

Minutes of the State Appeals Board
Appeal #14-01
Thursday, February 6, 2014
Preliminaries: 8:30 a.m.; Hearing 8:40 a.m.

Preliminaries:

- Appeals Board Members:
 - Thomas Downs P.E., Structural Engineer – City of Minneapolis
 - Mark Cross, Architect – Brainerd
 - Cindy Shilts, Building Official – City of Stillwater
 - Tom Thornton, Builder – Lake City
 - Dave Scherbel, Building Official – City of Arden Hills
 - Michael Godfrey, EX-officio (non-voting) – Construction Codes & Licensing Division, DLI
 - Doug Nord, Section Chief – Construction Codes & Licensing Division, DLI
 - Eric Beecher, Attorney – Office of the Attorney General

- Mike Godfrey welcomed the board members, introduced himself, Doug Nord, and Eric Beecher; he stated the meeting would be recorded. On behalf of himself and the Commissioner, he thanked the volunteer board members for serving on the State Appeals Board, for reviewing the materials that were previously sent to them, and for taking part in the appeal.

Godfrey introduced the State of Appeals Board members and their respective titles (as shown above) and explained the subject of the hearing: Valuation for building permits under Minnesota Rule 1300.0160, Subpart 3. Godfrey asked Mr. Eric Beecher to address the board.

- Eric Beecher addressed the board and stated he was there to represent the board; he was not a member of the board, would not be participating in making decisions but would be present for, for example, procedural purposes. He requested that speakers identify themselves when they began and address the board one at a time. He talked about the importance of the board members being specific and clear about issues, decisions, and evidence or facts that decisions were based on; he suggested the board follow normal procedures unless there was a reason to depart from them. Beecher reiterated the hearing was taking place because the Minnesota State Court of Appeals has directed the parties to come to you (the board) with their dispute and the Court of Appeals has decided that the claims are “determinations made by the city building official relative to the application interpretation of the state building code” and under Minnesota Rule 1300.0230 this is within the Board’s authority. A reviewing body will look at not only what the decision is but also the authority to make that decision. He

encouraged the board to consider their limitations on their authority as put forth in the Rule.

- **A motion was made by Dale Scherbel to nominate Thomas Downs as chair of the Board; Mark Cross seconded the motion; the motion carried.**

Call To Order:

- Thomas Downs called the hearing to order at 8:40 a.m. He explained there were two parts to the hearing. The first would be the open meeting section that provided both sides an opportunity to present their case. Secondly, once presentations were complete, the board would begin discussions asking for succinct and clear questions. Discussions would continue until a motion was made amongst the board; following the motion a process of voting would be conducted resulting in a very clear motion that gave direction.

Downs asked the audience to introduce themselves:

- Jeff Lebowski, Attorney – Construction Codes & Licensing Division, DLI
- Jim Lungstrom – Construction Codes & Licensing Division, DLI
- James Vagle – Builders Association of the Twin Cities
- Loren Kohnen, Building Official – City of Norwood Young America
- Katherine Swenson, Attorney – City of Norwood Young America
- Dale Wills, President – Centra Homes
- Joe Springer, Attorney – Centra Homes representative

Downs thanked everyone for attending and explained the hearing would begin with the appellant presentation and asked everyone to limit presentation times to approximately 30 minutes. The Building Official would then have 30 minutes to make their presentation; thereafter the open presentation timeframe would be closed.

- Joe Springer addressed the board members and thanked them for their service. He stated the importance of hearing from Dale Wills and asked him to address the board.
- Dale Wills addressed the board and stated he had two items to present and provided handouts (handouts were also included in presentation materials). Wills stated Centra Homes is a local home builder that typically builds the same twelve house plans over and over depending on the municipality and this applied to the homes built in Norwood Young America. Centra is not a custom builder and variance from one house to the next may only involve a different color of carpeting or siding. Their average buyer incurs \$2,500 in upgrades; they are very price sensitive buyers. Wills stated they have a very good understanding of their building costs because they build so many of these house plans; they receive solid bids for pricing. He referred to the Centra handout, specifically to the two columns depicting Valuation (City) highlighted in orange and Valuation (Centra) highlighted in yellow (referred to hereafter as Attachment A). He pointed out

the significant difference between the columns resulted in Centra Homes wanting to talk to the city and he noted that the Valuation (City) column was higher than what the home sold for and it was not taken into account that the valuation does not include land or the permit fee. A valuation that is higher than the price of the sale of the home is clearly inaccurate of what their costs really are. On two different occasions, as demonstrated by the documents submitted in the briefs, Centra offered breakdowns of actual costs. Through many emails and discussions, not having any glimpse of the future that this could actually go to hearing, a lot of these discussions were done verbally over the telephone. He stated he had been reluctant to hand over his sworn construction statement and admitted that this may have been the wrong approach. He had, however, requested to meet with the City in person and provide his cost breakdowns. He referred to the City of Norwood Young America's response that was included in the brief that stated how building permit fees would be based on valuation. Still trying to find some common ground with issues relating to the Valuation Table being so much higher than their actual costs were, Wills continued to work with the City and took part in a conference call with Chelsea Alger, Community Development Director, City of Norwood Young America; Todd Geske, Metro West; the attorney representing the city at the time; Mr. (Joseph) Springer (Fredrikson & Byron); and a representative from Klinebank – Centra purchased foreclosed lots from them. Through the telephone conference call, Mr. Geske was asked if they use the same table in all of the cities and his response was "yes, this is consistently how they do it." Mr. Geske was also asked if Waconia, in particular, used the same table and again, his response was yes, that was the approach to all of the cities and he felt the valuations were fair and an accurate reflection of what the actual costs were.

Wills provided an additional handout that was not included previously (referred to hereafter as Attachment B). He reiterated that Metro West had completed many inspections, had a good working relationship with many cities, and Centra Homes built in many of those same cities. The information that he viewed was inconsistent and he noted that Centra builds in Buffalo, Norwood Young America, Montrose, Otsego and other cities that Metro West inspects in. To demonstrate inconsistencies, Wills referred to his handout and noted that there were four groupings of homes built: 1) Amherst, 2) Ivy, 3) Maple, and 4) Spruce. He referred to the Ivy home in Otsego valued at \$122,394.00 whereby in Montrose, for an identical house, the valuation was listed at \$166,000.00, a difference of approximately thirty-five percent, or \$44,000, for an identical home. Centra Homes employed the same contractors in the different cities with most homes being identical with differences only in carpet and siding colors, as stated previously; the different house plans are identical. He referred to page 3 of Centra's home plans which showed the front elevation and explained the only difference between house plans pertained to stone exterior and whether the home had a two or three car garage. He also noted that the "Ivy" three car garage was the lowest valuation with the second lowest valuation being the "Ivy" with a three car garage and a finished basement. Yet, their most expensive valuation at \$166,000.00 is the "Ivy" with a two car garage with an unfinished basement. This is where the struggle comes into

play, the valuations lack consistency. He then referred to “Maple” citing the valuation ranges from \$139,840 to \$203,000 which is a difference of \$65,000 amongst just four cities. MLS, home sale pricing, and cost breakdowns were provided to the city. In 2008 it was possible to sell a home for less than the builder’s costs but today, typically, a home should not cost more to build that you are selling it for, not taking into account the lot price, permitting and other fees. He hoped the information provided would establish an accurate valuation to help find common ground on actual building costs versus what has been established by the city.

- Dave Scherbel asked the timeframe of the houses depicted on Attachment B with Wills stating that all of the homes were built between June 2011 and the present; all of which have been closed and have homeowners living in them. Scherbel asked for clarification on home floor plan difference with Wills stating that other than the variations stated previously, one home might have a fireplace where another does not. He reiterated that there were minor differences among the house plans with \$2,500 or less in variances and added that appliances were included in this variation but there were no structural differences.
- Joe Springer addressed the board stating that it was important to hear Mr. Wills’s testimony in order to make a legal determination and he referred to, and distributed, Minnesota Rule 1300.0160 Fees, Subp. 3., Building permit valuations. Springer read aloud from the rule as follows: *“The applicant for a permit shall provide an estimated permit value at time of application. Permit valuations shall include total value of all construction work, including materials and labor, for which the permit is being issued, such as electrical, gas, mechanical, plumbing equipment, and permanent systems. Building permit valuation shall be set by the building official.”* He asked the board to take a look at the entire rule – building permit valuation is defined as the total value of all construction work. How is value determined? The first thing to take a look at is the English language and he said there is a purpose for looking at the Merriam Webster dictionary because Rule 1309.0221 is part of the IRC or Minnesota amendments. The Merriam Webster dictionary states that value is as follows: “the amount of money that something is worth, the price or cost of something”. What is the value of construction work? Something that is shown on a chart that is updated every two years or the actual value or cost of the construction work? Besides looking at the English language, this panel has guidance based on a precedent set by the Knutson decision. Knutson built in Bloomington and their actual costs were \$6.4 million. The City of Bloomington, using an ICBO Chart (regional value chart) said that the value based on the square footage was \$9.4 million resulting in a \$3 million difference; Knutson was asked to put the money into escrow and the permit was pulled. Springer referred to the decision of Knutson versus the City of Bloomington titled “State of Minnesota Office of Administrative Hearings” and asked the board to turn to page 8 of the previously submitted document. From this document he cited the following: *“The above-discussion shall not be read to imply that the Judge has found the City’s use of the ICBO valuation data to be in violation of either statute or rule. The City, specifically the building official, is authorized to make*

a “determination of value.” There is no method prescribed as to how that determination should be made. The determination of the building official has a presumption of Validity. However, in this case, use of the average cost figures contained in the ICBO data gave an incorrect valuation. The applicable rule requires that the “value of all construction work” be the standard, not the regional average cost figures for the work as calculated by the ICBO. If the term “value” is to be interpreted to mean something other than actual cost, rules should be promulgated to adopt that meaning. In this case, Knutson has proved that the value of the Olympic Place construction, for purposes of section 304 of the UBC, is the certified construction costs with the addition of the architectural fees.” Springer noted these are the same things that are being struggled with here, actual costs. If it should be anything other than actual costs then you should adopt a rule to change it. Springer read aloud from the Knutson decision, Sec. 304 (a) Permit Fees, as follows: *“The determination of value or valuation under any of the provision of this code shall be made by the building official”* and he noted that this was the same language that is present in the current rule. Springer again read aloud from the Knutson decision and stated *“The value to be used in computing the building permit and building plan review fees shall be the total value of all construction work for which the permit is issued...”* and again said this was the same as the current rule. Springer stated the Knutson decision means if you are only going to look at a chart then adopt a rule to change it. He then read aloud the slight difference that was made to 1300.0160. Since 1986 the only change applied to the applicant being required to give a value. The city says that their table is consistent with the table used by the Department of Labor and Industry (DLI) and Springer referred to DLI’s Building Valuation Data – May 2011 and read aloud the following *“The data is provided for comparison with valuations submitted by the applicant for permits.”* He noted the chart was for comparison value and not a substitute for looking at the value submitting by the applicant.

- Springer concluded that if a city can look only at a chart then why does the rule even require that the permit’s applicant submit a permit value if it is going to be ignored, which is what happened here despite five months of trying to persuade them (the city of Norwood Young America) to acknowledge that they were way off.
- Mark Cross asked for clarification on the Centra Homes chart (Attachment A), Seller Paid Costs column; what would be included in this column? Wills reply was the buyer’s closing costs – title, insurance, lender origination fees; they find that most of their entry level buyers have little or no cash therefore Centra pays for closing costs that are traditionally the buyer’s. Points are typically not included but it is possible.
- Katherine Swenson introduced herself to the board; she is from the law firm of Greene Espel and represented the City of Norwood Young America. She also introduced Mr. Loren Kohlen, the building official for the city.

Swenson noted that Centra now appeared to be challenging the valuations for thirteen (13) properties but there were only ten (10) listed in their appeal application. She asked the board to ignore Centra's arguments related to the three (3) additional properties.

Swenson stated that it would be very easy to get confused and bogged down by all of the numbers, the permits, the emails, and the data tables with the dispute, but really there are only two questions here before the board. The first – What does the building code require a city to do when it comes to setting a valuation and secondly – Has Centra Homes shown that the city failed to follow the requirements of the code?

Swenson addressed the first question. What does the building code require? The first point she made was that the code requires the city's building official to make an estimate of the total value of all construction work. She reiterates the word "estimate" because the valuation has to be set and the fee based on valuation must be paid before construction can begin. Therefore, the code requires a forward-looking estimate and is consistent with the dictionary definition Mr. Springer handed out previously. If you refer to the handout, page two says valued or valuing – full definition – to estimate or assign the monetary work of. By contrast, Centra asked for a valuation based on actual costs – you've heard them say over and over "actual costs". That is not required by the language of the code, for one thing the phrase "actual costs", if we look at the rule itself, does not appear in the rule that addresses the fees, section 1300.0160. The entire rule, not just subdivision 3, can be found in Exhibit U for reference purposes.

Swenson continued saying that actual costs could only be determined in hindsight; after construction was done. You would not know how much something costs until after it was built. An actual cost standard is neither required by the language of the code nor workable within the code's requirement that valuation be set before work begins. Her second point – the code required valuation to include total value of all construction work; not specifying a particular method for how the number is acquired. One way of estimating valuation is through the use of valuation data, in fact, the Department of Labor & Industry encourages the use of valuation data by publishing that data every year to help jurisdictions in setting valuations for government buildings. The use of valuation data is good policy; it ensures projects of the same type and size will be assessed comparable permit fees. It makes audits and appraisals of each property unnecessary and prevents collusion between owners and contractors paying less in fees than they should.

Swenson discussed the Knutson case that involved the City of Bloomington pointing out that case involved the valuation of a large commercial building. The Knutson case did not forbid the use of valuation data. What happened in that case was valuation data being used did not give an accurate estimate of the total value of all construction work because the data was meant to be used only for full construction and the building being built was only a shell; resulting in an extremely over-valued, approximately \$2.5 million dollar valuation difference. The important thing to remember in that case was that the

Administrative Law Judge emphasized that he did not find fault with the general practice of using valuation data and Swenson pointed out the exact same paragraph read earlier by Mr. Springer “*The above-discussion shall not be read to imply that the Judge has found the City’s use of the ICBO valuation data to be in violation of either statute or rule. The City, specifically the building official, is authorized to make a “determination of value.” There is no method prescribed as to how that determination should be made. The determination of the building official has a presumption of Validity.*” Swenson then added that the Knutson case was not the rejection of the use of valuation data that Centra argued it to be.

Swenson’s third point – The code says that the valuation shall be set by the building official. The code does not require the city to defer to an applicant’s estimated valuation and, in the materials submitted by Mr. Kohnen and Mr. Geske, it states the city did not take into account any information received and compared using the valuation table and adjusted accordingly if it is too low or too high. Therefore to answer the question, “What does the building code require” three things should be kept in mind 1) the code requires a forward-looking estimate at the time of application as to the total value of all construction work; 2) it does not prohibit the use of valuation data to make that estimate; 3) it requires that the valuation be set by the building official not by the applicant.

Swenson moved on to the second question that was before the board – Has Centra Homes shown that the city failed to follow the code? Swenson stated no. For each property the city applied valuation data to the construction plans and compared the resulting number to the estimate submitted by Centra Homes. Centra’s valuations were too low; therefore, the building official set a valuation that was more in line with the number they arrived at using the valuation data. When a dispute arose over the valuation of 890 Fox Court, the first property at issue, the city encouraged Centra to submit material that would support its claims that the valuation was too high. Centra did not submit anything relevant to support their claim. The only documents submitted by Centra showed that other Centra built homes were selling for less than the set valuation. The valuation is not determined by sales price; it is a forward-looking estimate of the total value of the work, therefore, the city set valuations based on the information they had at the time of application. The city did not have the itemized list which Centra included in the appeals materials. Even if Centra had submitted an itemized list at any point in time, prior to the past week, the city would not have been required to lower its valuation because there were no receipts or contracts but only Centra’s word as to actual costs. This is like itemizing deductions on your tax return and not having receipts to back it up. The IRS would not accept the taxpayer’s word and the city should not be required to accept an applicant’s word for how much something actually costs, especially when Centra had an incentive to save money by submitting a lower number.

Swenson brought up the Knutson case again stating in that case the valuation simply did not work because the valuation data was not designed to be used for that type of project. It was designed to be used for a finished product and that (Knutson project) was just a shell. The Administrative Law Judge in that case picked a second-best estimate; they went with the audited contract cost of that building. To repeat, in the Knutson case, the construction costs were audited by the City of Bloomington and here by contrast, the city never had the opportunity to audit the construction costs for any of the (Centra) projects. Centra wanted to submit a number with no reliable support and have the city accept it. Furthermore, Centra has not shown that there is a systematic problem with the city's valuation data or that it was applied incorrectly (a mathematical error of some type). As to the data itself, it is comparable to the valuation data published by the Department of Labor & Industry. It is a little different here because it focused on residential construction and not the wide range of projects that the DLI data covers which includes schools and hospitals. To the extent that it is different, the city's data is consistent with the costs of construction in the jurisdictions where Metro West does business and Mr. Kohnen can talk more about this if necessary. This is not a situation like Knutson where the valuation data simply did not work because it was not meant to be applied to shell only construction and as to the application of the data to the construction plans, the question "did someone add the numbers together incorrectly" or "multiply the numbers wrong" Centra has not shown that this resulted in gross or substantial over-estimates of the total value of all construction work for any of the ten projects at issue. She believed this was covered in Mr. Geske's affidavit where he explained how he reviewed everything and found only one rounding error which resulted in a discrepancy of approximately \$10.00, nowhere near the \$2.5 million that was at issue with Knutson's case.

Swenson concluded by stating that in short the city did what was required under the code, it set valuations based on the information it had at the time of application and was not required to reject its own valuations in favor of Centra's unsupported estimates. She stated she would be happy to answer any questions the board might have.

- Dave Scherbel asked Swenson if anything was received to substantiate the costs of the homes from Centra other than those real estate listings. Swenson replied that it was the real estate listings and the permits for those homes that were sold and did not include the internal Centra documents that have since been submitted. Swenson noted that she saw Centra's sworn construction documents for the first time when they were submitted to the board and a copy was provided to her. Scherbel stated he had seen her request of Centra to submit this information but Swenson stated it was not her personally but Ms. Alger, as documented in writing. Swenson clarified that Ms. Alger and Mr. Wills exchanged emails whereby Ms. Alger requested information to help settle the dispute but that nothing was received in the form of receipts or signed contracts. She added that Ms. Alger did not receive an itemized list such as the one that was presented today.

- Loren Kohlen addressed the board and asked if he could answer any questions. He added that he has been in construction for 55 years, 38 of which has been as a building official. He has dealt with this same issue only one other time – that time with a homeowner building their own home. They brought forth all of the construction statements, all signed, and including every listed material, product, and labor. The city and the homeowners discussed and reviewed the material and everything worked out fine – they came to an understanding of what the actual value was. We have dealt with Centra Homes in a number of communities, as they previously stated, and this is the only time it (the valuation) was ever questioned.
- Tom Downs asked Kohlen why he thought the permit application required an estimated value by the applicant. Kohlen replied that this allows the contractor to have some input but ultimately they have to be fair with everyone.
- Katherine Swenson responded to Kohlen’s statements regarding prices being different and stated that she believed this to be a hold-over from a very old version of the law and gave an example of a 1982 law definition of what value or valuation meant. It was section 423 of the UBC and she read aloud *“the value or valuation of the building shall be the estimated cost to replace the building and structure, in kind”*. This isn’t what we have now but it may be where the estimated part of it remains today.
- Dave Scherbel stated he too struggled with “estimated value” and believed that honest contractors would put true and accurate values on their permits reflecting the resale value of the home.
- Swenson closed her presentation by stating that there are certainly ways that a builder can show that there is something wrong with a valuation – three main ways. The first one would be to show that there is something wrong with the valuation data – It isn’t meant to be applied in this situation, as was the case in Knutson, secondly to prove a math error, and thirdly, would be for the applicant to come to the city with sworn statements, receipts, and contracts to show what their actual costs were and to prove that the city’s valuation was substantially different. This would be fair but they have to be able to prove it, to give us reliable support because the city cannot just take their word for it and that is the problem we have in this case.
- Thomas Downs stated that presentation would then close and the board would talk amongst themselves or ask questions of either party.
- Dale Scherbel asked Centra Homes if the homes they built were panelized homes or built onsite. Wills replied they were built onsite. Scherbel asked Centra how long they had been building in Norwood Young America before contesting the valuation with the city. Centra responded, 6-8 months.

- Downs asked for additional comments or questions. Scherbel asked Eric Beecher for clarification on what the board should determine – are they (the board) to determine that the costs for the permit were accurate or the methodology to determine the permit fees? He added that if it was the methodology that the city used then that is fully supported by the building code.
- Beecher referred the board to Minnesota Rule 1300.0230, subp. 3, and stated it was his understanding that the dispute was that the city incorrectly interpreted 1300.0160, subp. 3, when it used the valuation table. Beecher asked if this was accurate and Joe Springer replied that it was accurate but the crux of the issue was, can a building official look only at a valuation table and not at anything else. Springer further commented that that is exactly what Norwood Young America told us they were doing and he quoted the city having said “We don’t care after talking to you (Centra) for five months, we are going to look at our table only” and in terms of the actual relief (page 9 of Centra’s original application, A through E). Beecher asked for clarification in regards to relief on page 9, number 2, the order to direct the escrow agent to refund, you are not asking this board to do this and Springer stated that was correct and further explained that he was asking the board to interpret the code only in terms of what they presented in paragraph 3 of the submitted documents.
- Katherine Swenson added that she believed the issue before the board was “Has Centra Homes shown that the city failed to follow the requirements of the building code”.
- Thomas Downs stated he would like the board to begin discussing the following: Minnesota Rule 1300.0160 titled fees. Does the board feel that the city legally set forth a fee schedule adopted by the municipality? The board stated unanimously that yes, the city legally set forth a fee schedule. The board also agreed that the building official is allowed to set the valuation that the municipality approved and Downs stated he believed this had been proven. The question raised by Downs was “Is the valuation fair, reasonable, and proportionate to the actual costs of the service”. He doesn’t believe anyone is contesting the legality of the city or the city official setting valuations. He believes the crux of the matter is whether those valuations are fair, reasonable, and proportionate to the actual costs of service and this is a part of the code that hasn’t been discussed much but that should be focused on. He added it was clear that the city went through their process in accordance with the code but there is a large disparity when comparing Centra’s estimated costs and the city’s valued costs. How do we solve that? Downs stated he understood the difference in the Knutson case but the Knutson case also took into consideration a city directed audit that actually proved the Knutson case for them. We don’t have that here but that is a means to settle this dispute. If Centra brings forth sworn statements they should be taken into consideration. He stated he still doesn’t fully understand why the State of Minnesota required an estimated cost on the application but noted it appeared that in this case with those ten houses they ignored or superseded the information with their own valuation. He then

answered Katherine Swenson previous questions by stating 1) Does the building code require that – “yes”; 2) Does the city violate it? In his own personal opinion – “No, he does not believe so”; 3) Can they set a valuation – “Yes they can but they are required by code to make it fair, reasonable, and proportionate to the actual services.”

- Dave Scherbel stated he agreed with everything stated by Downs but added that the only thing that bothered him after going through the entire packet of materials was that the Community Director (Chelsea Alger) asked specifically for more documentation on what the actual costs were and said they could set up a meeting with the building official. That never happened until the very end and therefore it makes it hard to make a decision.
- Cindy Shilts stated she agreed that the supporting documentation to prove the valuations by the builder were not given to the city and subsequent requests for a meeting to discuss the issues were never held.
- Mark Cross stated that he thought subpart 2, which was brought up earlier, holds true with all building official departments that they have to prove their fees from time to time. He added that it hasn't been brought up in any documentation that was given to the board so he isn't sure how they, as a board, can say “are the fees commensurate with the services rendered.” He made the assumption that this gets reviewed on some type of a basis with the state and without any supporting documentation on this he cannot tell if any of the fees would be in line with what services cost either.
- Thomas Downs agreed with Cross and stated that they are not there to set valuations. He did note that in the packet, page 7 of the document dated April 3, 2012 State of Minnesota Office of Administrative Hearings where the Knutson case was discussed, one of the statements made on page 7, second paragraph down states that *“license fees set by a city are presumed to be valid unless the party challenging those fees can offer evidence to overcome the presumption.”* He believed the information was lacking up until the submittal of documents by Centra.

Thomas Downs asked if there were any questions for the two parties. Downs then asked if there were any clarifications that the appellant would like to add to the discussion.

- Joe Springer addressed the board and asked the board to review Ms. Swenson's affidavit, Exhibit A, fourth paragraph. He stated the document was from Mr. Wills showing state code permit valuations based on the actual labor and materials to construct the home. He added that the price of the home (in reference to Exhibit A) was less than \$141,000 and therefore to get to Mr. Scherbel's issue, why wasn't information provided? He referred to Exhibit C (within Exhibit K, Ms. Alger's affidavit) and read aloud *“perhaps a similar project in another community where the lower value applies with bids and/or agreements with prospective buyers”*. Springer stated that Centra

provided the information that was requested of them. In the end, the issue that he is hearing is “why didn’t Centra give the city a sworn statement”. After five months of discussion we tried to have an in-person meeting and the city stated they wanted to do it by telephone. Springer stated that the city said Metro West used the valuation table and that is what they were going to use, that is all we are going to use, end of story, we have decided. That is why the sworn (statements) were not given to the city.

- To elaborate on why the sworn (statements) were not given to the city, Dale Wills stated that he was in absolute agreement with this concern and explained there were two different emails where he offered the cost breakdown and sworn statements. Wills stated that in both of those emails he said he would bring all of his work orders that were contracted and at no time was the city willing to meet and discuss those documents. The only time any of those documents were asked for was in the email from Chelsea Alger and noted that shortly after that they came out with an official statement saying they didn’t care because they were only using the valuation table. During the escrow agreement we felt the only way we could present our sworn statements or contracts was in court because as you can see in their official statement they said “we will only do this based on our chart.” Therefore at no time did they give us the opportunity to meet in person. The challenge we had was that they were never willing to accept the information we were willing to provide them. He stated he was willing to show actual work orders that show the actual work order to the subcontractor, willing to show their contract, cost breakdowns, sworn construction statements, but they (the city) was not interested in seeing any of that information. Wills stated he agreed with the concern voiced and said that is why they ended up where they were. (at this hearing).
- Joe Springer stated that the board said it was their burden to show that the city’s valuation was wrong; we now have submitted sworn construction statements. Is there anyone that has disputed anything that is in our sworn construction statements and if the panel wants to order a Knutson-style audit, where we have shown that the costs are 80-90% higher than our actual costs, by all means.
- Dale Wills added that his cost breakdowns were actual copies signed by him at every closing whereby swearing that they were actual reflections of costs. Copies were provided to the panel and Wills stated he would welcome an audit.
- Mark Cross asked if there were any sweat-equity in any of the homes in question with Wills responding no.
- Katherine Swenson stated that earlier that morning Mr. Springer said he didn’t want to focus on the law and she believed that the law was the only thing that the board should be concerned with – What the building code says. She believed they had shown that the use of valuation data was something that was set forth in the building code and the city used it; Centra had not met its burden to show that there was something wrong

with the valuations. She asked if there were any other questions or information she could point the panel to. She added that the city was required to make a valuation at the time of application and there is evidence of a very cordial exchange of emails between Ms. Alger and Mr. Wills in which information was requested by Centra but not given.

- Thomas Downs asked if there were any additional questions by the board.
- Dale Scherbel asked the board – Are we determining if the city did what the building code required them to do or are we trying to actually determine what the value of these homes are for building permit fees.
- Thomas Downs gave his opinion and stated that they were not present to determine a value in any of the homes or in the way the fees were valued. It was very clear that the city followed what the code required. Downs said the only question was – Is it fair, reasonable, and proportionate to the actual cost of services. He added that Swenson said they would look at three remedies for this – either it is a wrong valuation cost, a mathematical error, or they would accept sworn statements of the actual cost. Downs asked Swenson if this was a fair interpretation of her presentation and Swenson said yes. Downs stated he believed they had already agreed that the code had not been violated but they hadn't agreed on whether the valuation was fair, reasonable, or proportionate to the cost of services. One way you get to this answer is through sworn statements of actual costs by the contractor. He then asked for opinions from the board and Dave Scherbel agreed wholly.
- Tom Thornton agreed that a sworn construction statement would give accurate costs. He questioned add-ons that might have occurred during construction and noted that those should have been disclosed up front.
- Dale Scherbel stated he struggled with actual costs and he discussed his opinion of what value was and noted that he had prior meetings with companies to discuss valuations that were agreed upon and accepted by both parties.
- Tom Thornton asked for clarification on Scherbel's statement and Scherbel stated that during the aforementioned meeting construction bids from the contractor were brought forth.
- Thomas Downs stated that he understood that a permit paid for prior to construction needed some type of estimate. When a contractor and a city disagreed he believed that it was the contractor's responsibility to prove through sworn statements that the correct valuation for the permit was "X"; minus this the city would use their established and consistent methodology of obtaining permit fees.

- Dale Scherbel commented that he was surprised at the extreme difference in square footages being used by the city and the actual costs by Centra because most of the time those valuations are pretty close. He didn't find any reason at all why the valuation chart should be questioned.
- Thomas Downs asked Beecher for direction on how to put a motion to the committee to state that the contractor has the obligation to prove the actual costs for the final fee for the permit.
- Eric Beecher asked the following clarifying questions and directed his first question to Joe Springer – Your dispute is not with the fee table that was used once there was a valuation in place, is this correct? Springer replied that was correct and he felt that was an important distinction between the fee table versus the valuation table. Springer added they were discussing two different tables and he wasn't sure whether the valuation table was created by Metro West; at the crux of their dispute. He added that the valuation table overstated actual value. Springer agreed that the table that showed the fee based upon the valuation was valid and was not arguing this but questioned if using the valuation table before you get to the fee table would incorrectly state the value of the structure. This is their issue – the use of the valuation table for the homes in question being 80-90% over not just construction costs, but at times, more than the house was sold for.
- Katherine Swenson believed that subpart 2 of the rule that talked about fair, reasonable, and proportionate fees was talking about the fee schedule, Tab (Exhibit) R, of the materials. She explained that this was the fee schedule for all of the different fees that the city assesses and there is a portion that deals with building permits; there are three types of building permit related fees as set forth in the fee schedule – the building permit fee, plan review fee, and the state surcharge fee. All three of those are based on valuation which is what is in dispute as well as what Mr. Springer has said. The focus today should not be on the larger fee schedule as she did not believe this was in dispute. The board expressed their agreement that it was the Metro West valuation schedule that is updated every few years that had not been adopted by the city.
- Eric Beecher clarified by asking – The question that the parties would like the board to answer is 1) Does the city's use of Metro West's valuation table comply with subpart 3 of 1300.0160 which requires permit valuations to include the total value of all construction work. He then asked if the statement were a fair representation of what the dispute was and what the parties were looking for. The board replied "Correct."
- Katherine Swenson asked to rephrase the above question to read: Has Centra Homes shown that the city has not complied with the building code in that way? Swenson then asks Beecher to re-state his statement.

- Eric Beecher stated that under the Minnesota Rule that establishes the board, subpart 3, limitations on authority, the application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted thereunder has been incorrectly interpreted. Therefore his question is – Did the city incorrectly interpret 1300.0160, subpart 3, when it determined that it could use Metro West’s valuation tables? He further clarified to Swenson that her point was that Centra has the burden to prove that it was incorrectly interpreted with Swenson replying yes.
- Beecher asked the board if they understood what they were being asked to decide and the board replied yes.
- Thomas Downs expressed a different interpretation stating that Centra did not agree with the valuation. The city and the building official complied with the code, whether we agree with the valuation table or not, to him is not the issue. He doesn’t know where the \$90.49 square foot came from, how DLI arrived at that number, but it is a consistent number used throughout the permit application for the city of Norwood Young America. He believed the only question the board had left to answer was – How do we resolve this dispute and the resolution of that dispute is submission of sworn statements of actual construction costs to the city of Norwood Young America and they can resolve the permit fee cost. He further stated that they had already agreed, not through a vote, but through head nods and yeses, that there were no code violations for the ten home applications. He hasn’t found any but the resolution to this dispute is what actual costs should be used in the valuation of permit fees?

Thomas Downs asked Mike Godfrey if he agreed with his previous statement and Godfrey stated yes and added that the valuation tables published by the ICC are used for the convenience of building officials to use to look at to compare. There was no rule or law that said the table was required to be used and he noted that average costs were compiled using homes ranging in price from \$80,000 to \$800,000 and that the table should only be used as a guide. Godfrey added that the DLI tables could be removed and there would be no violation of any law.

- Dale Scherbel added that he would use the table as a guideline as in the same case that the city did. Basically the city saw the values were considerably lower than the average value on the table.
- **A motion was made by Thomas Downs to find that the city of Norwood Young America did not violate the code by using the valuation table in establishing permit fees, seconded by Cindy Shilts. The vote was unanimous; the motion carried.**
- Thomas Downs expressed his opinion that the board should make a motion to require the contractor to provide sworn construction statements to the city of Norwood Young

America for reconsideration of each of the ten houses in dispute to arrive at a modified permit fee.

- Mark Cross stated that if the builder wanted a re-adjustment then they need to submit a challenge or recommendation.
- Thomas Downs stated that the city had already agreed to that type of dispute resolution according to Katherine's presentation. He added that they were not going to make any resolution or motion to either uphold or challenge the valuation tables. We do not have that information nor do we have that type of authority. Therefore there are only two motions, one to find that the city of Norwood Young America did not violate the code, and this has been passed, and the second motion (recommendation) to have the city and the contractor sit down and go through the sworn construction statements to arrive at a challenged and modified permit fee through valuation.
- Mike Godfrey believed the contractor, in their introduction page of the submitted documents, was trying to show that the city was wrong. He clarified Down's intention and they both agreed that there was not a code violation at issue.
- Thomas Downs stated that the board needed a recommendation for the parties to get together and either accept or reject the sworn construction statements from the contractor. Downs asked Beecher if they do this. He believed they could due to the Knutson ruling that included a wrong valuation. That dispute was resolved by the contractor challenging that valuation and bringing forth evidence that it was the wrong valuation. We have an obligation to make this recommendation. If we make a recommendation that one party doesn't agree with there is an appeals process.
- Eric Beecher answered that part of the problem was that there was very little guidance in the rules, statutes, or case laws on what the board could and could not do; there was only a small subpart with very little guidance on how the board must go about doing things or how they must interpret the code. He believed the first motion took care of interpretation of the code for this case and he asked for the parties input. He asked if the parties were satisfied with the first motion that answered the question on whether the code permits the city to use the valuation table.
- Joseph Springer stated the issue was actually in application for these particular permits. Does the use of the table for these permits overstate the value of construction? This needed to be answered, that is why we are here. We do need some resolution of this issue. An application error where the city is only looking at their permit valuation table, where we heard from Mr. Godfrey is an average and should be used for comparison only, not meant as the only means to determine the value which is what the city did. Does this practice violate the rule here? Those were averages that were published by DLI – does the city actually have to look at other things? He wasn't sure that even the

first motion answered the question – was the cost overstated by using the valuation table? If the panel wanted to recommend that Centra Homes demonstrate and provide your sworn construction statements and all of your subcontractor costs we are more than pleased to do that and have offered this information before. By only making a recommendation how does this help them to resolve the issue?

- Katherine Swenson agreed with Mr. Springer stating that she would like the issue resolved today. She believed that the panel already stated that the city did not do anything wrong – the code was followed. Centra is the one that is attacking the decisions and they have not shown what else the city should do. At this point we cannot just adopt what they are proposing because there is no evidence, adding that they haven't met their burden to show that the city's valuation should be overturned. There is nothing wrong with the city's valuations, the code was followed, and they haven't shown those three possible errors that she earlier spoke of. She believed the case could be decided right then and in the future if there were other construction projects with disputes to valuations they could show evidence and hopefully disputes could be resolved without coming to the board. For these ten projects at issue we have the information on the table and she believed the board could make a decision.
- Thomas Downs added he would like to refer to the railroad company vs. the city of Minneapolis back in 1952 where they state the license fees set by the city were presumed to be valid unless the party challenging those fees could offer evidence to overcome the presumption. He believed the contractor has those sworn statements to challenge presumed validity of the valuation. Somehow these two parties need to get together; the city needs to accept or reject the sworn statements or order an audit. The city needs sworn statements of actual costs for the ten houses in dispute in order for the city to modify the permit fees. The city already stated they would accept this as one of the three resolutions. Is this correct? Swenson stated yes, she agreed with this, but added that she was wondering how to reconcile with the motion that was already passed that said the city did not violate the building code in respect to the ten houses.

Thomas Downs stated there are three issues on the table, believing that all three issues were answered he restated 1) What does the building code require? We discussed this issue; 2) Did the city violate that code? We have resolved this issue; 3) Valuation set by the building official – This was also resolved with our first motion.

- Mark Cross stated that they had already agreed the city had not violated the code. The applicant has the ability to give them any information that he wanted to give them if they make a motion for that. If they follow the code, the code is they can accept that information and set the value at whatever they feel the value is. This is essentially what 1300 states therefore even if Centra submits the actual costs, the building inspector actually sets the value of the house unless an audit is ordered that requires the city to follow the valuation determined by the audit.

- Thomas Downs stated there were two ways to resolve the issue to get the two parties to agree on sworn statements being the actual cost of construction. If we were to fail to resolve the issue then an audit could be ordered but he believed that the city had already agreed to accept sworn statements of actual construction costs, which he added is in the record.
- Katherine Swenson said the city would review and audit. The rule talks about what the board can decide and what appeals to this board are based on and she believed that everyone is in agreement that if this was about whether the true intent of the code or the rules thereunder have been incorrectly interpreted or applied by the city. From what had been said, the city had not violated or misinterpreted the code and from what we have told you today, certainly they could have come to us with sworn construction statements and if that happened we would look to see if that changed the valuation at all. That is in compliance with the building code and where the matter ends. If that happens in the future there is nothing to indicate that the city is not following the building code by saying until you show us how our valuations are incorrect it is what we say it is based on our valuation table.
- Thomas Downs stated that they were discussing ten houses in dispute not the next house that comes in for a building permit.
- Katherine Swenson said that based on the affidavits they submitted, what happens when a permit comes in is that the city uses the valuation table, applies it to the construction plans, and in theory there could be other documentation submitted, and a valuation is calculated by a Metro West administrator, they look at the number and if there is a discrepancy it is reconciled and the applicant can come forward with evidence to back up the value. That is what the city has been doing and it complies with the building code.
- Loren Kohnen said they set the valuation, not the cost, and if he were given the information to substantiate Centra's side he would review it.
- Thomas Downs clarified Kohnen's statement, asking if they (Centra) came with sworn statements, as a city building official you would review the documents and take appropriate action. Kohnen replied that they would review the documents. Downs stated that the total value is all construction work, including materials and labor for which the permit was issued for, such as gas, electric, mechanical, plumbing equipment, and permanent systems. We are not talking about buying something for \$200,000 when the value is \$150,000. We are talking about cost of construction – all construction work, not what the house sold for but what the cost to build it is.
- Katherine Swenson stated the city would be open to receiving documents that would show why the city's valuation was wrong but she didn't think they could commit to

saying that if Centra submitted a contract that the city would rubber stamp it. The city would review it but the city still had the right to reject something they believed was not trustworthy or accurate. She does not want to have the idea that the applicant can come to the city and assume that the city must accept the documents with no discretion. This is hypothetical because the city has not received this information. The city has done exactly what it was required to do under the building code.

- Dale Wills said as we look at code that says the building, structure, electrical, gas, mechanical, plumbing, and alterations required by the permit, it doesn't include permit fees, cost of the land, salesman and we do not self-perform so this includes 100% of our labor. We do not build houses performing – we manage the process. He stated he would gladly submit his cost breakdown but because this is an issue in a number of different cities, is this going to resolve the issue? Wills referred to subpart 2; fees established by the municipality must be by legal means and must be fair, reasonable, and proportionate to the actual cost. The question that is to be answered is, are the fees fair, reasonable, and proportionate to the cost. Whether you have my cost breakdown or not you do have submitted information by the city that shows what we actually sold the houses for and from that you can deduce that clearly the valuation is not proportionate to the costs when the city's valuation actually exceeds what the unit was sold for. Once you subtract out any profit, land, and building permit, is this fair, reasonable and proportionate to the actual cost.
- Mark Cross stated he read (Subpart 2) totally different. Reasonable and proportionate to actual costs of service meant the costs to do the building inspections. He does not know what Metro West charged the city per inspection or per home, or amount per permit. He did not know how they arrive at their cost but that is what that is stating; they can't charge you an un-proportionate amount that it takes to actually perform the service of a building inspector.
- Thomas Downs had yet another take on it and stated that there were four measures regarding the establishment of the fees. They have to be done by legal means, fair, reasonable, and they have to be proportionate to the cost of the service for which the fee is imposed. Those are four different measures of how the municipality can establish fees. We also go back to the 1952 ruling that says we have to assume that the fees established by the city are valid unless proven otherwise; Centra, prove your costs to the city, and to the city, decide whether you want to accept those sworn statements. If not, you are going to wind up with an audit.
- Mark Cross asked Downs if he believed that costs of service referred to the costs of the inspection service and Downs replied yes, absolutely, costs of services provided but it is the fourth of the four things that the city has to meet as a requirement of the code – legal and fair.

- Dale Scherbel stated he didn't think that it entered into the question that they were asking. Downs reiterated that Centra was challenging if the valuations were reasonable. It is the appellant's duty to offer evidence that the valuations were not fair and reasonable. What he heard from the city was that they would look at documentation. Loren Kohnen added that they aren't talking about fees but the valuation only. Downs added that the building official sets the valuation. The fees are a multiplier of the value of all construction work and Centra would like to challenge this. This board would like to recommend that the board accept the evidence in that challenge.
- Joe Springer stated that their issue had gotten kind of cloudy but that after five months of discussion with the city, they told us that they were going to use their valuation table and that was it. He discussed actual costs and how the city refused to look at them but only their table.
- Thomas Downs asked Katherine Swenson if the city would accept review of the evidence provided by the contractor to determine a final valuation. He asked, will the city take in the evidence and review that evidence to determine actual valuation of the ten houses in dispute? Swenson replied yes. Downs continued saying that they were trying to understand the difference of opinions and determine if the code was met and make a recommendation that the two parties work it out through sworn statements that the city said they would accept. Swenson stated they would accept the sworn statements for review but would not automatically stamp approval. Downs asked for clarifications, questions, or opinions from the board to share.
- **Thomas Downs made a motion that the board recommend this dispute resolution be handled between the contractor (Centra) submitting cost evidence and the city building official review this for possible modification of the valuation, seconded by Mark Cross. The vote was unanimous; the motion carried.**
- Thomas Downs asked Mike Godfrey if this concluded the board's business. Mike Godfrey said that if this is how they wanted to rule then yes, it concluded the board's business.
- **Thomas Downs made a motion to adjourn the meeting, seconded by Cindy Shilts. The meeting adjourned at 10:40 a.m.**

Centra Homes v. City of Norwood-Young America -- DOLI State Appeals Board

Permit #	Address	Home Type	Valuation (City)	Valuation (Centra)	Centra Actual Construction Cost*	Sale Price	Land Cost	Seller Paid Costs	Sale Price Less Land and Seller Paid Costs
2012006	890 Fox Court	Ivy (2-car)	\$146,000.00	\$81,000.00	\$78,519.33	\$145,000.00	\$12,878.80	\$8,423.57	\$123,697.63
2012032	855 Fox Court	Amhurst (3-car)	\$189,544.00	\$101,424.94	\$101,196.30	\$175,000.00	\$12,878.80	\$11,937.33	\$150,183.87
2012112	885 Fox Court	Spruce (3-car)	\$185,000.00	\$103,054.40	\$101,407.09	\$173,559.00	\$12,878.80	\$11,558.02	\$149,122.18
2012113	1015 Fox Crossing	Ivy (2-car)	\$147,000.00	\$85,513.67	\$83,919.39	\$151,808.00	\$12,878.80	\$8,721.41	\$130,207.79
2012152	1020 Fox Crossing	Ivy (2-car)	\$147,000.00	\$83,667.67	\$78,262.74	\$146,403.00	\$12,878.80	\$9,210.17	\$124,314.03
2013010	835 Fox Court	Spruce (3-car)	\$197,000.00	\$105,951.40	\$97,538.49	\$177,899.00	\$12,878.80	\$18,832.68	\$146,187.52
2012155	840 Fox Court	Maple (3-car)	\$182,480.00	\$100,265.50	\$98,036.14	\$172,764.00	\$12,878.80	\$10,196.65	\$149,688.55
2013020	1010 Fox Crossing	Ivy (2-car)	\$140,460.00	\$86,251.39	\$78,002.26	\$151,157.00	\$12,878.80	\$13,559.93	\$124,718.27
2013027	1055 Fox Crossing	Ivy (2-car)	\$135,520.00	\$88,480.87	\$74,487.67	\$149,445.00	\$12,878.80	\$9,659.40	\$126,906.80
2013037	820 Fox Court	Amherst (3-car)	\$200,500.00	\$109,649.82	\$110,453.58	\$183,821.00	\$12,878.80	\$6,710.25	\$164,231.95
2013044	1000 Fox Crossing	Ivy (2-car)	\$147,240.00	\$89,432.35	\$93,389.75	\$150,740.00	\$12,878.80	\$8,470.32	\$129,390.88
2013045	1030 Fox Crossing	Ivy (2-car)	\$147,240.00	\$89,432.32	\$84,353.47**	\$151,240.00	\$12,878.80	NOT CLOSED	N/A
2013046	1005 Fox Crossing	Amherst (3-car)	\$194,088.00	\$109,108.37	\$74,648.68**	\$180,081.00	\$12,878.80	NOT CLOSED	N/A

* Centra's actual construction cost includes all costs of construction, whether or not for permit-related work.

** For these homes, the sale has not closed or construction is not complete. As a result, there is not a sworn construction statement and the "construction costs" are based off of Centra's internal construction cost breakdowns, which are included in Exhibit C to the Affidavit of Dale Willis.

HOMES BUILT IN OTSEGO

Address	Home Type	Valuation (Otsego)
11481 71st Street	Maple (3-car)	\$147,700.00
11390 72nd Street	Ivy (3-car)	\$122,394.00

Attachment B

Permit #	Address	City	Home Type	Valuation	City
	11105 825 Emerson	Montrose	Amherst (3 Car)	\$ 186,000.00	
	12105 819 Emerson	Montrose	Amherst (3 Car)	\$ 188,000.00	
	2012032 855 Fox Court	NYA	Amherst (3 Car)	\$ 189,544.00	
	2013046 1005 Fox Crossing	NYA	Amherst (3 Car)	\$ 194,088.00	
	2013037 820 Fox Court	NYA	Amherst (3 Car)	\$ 200,500.00	
	12560 1804 11th St NE	Baffalo	Amherst (3 Car)	\$ 202,000.00	
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	201200541 11390 72nd Ct NE	Otsego	Ivy (3 Car)	\$ 122,394.00	
	201200077 11470 72nd St NE	Otsego	Ivy (3Car)	\$ 127,434.00	Finished Basment
	2013027 1055 Fox Crossing	NYA	Ivy (2 Car)	\$ 135,520.00	
	2013020 1010 Fox Crossing	NYA	Ivy (2 car)	\$ 140,460.00	
	2012006 890 Fox Court	NYA	Ivy (2Car)	\$ 146,000.00	
	12131 807 Steamboat LN	Montrose	Ivy (2 Car)	\$ 146,360.00	
	2012113 1015 Fox Crossing	NYA	Ivy (2 Car)	\$ 147,000.00	
	2012152 1020 Fox Crossing	NYA	Ivy (2 Car)	\$ 147,000.00	
	2013044 1000 Fox Cossing	NYA	Ivy (2 Car)	\$ 147,240.00	
	2013045 1030 Fox Crossing	NYA	Ivy (2 Car)	\$ 147,240.00	
	1307 805 Steamboat Ln	Montrose	Ivy (2 Car)	\$ 154,820.00	
	1338 813 Steamboat LN	Montrose	Ivy (2 Car)	\$ 166,000.00	
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	201200653 7023 Lambert Lane NE	Otsego	Maple (3 Car)	\$ 139,840.00	
	201200572 11481 71st St NE	Otsego	Maple (3 Car)	\$ 147,700.00	
	2012155 840 Fox Court	NYA	Maple (3 Car)	\$ 182,480.00	
	12469 1812 11th St NE	Buffalo	Maple (3 Car)	\$ 182,896.00	
	13101 1802 11th St NE	Buffalo	Maple (3 Car)	\$ 187,000.00	
	1320 811 Steamboat Ln	Montrose	Maple (3Car)	\$ 193,000.00	
	1340 802 Steamboat Ln	Montrose	Maple (3 Car)	\$ 203,000.00	
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	2012112 885 Fox Court	NYA	Spruce (3 Car)	\$ 185,000.00	
	2013010 835 Fox Court	NYA	Spruce (3 Car)	\$ 197,000.00	