

BOARD OF ZONING APPEALS

January 21, 2010

The Board of Zoning Appeals met in Courtroom No. 1 for their regularly scheduled meeting. Ms. Bacho called the meeting to order at 7:30 pm. Ms. Waytes moved to elect Ms. Bacho as Chairman Pro Tem. Mr. Behrens seconded the motion. On roll call, Mr. Horacek, Mr. McElroy, Mr. Behrens, Ms. Bacho and Ms. Waytes answered "yes". Motion carried. Ms. Bacho then asked the Secretary to call the roll. Members in attendance were Mr. Horacek, Mr. McElroy, Mr. Behrens, Ms. Waytes and Ms. Bacho. Also in attendance were the Assistant Law Director, James Lyons; the Assistant City Manager, Doug Lewis; the City Planner, Russ Schaedlich and the Secretary, Tina B. Pomfrey.

MINUTES: The minutes of December 17, 2009 were approved as submitted.

ORGANIZATION OF OFFICERS:

Ms. Waytes moved to nominate Ms. Bacho as Chairman of the Board of Zoning Appeals. Mr. Behrens seconded the motion. There being no further nominations, the Chairman Pro Tem asked for a vote. Mr. Horacek, Mr. McElroy, Mr. Behrens and Ms. Waytes answered "yes". Ms. Bacho answered "no". Motion carried, 4-0. Ms. Bacho moved to nominate Mr. Behrens as Vice-Chairman of the Board of Zoning Appeals. Ms. Waytes seconded the motion. There were no further nominations. On roll call, Mr. Horacek, Mr. McElroy, Ms. Waytes and Ms. Bacho answered "yes". Mr. Behrens abstained from the vote. Motion carried 4-0.

Ms. Bacho explained the procedures for this meeting and swore in those who planned on speaking for or against the variance requests.

NEW BUSINESS

REFUSAL NO. 2176

APPLICANT: James S. Smith

DISTRICT: R-1 Single Family Residential

LOCATION: 424 West Jackson Street

VARIANCE: Section 1131.02 (d)

An application has been submitted by Mr. James S. Smith, chairman of New Hope Baptist Church, 428 West Jackson Street, requesting a variance to Section 1131.02 (d) of the Painesville Codified Ordinances. Section 1131.02 (d) states...Fixed canopies may project no more than three and one-half feet (3 ½) into the front yard. The applicant would like to install an awning 7 feet into the front setback. A variance of 3 ½ feet is being requested.

Ms. Bacho explained that the Board has received a written report by the administration regarding the refusal. Ms. Bacho asked who was present to speak on behalf of the variance request. James Smith, 140 Newell Street, was present for the meeting. He said he was satisfied with the explanation the City gave regarding the variance request. Ms. Bacho asked if Mr. Lyons had anything to add to the administrative report regarding the variance request. Mr. Lyons replied no. Ms. Bacho asked if the City had any comments. Mr. Schaedlich stated he had nothing to add to the administrative report. Mr. Behrens asked if the variance request concerned anything other than the awning on the front porch. Mr. Schaedlich replied no. Ms. Bacho asked for a motion. Mr. Behrens moved to approved Refusal 2176 as requested. Ms. Waytes seconded the motion. Mr. Lyons interjected and asked that the Board consider the phrase "grant the variance as requested" instead of "grant the refusal as requested" to avoid confusion with the applicant and in the minutes. Mr. Behrens moved to approved Variance 2176 as written. Ms. Waytes seconded the motion. On roll call, Mr. Horacek, Mr. McElroy, Mr. Behrens, Ms. Waytes and Ms. Bacho answered yes. Motion carried, 5-0.

ADMINISTRATIVE APPEAL

APPLICANT/OWNER: Nancy Pettit

DISTRICT: R-1 Single Family

LOCATION: 67-69 East Prospect Street

In accordance with the Zoning Code of the City of Painesville, Ohio, an appeal has been submitted by Ms. Nancy Pettit regarding the notice dated December 4, 2009. The notice states the applicant is in violation of the Sections 1139.04 (e) & (f) of the Codified Ordinances of the City of Painesville, Ohio. The Board of Appeals will meet to consider the appeal of the notice dated December 4, 2009: Loss of Non-Conforming Use.

Mr. Lyons explained to the Board, specifically the new members, that this proceeding is little different than a variance request. Mr. Lyons indicated that the Board has three (3) different functions to perform. Painesville Zoning Code, Section 1141.05, allows the Board to interpret the Zoning Code in order to carry out the intent and objective of the Zoning Code. Additionally, the same section allows the Board the power to hear and decide appeals where it is alleged by the appellate (the applicant bringing the case to the Board) that there is an error in any order, requirement, decision, grant or refusal made by the administrator(s). An appeal shall be filed within 20 days of the decision. The third power is the power to

grant variances, such as the previous case, where it is alleged that the strict application of the zoning code has caused practical difficulty in the use of the property. Based on the standards that are articulated in the Zoning Code and the administrative report, the applicant is seeking relief from the strict application of the Zoning Code. Ms. Pettit is present under an administrative review, the second power, appealing the decision of the administrator that the non-conforming use of her property has expired because the property has been vacant for a time frame exceeding one (1) year.

Mr. Lyons gave several suggestions to the new Chairman with regard to swearing in both applicants and administrators and noting it for the record. Ms. Pettit was sworn in at the beginning of the meeting and Mr. Schaedlich was sworn in at this time to indicate the letter that was sent to Mrs. Pettit on December 4, 2009 is a true and accurate copy of what was given to Mrs. Pettit and that it is the official position of the City.

Ms. Nancy Pettit was present for the meeting. Ms. Bacho asked Mrs. Pettit if she had been sworn in. She replied yes. Mrs. Pettit stated that she lives in Painesville, 198 Grand River Avenue, but owns the property at 67-69 East Prospect Street. Mrs. Pettit stated the non-conforming situation arose when she went to the Painesville City Utilities office looking for information about utilities for tax purposes. The clerk in the utilities office stated that the property is vacant. Mrs. Pettit stated that she had been staying at the East Prospect Street house but did not change her address because she lives in Painesville. The clerk stated that Mrs. Pettit could not have been living there because the utilities record did not register any water consumption. Mrs. Pettit said the clerk called Noell Sivertsen from the Building Department. Mrs. Pettit claims that the upstairs was rented and the downstairs was empty but that she was staying there, working on the property to get it rented again. Mrs. Pettit said she cannot afford to pay someone to do the repairs so she is doing it herself.

Ms. Bacho asked if the intention is to rent the property again. Mrs. Pettit replied yes, however, she had to evict the upstairs tenant for nonpayment for 2 months. Now she is stuck with their utility bill and the damage that was done to the unit by the previous tenants. Because of the economy, it is really hard to make ends meet. Ms. Pettit said she is retired and thought that rental properties would be good to supplement her income but it is draining her accounts.

Mr. McElroy stated that it is the City's position that the property at 67-69 East Prospect Street served as a single residence for a minimum of 21 months and lost its nonconforming status. Mr. McElroy asked Ms. Pettit if she lived in the property for that time frame. Ms. Pettit said that the whole property was not vacant for 21 months. Mr. McElroy asked if she received the letter from Ms. Sivertsen dated December 4, 2009. Mrs. Pettit replied yes. Mr. McElroy stated that in the letter, it states that for 21 months, the property was not occupied as a duplex, but only as a single family residence. Ms. Pettit stated the upstairs was rented and she stayed in the downstairs residence for one (1) month. Mr. McElroy commented that he sympathizes with Ms. Pettit with regard to the difficulties of the economy, however it is a struggle for the Board because they are there to determine only if the administration erred in the determination that the property has fallen out of the nonconforming use time frame. Mr. McElroy understands from Ms. Pettit's own testimony that this property was not being occupied as a duplex. Ms. Pettit stated that she lived there during the whole month of May 2009, but she was not renting the property. Mr. McElroy stated he still believes that the property still would have lost its nonconforming status.

Mr. Lyons asked Ms. Pettit if she has any records from September 2007 for the upstairs and downstairs of the property. Ms. Pettit replied she has the utilities in her name but according to the administration, that does not prove anything. Mr. Lyons asked if she has rental records that show when the second floor and first floor was rented. Ms. Pettit said she has something from Human Services for the upstairs unit, however, the downstairs was not rented; she was the only one staying there. Mr. Lyons asked Ms. Pettit if it is correct to state that the downstairs unit was not rented at all, except for the time that she stayed there in May 2009. Ms. Pettit replied yes. Mr. Lyons asked Ms. Pettit if she has records prior to January 2009, when was the last time anyone rented the downstairs residence. Ms. Pettit said she would have to look for those records, she could not recall. Mr. Lyons asked when the upstairs was rented. He commented that the letter stated the second floor was vacant from November 14, 2007 to August 3, 2009. He asked if that was an accurate statement. Ms. Pettit replied no, but she would have to go back to her records to check.

Discussion ensued with regard to meters on the residence. Mr. McElroy asked for clarification of the issue from Mr. Lyons. Mr. McElroy surmised that the issue is whether or not the property has two (2) renters for the time frame outlined in the letter. He stated that the City's position is that the property was vacant from November 14, 2007 till August 3, 2009. Mr. McElroy asked Ms. Pettit if she has any evidence that that statement is inaccurate. Mr. Lyons stated that the statement from Mr. McElroy is not entirely correct. Mr. Lyons explained that the property is a two family residence in a single family district. An owner can occupy one of the residences if it is being used as a residence. If Ms. Pettit did not have another residence, and was living in the first floor one half of the year but was spending half of the year with a daughter in Florida, this would not be an issue and the only question would be if the second floor were vacant for a period of one year. This property on East Prospect is not her primary residence but she stated that she was residing there for a period of one month in 2009. The Board must decide if Ms. Pettit

was using the property as a residence for that period of time and that is a factual determination that the Board has to make. Mr. Lyons speculated that perhaps Ms. Pettit did not realized what a formal legal process the Board of Zoning Appeals is in terms of needing to bring all her evidence to the hearing. Mr. Lyons indicated Ms. Pettit does not have information available at this time to answer the questions regarding proof of residence. This is a serious process since whatever is determined by the Board today is a final decision with respect to the City unless it is appealed to the Court of Common Pleas as an Administrative Appeal. Mr. Lyons commented that since all have been sworn in, the Court could base their decision on the evidence that has been presented this evening. Mr. Lyons stated that the Board has the right to give Ms. Pettit more time to bring additional evidence to the Board.

Mr. McElroy asked Ms. Pettit if she would like additional time to bring more evidence to the Board. Ms. Pettit replied yes since she bought the house as a duplex.

Ms. Waytes asked if the house was originally built as a duplex. Ms. Pettit said she researched the property to try to discover that. Mr. Schaedlich commented that it appears this home converted from a single family to a two family at some point in time. Mr. Lyons said in order to be nonconforming, it has to have been a valid prior use.

Ms. Waytes moved to continue the hearing until the next regularly scheduled Board of Zoning Appeals meeting in February to allow Ms. Pettit time to produce additional documentation or evidence concerning her property with regard to the City's administrative decision.

Ms. Bacho asked if anyone else has more information that the Board would require to be added to that motion.

Mr. Lyons indicated that Ms. Pettit should bring in information relevant with regard to the letter that was given to her by the administration.

Ms. Pettit asked if both units need to be rented at the same time in order for the house to be classified as a duplex. Mr. Schaedlich stated it is a situation where if one of the units is vacant for a continued 12 month period, the nonconforming use would be lost. If it is vacant for any time before 12 months and then it is rented, it is fine.

Mr. Horacek questioned the conforming and nonconforming use as explained in the December 4th letter. Mr. Lyons said although he would have written it differently, what was meant was since the property has had only one unit occupied since August 2009, it has been used in a conforming fashion. It does not mean that the property was brought back into a nonconforming status for use as a duplex in a single family residential district. More discussion ensued. Mr. Lyons stated the ordinance is very clear. In order to get rid of a nonconforming use, a property must be vacant for a period of 12 months or has to sustain damage of over 50%. If damaged to the extreme, the property would have to be rebuilt to conform to the current zoning district.

Mr. Lewis was sworn in. Mr. Lewis said properties are monitored by several different methods. In this case, the property was monitored through the utility account. Code requires that utilities must service a residential property if someone is living there. If someone were living there, the utilities would show electric and/or water consumption. In this case, the property showed zero consumption. Ms. Pettit replied that the utilities clerk said that her usage was not enough to register on the account. Mr. Lyons stated that he understands the process to be that when there is very low consumption that is taken as circumstantial evidence that no one is residing in the unit. Noell Sivertsen made the determination that no one was living there, and that is how we arrived at this process. The reason the letter goes out is to give the homeowner a chance at due process.

Ms. Pettit said she definitely used the utilities. Mr. Lyons commented that the more troubling aspect is that based on the utility records for the 21 month period from November 14, 2007 until August 3, 2009, it was determined that the upstairs was vacant for a period of over 12 months. The Board is giving you opportunity to bring evidence that someone was there.

More discussion ensued.

Ms. Bacho asked the secretary the read the motion as previously stated. The secretary stated that Ms. Waytes moved to continue the hearing until the next regularly scheduled Board of Zoning Appeals meeting in February to allow Ms. Pettit time to produce additional documentation or evidence concerning her property with regard to the City's administrative decision. Mr. Behrens seconded the motion. On roll call, Mr. McElroy, Mr. Behrens, Ms. Waytes, Mr. Horacek and Ms. Bacho answered yes. Motion carried, 5-0.

There being no further discussion, the meeting was adjourned at 8:23 pm.