ZONING APPEALS

CASE NO. 36-64

CITY OF WICHITA, KANSAS

FILED 8-12-64

APPLICATION FOR VARIANCE

I. Name of Applicant The Clarkson Construction Company
Mailing Address 4133 Gardner Avenue, Station "F" Phone HU 3-8800
Kansas City 20, Missouri
Name of Authorized Agent Lester Wilkinson
Mailing Address 3521 West 21st Street Phone WH 3-9377
Relationship of applicant to property is that of Owner under attached
(owner, tenant, lessee, other) Contracts

II. The variance requested is for use of property as a "borrow pit" in the
construction of Highway I-35W

in an area McArthur Rd. & east of
for property located (South of Pawnee, East of Broadway and West of
Broadway (bet. McArthur & 43rd St So.
Hydraulic

and legally described as: The South Half of Lot 9, All of Lots 10 and
11, Riverside Gardens, Sedgwick County, Kansas

in the City of Wichita; and which is presently zoned AA.

(Give metes and bounds description below if appropriate):

III. The applicant herein, or his authorized agent, acknowledges:

- a. That he has received an instruction sheet concerning the filing and hearing of this matter;
- b. That he has been advised of the fee requirements established by Section 2.12,580 of the Code of the City of Wichita (Ordinance No. 24-606); and that the appropriate fee is herewith tendered;
- c. That he has been advised of his right to appeal of the decision of the Board to the City Commission within ten (10) days of that decision;
- d. That all documents are attached hereto as noted in paragraphs 3 and 4 of the instructions.

THE CLARKSON CONSTRUCTION COMPANY, a
corporation

By [Signature]
Applicant President

[Signature]
Authorized Agent Lester Wilkinson

OFFICE USE ONLY: Received in office of Secretary, Board of Zoning Appeals,
3:00 (a.m. (P.M.)) August 12, 1964, together with
appropriate fee of \$50.00.

T21-402

[Signature]
Signed

SUPPORTING STATEMENT

Comes now The Clarkson Construction Company and makes the following statement in support of its application for a variance.

Applicant would show to the Board that it now owns Lots 5, 6, 7 and the East Part of Lot 8 in Riverside Gardens, and has used a portion of said lots for and as a "borrow pit" in its work in constructing Highway I-235, known as the Bypass. That it has maintained said "borrow pits" in conformity with all the requirements placed upon it by the Wichita-Sedgwick County Metropolitan Area Planning Commission. That said "borrow pit" was permitted and developed while the area was in the county and not within the City Limits of the City of Wichita. That while the County Zoning resolution specifically provided for land use as a "borrow pit" that there is no similar provision of which applicant is informed in the City ordinances governing the zoning and use of land within the City of Wichita.

Applicant is informed that on previous occasions this Board has granted a variance for the use of land within the City of Wichita for a "borrow pit".

Applicant would further show to the Board that it is the successful bidder on a certain portion of the grading and constructing of the roadway to be known as I-35W or commonly called the "Canal Route." That this portion of the roadway to be built by applicant is practically contiguous to the land from which the earth taken from the "borrow pit" location will be used.

Applicant desires to enlarge the "borrow pit" now on its property as above described and thereby construct a larger body of water and that applicant will have sufficient land around both "borrow pits" on which to develop either a recreational area or a high-grade dwelling area, as shown by its sketch plan submitted herewith.

That there are no dwellings or other buildings on the land which applicant now seeks to use as a "borrow pit" and there are no dwellings contiguous to or near the land proposed to be used as a "borrow pit".

Applicant would further show that it does not intend or ask to use all of the ground which it now owns or has under contract as a "borrow pit" but would leave substantial portions of said ground in its natural condition excepting as the applicant will later develop either as a recreational area or as a residential development.

As stated above, the ordinances of the City of Wichita with regard to zoning does not provide in any of its classifications a land use specifically classified as a "borrow pit". The ordinance with regard to "C" zoning permits certain uses and it is by a negative line of reasoning considered by some that inasmuch as it is not prohibited it would be admitted as a use. It is applicant's opinion that to grant "C" zoning in this area by the Planning Commission would be in violation of its rule against "spot zoning". Further, "C" zoning carries with it a large number of specific and admitted uses which would be detrimental to the entire area around about applicant's property and which would be objectionable to many of the persons owning land near the property of applicant. Also, if "C" zoning is granted applicant, it will throw the door open for others to ask for "C" zoning and if granted would prevent the development of a recreational area or a high-grade residential area.

Applicant would further show that the granting of the "borrow pit" for applicant's land is necessary in order that applicant can fulfill its contract with the Highway Department and is therefore for the best interests of the Highway Department and the general public.

Respectfully submitted,

THE CLARKSON CONSTRUCTION COMPANY

BY *H. E. Clark*

President

OPTION TO PURCHASE

THIS CONTRACT, Made and entered into, in quadruplicate, this 19th day of July, 1944, by and between

HERMAN LOEHMANN and CECILIA LOEHMANN, husband and wife, and MARGUERITE LOEHMANN personally and as Executrix of the Estate of Edward Loehmann, deceased, hereinafter referred to as First Parties.

AND

CLAMSON CONSTRUCTION COMPANY, INC. of Kansas City, Missouri, hereinafter referred to as Second Party.

WHEREAS, the First Parties, Herman Loehmann and Cecilia Loehmann, are the owners of the following described real property, to-wit:

Lot 10 and the Northwest one-fourth (NW¹/₄) of lot 11, Riverside Gardens, Sedgwick County, Kansas,

and the First Party, Marguerite Loehmann, personally and as the Executrix of the Estate of Edward Loehmann, deceased, is the owner of the following described real property, to-wit:

The South Half of Lot 9 and the Northeast one-fourth (NE¹/₄) of lot 11, Riverside Gardens, Sedgwick County, Kansas, and

WHEREAS, Second Party is desirous of purchasing the above described real property.

NOW, WHEREFORE, WITNESSETH: That First Parties here agree to grant to Second Party a sixty (60) day option upon the payment to the owner agent Five Hundred Dollars (\$500.00) upon the terms and conditions hereinafter set forth:

FIRST: It is understood and agreed that in the event Second Party exercises its option to purchase in the sixty (60) day period or on or before the 15th day of September, 1944, that the said Five Hundred Dollars (\$500.00) above stated shall be considered as a part of the total purchase price. It is further

agreed that Frank L. Hartman is the escrow agent of both parties and said escrow agent shall receive and hold the original of this contract; all monies to be paid hereunder and pay all monies so received by him as specified herein.

SECOND: It is further understood and agreed that the full purchase price for the above described property shall be Seventeen Hundred Dollars (\$1700.00) per actual acre contained in said descriptions and shall be due First Parties on the basis of their ownership.

THIRD: It is further understood and agreed that said property as a "barrow pit" and this option to purchase is also conditioned upon Second Party being able to obtain from the Metropolitan Planning Commission and the City Commission of the City of Wichita the zoning necessary for the use of said property as a "barrow pit". It is understood and agreed that should Second Party fail in an attempt to obtain such zoning in the period of sixty (60) days from the date hereof then this contract shall be of no force and effect and Second Party shall be entitled to the return of the above set forth Five Hundred Dollars (\$500.00). However, Second Party may elect to take said property regardless of the outcome of the attempt at obtaining zoning as above set out.

FOURTH: It is understood and agreed between the parties that Second Party here covenants with First Parties that in the event it elects to purchase said property regardless of the same being used as a "borrow pit" and further agrees that when said operation for use of said ground as a "borrow pit" has been completed that it will not voluntarily sell any part of said property to be used as a sanitary landfill by the City of Wichita or any other use that would be considered a dump, either private or municipal.

FIFTH: It is understood and agreed that in the event said Second Party has not at the expiration of sixty (60) days from this date by written notice elected to purchase said property under this option, First Parties may require the escrow holder to pay to First Parties their proportionate part of the said Five Hundred Dollars (\$500.00) as the same may be divided between First Parties and the escrow holder and this contract be considered at an end.

SIXTH: It is understood and agreed that that part of the above described property known as:

The South Half of Lot 9 and the Northeast one-fourth ($\frac{1}{4}$) of Lot 11

is now a part of the Estate of Bernard Lohkamp, deceased; that Marguerite Lohkamp, the above named First Party, is the only legatee or devisee in the will of the said Bernard Lohkamp and that sale cannot be had of said property through the Probate Court in the estate of Bernard Lohkamp, deceased. It is further understood and agreed that title to the property described in this paragraph cannot be given until the estate of Bernard Lohkamp, deceased, is closed and that said estate will be closed on or before November 1, 1944. It is agreed that the said Marguerite Lohkamp will, as soon as the said estate of Bernard Lohkamp,

deceased, is closed convey by Warranty Deed the title to Second Party and receive from the escrow agent the full purchase price therefor.

SEVENTH: It is understood and agreed that First Parties will furnish to Second Party a full and complete Abstract of Title to said property showing good and merchantable title in First Parties.

EIGHTH: It is understood and agreed that upon examination of title the First Parties, Herman Lohkamp and Cecelia Lohkamp, shall be entitled to that part of the purchase price due ~~them~~ and payment of which shall not be dependent upon completion of the estate of Bernard Lohkamp, deceased. It is understood and agreed between the parties hereto that upon the approval of title and the election of Second Party to exercise its option, Second Party shall be entitled to proceed to use said property as a "barren pit" and that the portion of the purchase price of said property due Marguerite Lohkamp personally or as the executrix of the estate of Bernard Lohkamp, deceased, shall be paid to Frank L. Hartman, the escrow agent, and shall be retained by him until such time as the said Marguerite Lohkamp either personally or as executrix is able to convey said property to Second Party.

IN WITNESS WHEREOF, we have hereunto affixed our signatures the day and year first above written.

Herman Lohkamp

Cecelia Lohkamp

Marguerite Lohkamp

Marguerite Lohkamp, Executrix
of the Estate of Bernard Loh-
kamp, deceased.

FIRST PARTIES

CLARKSON CONSTRUCTION COMPANY, INC.

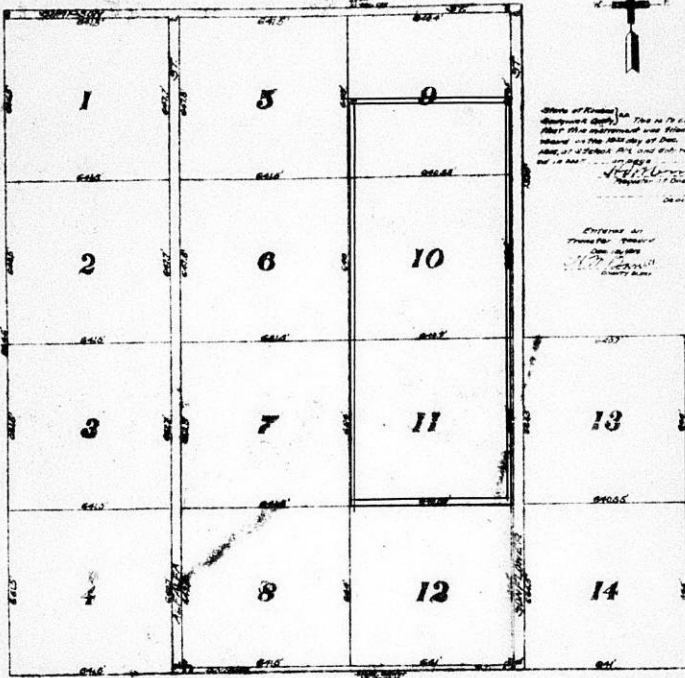
BY _____
W. E. Clarkson, President

SECOND PARTY.

Sketch of CLARKSON Application

No Buildings Involved

RIVERSIDE GARDENS SEDWICK COUNTY KANSAS



State of Kansas
 (Sealed Copy) This is to certify
 that the within and that for
 record in the County of Sedwick
 Kansas, this 11th day of
 August 1925
 J. H. [Signature]
 Register

Ordinance No. 100
 Passed by the Board of
 Commissioners of Sedwick
 County, Kansas
 August 11, 1925

State of Kansas
 County of Sedwick
 I, [Signature], County Clerk, do hereby certify that the within and that for record in the County of Sedwick, Kansas, this 11th day of August 1925.
 [Signature]
 County Clerk

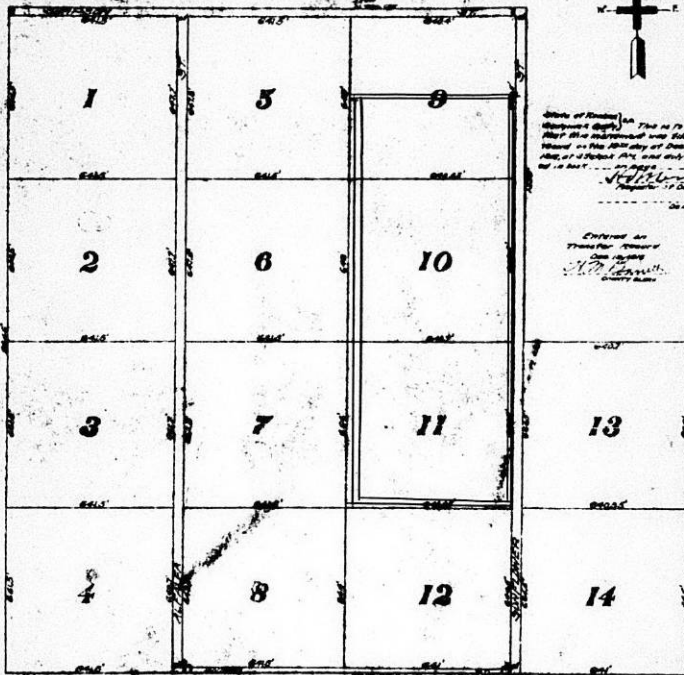
As witness my hand and the seal of the County of Sedwick, Kansas, this 11th day of August 1925.
 [Signature]
 [Signature]
 [Signature]
 County Clerk

Sketch of Clarkson Application

in Buildings Involved

RIVERSIDE GARDENS

SEDOWICK COUNTY KANSAS



State of Kansas) ss. The ss. Clerk of Sedowick County, Kansas, do hereby certify that the within and foregoing plat of Riverside Gardens, as shown on the plat of the same, is a true and correct copy of the original plat of the same, as the same appears on file in the office of the Clerk of Sedowick County, Kansas.

Witness my hand and the seal of said County at Sedowick, Kansas, this 1st day of May, 1921.

State of Kansas) ss. The ss. Clerk of Sedowick County, Kansas, do hereby certify that the within and foregoing plat of Riverside Gardens, as shown on the plat of the same, is a true and correct copy of the original plat of the same, as the same appears on file in the office of the Clerk of Sedowick County, Kansas.

Witness my hand and the seal of said County at Sedowick, Kansas, this 1st day of May, 1921.

Approved by the Board of Commissioners of Sedowick County, Kansas, this 1st day of May, 1921.

Witness my hand and the seal of said County at Sedowick, Kansas, this 1st day of May, 1921.

STATEMENT AS TO ADDRESSES

AFFIDAVIT

STATE OF KANSAS)
) SS.
SEDGWICK COUNTY)

LESTER WILKINSON, being first duly sworn, upon his oath deposes and says:

That he is the attorney for and the authorized agent of the applicant, The Clarkson Construction Company, Inc., is authorized to make the following statement with regard to the addresses of persons named in the Certificate of The Security Abstract and Title Company attached to the Application of The Clarkson Construction Company, Inc. and such addresses are as follows:

The Clarkson Construction Co., a Missouri corporation, whose home address is 4133 Gardner Avenue, Kansas City, Missouri, said construction company is the applicant;

Marguerite Lohkamp is the widow of Bernard Lohkamp, deceased, is one of the persons contracting to sell to The Clarkson Construction Company a part of the land on which said company asks to have variance so as to use the land as a "borrow pit" and her address is 1127 East McArthur Road, Wichita, Kansas;

Albert Lohkamp does not at this time own any property within 200 feet of the land subject to the application herewith submitted. The said Albert Lohkamp has sold his interest in said property to Gertrude and George Lipke, whose address is given in the Certificate. Albert Lohkamp is a resident of Monett, Missouri;

Herman and Cecelia Lohkamp are residents of Sumney County and their address is Conway Springs, Kansas;

Henry Zeller's address is R. F. D., Olpe, Kansas;


Josephine Zeller Krause's address is 2582 South Mosley, Wichita, Kansas;

Teresa Zeller Smarsh's address is R. F. D., Cheney, Kansas;

Leo T. Zeller's address is 527 S. McComas, Wichita, Kansas;

Frank Zeller's address is Villa Maria Care Home, Mulvane, Kansas.

The above names and addresses I believe complete the addresses of those named in the Certificate of the abstract company whose addresses were not given.


Subscribed and sworn to before me the undersigned a notary public in and for said county and state this 14th day of August, 1964.
My Commission Expires:

February 2, 1965


Notary Public

OWNERSHIP LIST

LOT	ADDITION	PROPERTY OWNER
N $\frac{1}{2}$ 5	Riverside Gardens	Clarkson Dev. Co. no address found
S $\frac{1}{2}$ 5	"	"
6	"	"
7	"	"
8 except W 303 ft.	"	John Anglin Minnie Anglin 920 E. 43 S.
9	"	Marguerite Lohkamp 1127 E. McArthur Rd Gertrude Lipke George Lipke 2720 W. 63 S. Albert Lohkamp, Monett, Mo. Marguerite Lohkamp Herman Lohkamp Cecilia Lohkamp Conway Spgs. Ks.
10	"	"
NW $\frac{1}{4}$ 11	"	Herman Lohkamp no address found
NE $\frac{1}{4}$ 11	"	Marguerite Lohkamp no address found
SE $\frac{1}{4}$ 11	"	Gertrude Lipke 2720 W 63 S.
SW $\frac{1}{4}$ 11	"	Albert Lohkamp no address found
12	"	Marguerite Lohkamp Gertrude Lipke George Lipke 2720 W. 63 S. Albert Lohkamp Marguerite Lohkamp Herman Lohkamp Cecilia Lohkamp
13	"	"
14, except N. 150 " ft. of E. 300 ft.	"	Frank Zeller Villa Maria Care Homes Mulvane Henry Zeller - RFD, Olpe, Ks. Carl Zeller 3859 S. Meridian Josephine Zeller Krause 2582 So. Maskey John Zeller 3100 W. Douglas Teresa Zeller Smarsh RFD, Conway Spgs Leo. T. Zeller 527 So. McComas
E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec 16-28-1E		Louise Recklebe 1305 E. Mc Arthur

We hereby certify the foregoing to be a true and correct list of property owners in a 200 foot radius of the S $\frac{1}{2}$ of Lot 9 and all Lots 10 & 11 Riverside Gardens, as shown by the records in the office of the Register of Deeds of Sedgwick County Kansas, this 4th day of August 1964 A. D. at 7:00 A.M. 116484

The Security Abstract & Title Co. Inc.
By *John M. Bell* V.P.

FORM 223-021

PAYMENT NOTICE
City of Wichita

PAY AT TREASURER'S OFFICE - FIRST FLOOR

Bldg & Elev.	Elec.	Elev. Insp.	Exam. Fees
Hse. Mvr.	Hse. Moving	Licse.	Mech.
Oil Well	Pav. Cuts	Plan.	Plbg. Cert.
Sanitation	Sewer	Signs	Sidewalk
Street	Trailer		

DESCRIPTION	AMOUNT
BZA Application	3.50 ⁰⁰

Name Edward C. ...

Address 4133 ...

Type 1-713 Due Date

Comments: ...

5521 W. 31st St

Date 9-12-64 By ...

*

This BZA. Case
Has a Large Drawing
On 35mm Microfilm
Roll # 1