

## BOARD OF ZONING APPEALS

July 15, 2010

The Board of Zoning Appeals met in Courtroom No. 1 for their regularly scheduled meeting. Mr. Behrens, the co-chairman, called the meeting to order at 7:30 p.m. and asked the Secretary to call the roll. Members in attendance were Mr. Horacek, Mr. McElroy and Ms. Waytes. 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 June 17, 2010 were approved as submitted.

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

### NEW BUSINESS

#### REFUSAL NO. 2186

**APPLICANT:** Shun Jiao Zeng

**DISTRICT:** R- 1 Single Family Residential

**LOCATION:** 128 Carmody Drive

**VARIANCE:** Section 1137.03(b) (2)

An application has been submitted by Mrs. Shun Jiao Zeng of 95 N. Settlers Lane, requesting a variance to Section 1137.03 (b) (2) of the Painesville Codified Ordinances. Section 1137.03 (b) (2) requires a minimum of one enclosed parking space for every single family dwelling unit.

Ms. Ellen Lee, 7082 Rushmore Way, Concord Twp., was present to represent her mother, Mrs. Shun Jiao Zeng. She explained the layout of the property. Ms. Lee stated that the yard is fenced and there are many trees behind the fence at the back of the property. She stated it will cost money to take them out. Ms. Lee also commented that it will be difficult to maneuver a car out of the driveway if a garage must be built because of the placement of the sun porch off of the side of the house. Ms. Lee asked the Board to allow her to build a shed instead of a garage.

Ms. Waytes asked about the pictures that were present in the Board packet. Ms. Lee indicated that they are pictures of the yard. She pointed out the trees at the back of the property.

Mr. Behrens asked if it was known that a garage needed to be built when the property was purchased. Ms. Lee replied yes.

Mr. Behrens asked for the comments of the City. Mr. Schaedlich explained that there appears to be enough room in the back yard to construct a garage. He indicated that he inspected the surrounding neighborhood and said he submitted pictures of the neighborhood in the Board packet. Mr. Schaedlich commented nearly all the neighboring properties currently have garages. Many of the properties are smaller than this particular property.

Mr. Behrens asked if there was correspondence from the neighborhood. The secretary stated she distributed a letter to the Board at the beginning of the meeting. It is from the current tenant of the property, who is not in favor of a garage being built. There was no other correspondence.

Ms. Waytes moved to grant the variance as requested. Mr. McElroy seconded the motion. On roll call, Mr. McElroy, Ms. Waytes, Mr. Horacek and Mr. Behrens answered no. Motion failed, 4-0.

Ms. Lee stated that she and her parents went to the property and measured it. She said it will be difficult to fit a garage on the property. Discussion ensued. Mr. Behrens reiterated that the decision of the Board is that a garage must be built on the property. Ms. Lee indicated that the present owners will not use the garage. Mr. Behrens replied that it does not matter, that a garage must be built. More discussion ensued.

Mr. Lyons stated that the applicant may have to appear before the Board again to ask for a variance of the setback requirements in order to construct the garage.

#### REFUSAL NO. 2187

**APPLICANT:** Adam R. Lulow

**DISTRICT:** R- 2 Multi-Family Residential

**LOCATION:** 1770 North Ashwood Lane

**VARIANCE:** Section 1137.03(b) (2)

An application has been submitted by Mr. Adam R. Lulow, 1770 North Ashwood Lane, requesting a variance to Section 1135.01 of the Painesville Codified Ordinances. The applicant is proposing to install a fence that is six (6) feet in height at his property on North Ashwood Lane. Section 1135.01(a)(1) B states that fences within the front setback line of record or existing main building line, whichever is less, shall not exceed three (3) feet in height. Section 1135.01(a)(1) C states on corner lots all sides adjacent to the right-of-way shall be treated as a front setback line and regulated by Section 1135.01(a)(1)B.

Mr. Adam Lulow was present for the meeting. He stated that the Board recently approved a similar request in his neighborhood. Mr. Lulow explained that he has two (2) kids and two (2) dogs. He would like to maximize the space in his yard while keeping his kids and dogs safe from harm. Mr. Lulow

clarified the letter from the Association management company that he submitted to the Board with his application. Mr. Lulow stated that the management company approved a 5 foot fence and the variance request is for a 6 foot fence. The fence is actually 5 feet tall with a 1 foot lattice at the top of the fence. It is the style that is most prevalent in the development, although there are wooden stockade fences installed in the neighborhood as well.

Mr. Behrens asked if there were comments from the audience, Law Director or the neighborhood. There being none, he asked for the comments of the City. Mr. Schaedlich stated that the City believes stipulations should accompany an approval of the variance request. The applicant should contact OUPS before installation of the fence, the homeowner is responsible for the removal of the fence should the City need to gain access to the easement and the style of the fence should be approved by the management company.

Mr. McElroy moved to grant the variance with the stipulations suggested by the City. Ms. Waytes seconded the motion. On roll call, Ms. Waytes, Mr. Horacek, Mr. McElroy and Mr. Behrens answered yes. Motion carried, 4-0.

#### **ADMINISTRATIVE APPEAL**

**APPLICANT/OWNER:** Jeffery N. Gatchel

**DISTRICT:** B-2 General Business

**LOCATION:** 381 Condon Court

In accordance with the Zoning Code of the City of Painesville, Ohio, an appeal has been submitted by Mr. Jeffery N. Gatchel regarding the notice dated December 3, 2009. The notice states the applicant is in violation of the Sections 1139.04 (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 3, 2009: Loss of Non-Conforming Use.

Mr. Behrens stated this appeal is unusual and asked Mr. Lyons to explain to the Board the proper procedure to hear this appeal. Mr. Lyons indicated that this is not a variance request. It falls under section 1141.05 B of the Codified Ordinances of Painesville. This section allows the Board to hear and decide appeals where it is alleged by the appellate that there is an error in the order or decision that was made by the City. In this case, the appellate is Mr. Gatchel. On December 3, 2009, Noell Sivertsen, the Property Maintenance Inspector for the City of Painesville, notified HUD, the organization that owns the property at 381 Condon Court, that the nonconforming use of the home had been lost because it had not been occupied for a period of one year. The Board has to consider if this decision was correct. There are some unusual circumstances surrounding this case, as Mr. Gatchel has a contract to purchase the property, but does not yet own the property. It has not transferred and is still in the name of HUD, the organization that decided not to appeal the decision back in December 2009. Mr. Lyons said it is his understanding that Mr. Gatchel hopes to use the property as a residence but the City received information from HUD that the property was marketed as commercial. Mr. Gatchel may disagree with that. Mr. Lyons indicated that Mr. Joe Gurley, the Law Director for the City, thought that it would be fair to allow Mr. Gatchel to file an Administrative Appeal to allow the Board to consider waiving the 30 day appeal requirement to consider this issue. The Board must determine if an error was made in this decision back in 2009. The Board first must determine whether to allow the appeal; if they decide to hear it, they must consider the issue based on the merits of the decision that was made by Ms. Sivertsen in December 2009. Another item that Mr. Lyons also commented on is the appraisal report submitted by Mr. Gatchel. On page 2 of the report, the property is listed as a legally nonconforming property. Mr. Lyons noted that the date of this record was November 28, 2009 and predated the property entering into the nonconforming status. The Board can hear what Mr. Gatchel has to say and then determine whether they have jurisdiction to hear the appeal. If the Board agrees to hear the appeal, then the Board must immediately determine what the merits of the case are.

Mr. Behrens stated that the Board is in receipt of the application for appeal, the City's position on this appeal, HUD paperwork and paperwork regarding the purchase of the property. Mr. Behrens asked if anyone is present who would like to speak to the appeal. Mr. Jeff Gatchel was present and explained that at this time he does not have a permanent residence. Mr. Gatchel stated that he and his wife sold their home and made an offer on the property on Condon Court to HUD. He indicated that he and his wife were not aware of any issues regarding the property until the utilities were to be turned on. Mr. Gatchel stated that as of yesterday, he and his family are homeless and hoping that the City will reconsider and allow the property to be used as a residence.

Ms. Waytes asked at what time Mr. Gatchel discovered the property could not be used as a residence. Mr. Gatchel replied when his wife tried to put the utilities into their name. Ms. Waytes stated that per the paperwork the Board is in receipt of, the property was marketed as commercial (on the appraisal report). Ms. Waytes asked if there were there any "red flags" during this process that might have indicated that there were issues with this property. Mr. Gatchel said they did not know of any problems and the property was marketed (on the MLS site) as residential, not commercial. Only now the property is listed as "investors only". Mr. Gatchel indicated he is not sure what the difference is. Mr. Gatchel stated that property taxes have always been paid at the residential rate, according the Lake County website.

Ms. Waytes stated that is before the home lost its nonconforming status after being unoccupied for 12 months, however. The issue is not the house, which has never been used as a commercial property, but the location of the home, which is zoned commercial.

Mrs. Natalie Gatchel stated they bid on the property after speaking with the neighbors, who indicated that all 4 houses on the street are residential and have never been used commercially.

Ms. Waytes stated that the homes are residential in use; the land is zoned commercial. Mr. Schaedlich explained that the property was built originally for residential use. There was a major rewrite of the zoning code in 1991-1992, and this particular area was slated as commercial. The intent of the City was that over time, this area would revert to commercial use entirely. The properties that were there that were homes could continue to be used as residential properties as long as they were occupied. The utilities to this house were turned off in November 2008, and the house has sat vacant since then. Because the City has a non-conforming clause in the code that states that any property that is vacant for 12 consecutive months must then conform to zoning, the current zoning dictates the use of the property.

Mrs. Gatchel said that they were unaware of the status of the property and would not have considered buying it if they had known of the non-conformity. She indicated that HUD is still listing the property as residential and still showing it to potential buyers.

Mr. McElroy said personally he finds this situation heart breaking, however, the difficulty for him is finding an error in the City's interpretation of the Zoning Code. The City notified HUD over six (6) months ago regarding the change in the property status and HUD could have appealed that decision. Mr. McElroy commented that he did not think this situation is fair to the Gatchels's, however HUD and the realtor are to blame for this circumstance and not the City. Mr. McElroy stated that from a legal perspective, the opportunity to appeal this decision is well past the 30 day time frame that is set forth in the Zoning Code.

Mrs. Gatchel asked what the next step was. Mr. Lyons stated that the Gatchel's could certainly take the risk and purchase the property from HUD. They would then have the right to request a rezoning of the land by the City, but it would take a couple of months.

Mr. Lyons mentioned that the contract with HUD was signed on June 24<sup>th</sup>. Mr. Gatchel's replied that it was signed on June 14<sup>th</sup> but was revised on the June 24<sup>th</sup>. Mr. Lyons commented that the appeal to the BZA was filed on July 1<sup>st</sup>. Mr. Lyons asked when the Gatchel's learned that they could not obtain electrical service from the City. Mr. Gatchel replied 2 weeks ago, around June 29, June 30, July 1<sup>st</sup>. Mr. Lyons asked Mr. Gatchel when he signed a contract to sell the house they just moved from. Mr. Gatchel replied a year ago. Mr. Lyons stated that for a year now this has been in the making but has only come to a head in the last few weeks. Ms. Lyons then asked Mr. Gatchel if he read in the contract that HUD was not warranting the zoning. Mr. Lyons pointed out that in the body of the contract it says that it is up to the purchaser to confirm the zoning plus take responsibility for any home inspection. Mr. Gatchel replied that he did not think he would have to confirm that a home with three bedrooms and bathroom, recently remodeled, with no commercial parking would be a commercial property and he does not believe anyone else would either. He stated that he was just trying to buy this house and make it beautiful for his family. He commented that it seems that the City of Painesville wants this house to sit empty and he just does not understand that fact.

Mr. Lyons stated that the Board of Zoning Appeals power is more limited than many understand and the issue that Mr. Gatchel brings to light is a rezoning issue that is not served by this Board. The Board's power is only to determine whether an error was made with regard to the non-conforming use status that was made in December. Mr. Lyons asked Mr. Gatchel if he could rescind the contract with HUD. The Gatchel's said they did not know if they could without losing their \$500 earnest money. Mr. Lyons stated that he spoke with Mr. Lewis who said that HUD might allow the earnest money to transfer to another HUD property. Mr. Gatchel stated that in the meantime he has no house to live in; he and his family, 2 cats and dogs are homeless. His wife and he are both missing work and it has cost over \$1000 so far just to be homeless. Mr. Gatchel asked if he could get a variance or must he rezone the property. Mr. Gatchel said he just "wants to get the ball rolling".

Mr. Lyons said you could talk to Mr. Schaedlich with regard to what is required to start the process of rezoning. Mr. Schaedlich said there is no other R-1 property in the area so it will be difficult, however, it is not an immediate decision and will take several months to achieve if it is rezoned because it goes first to the Planning Commission and then to Council.

Discussion ensued with regard to zoning in the area. Mr. Gatchel showed the Board a map with other residential properties in the area. Mr. Behrens asked if, for instance, an owner of a residential property in that area were to pass away, could the house still be inhabited. Mr. Schaedlich replied yes, provided it does not lose its nonconforming status by being vacant for 12 months, it could be used residentially. So Mr. Behrens stated that just because the zoning is commercial, if the properties are used, there is a chance the properties might never lose their nonconformity. Mr. Schaedlich agreed that is the case.

Mr. Lyons said that Mr. Gatchel could recruit adjoining property owners to rezone the properties, however, it is a Planning Commission issue and, as Mr. Schaedlich stated, it is a many month process property and would not give immediate relief to the situation.

Mr. Behrens asked if a garage would need to be built on this property (if it were rezoned). Mr. Schaedlich indicated that technically a garage would be required but since there is no room for a garage, a variance would have to be granted.

Mr. Andy Flock, 871 Hine Avenue and councilman for Ward 1, was sworn in. He stated he spoke with Mr. Gatchel about this situation, trying to find a solution. Mr. Flock stated that he has spoken to Doug Lewis regarding this. Additionally he has spoken to Joe Paganakis and the director of HUD in Cleveland as well as the attorney for HUD in Philadelphia who are all waiting for the decision here tonight. Mr. Flock stated that he feels this is a moral and humanitarian issue and is hoping that the City can help to find a tentative solution until this situation can be resolved. Perhaps the Gatchel's could stay at the property temporarily and pay some type of rent.

Mr. Anthony Cimaglio, 477 Owego Street, stated that he lives on the north end of Painesville and is familiar with this particular house. He indicated that the house is empty and wondered why the City would not want a family in it. Mr. Cimaglio revealed that he was unaware of some of the zoning changes and has been made aware that his own house could not be rebuilt if it is destroyed. He stated that he wonders when the property was rezoned and why he didn't receive notification (of the rezoning). Mr. Cimaglio said the foreclosure problem that the nation is suffering is going to produce more of these situations. He commented that the City sometimes has to bend the rules, and he believes the City can change this (situation). Mr. Cimaglio recalled a property on Prospect Street that was changed very easily from commercial to residential. He commented that he can't understand why it has come to this; people who want to move to Painesville should be sent food baskets to welcome them to the City. He asked the Board to please consider the family when making this decision,

Ms Waytes replied that the Board of Zoning Appeals has been asked to make a decision on an Administrative Appeal. When there are issues regarding zoning in the City, the residents of this community need to be present at the Council meetings, not the Board of Zoning Appeals meetings once the code is already written. The BZA was created to enforce the code and interpret the code, not re-write it. Ms. Waytes indicated that Board was not asked to rule if the Gatchel's could live in the property, only if the Administration made an error in their interpretation of the loss of nonconformity

Mr. Cimaglio asked who from the City created the non-conformity law? Mr. McElroy replied that that is a question for the Planning Commission. The Planning Commission sets the Zoning Code which is then approved by City Council. Council also approved the Codified Ordinances that provided specific powers to the Board of Zoning Appeals. The Board cannot make decisions outside its jurisdiction and that is what it is being asked to do. This Board cannot change the charter of the City due to one family's circumstance. Mr. McElroy said he thinks this situation is horrible but this is outside the 30 day appeal time frame and the property has not changed hands at this time Mr. McElroy says that he believes the major issue is whether the Board has jurisdiction at all. He said this has significant long term ramifications. As a Board member, Mr. McElroy said he believes the initial issue is if the Board has jurisdiction to hear this.

Mr. Lyons said Mr. Cimaglio made a statement that this Board changed the zoning of property on Prospect Street from commercial to residential. Mr. Lyons commented that is an incorrect statement and although Mr. Cimaglio did not intentionally make an incorrect statement, he wants to clarify it for the applicants so they don't think that something was changed for someone and not for them. What happened in the situation Mr. Cimaglio alludes to is that a two (2) family property lost its nonconformity and had to revert to a single family home. The owner appealed the decision. and based on the facts of that particular case, the Board believed that the City was in error and the decision was overturned. Council forbids this Board from granting "use variances". If the Board did have this power, the Gatchel's could ask the BZA to allow for a particular use of the property. This is not unusual; other communities have Boards that also do not have this power.

Mrs. Gatchel wondered what to do next. Mr. Lyons said talk to Mr. Schaedlich or Mr. Flock. The Gatchel's said they would like to know their odds of this situation improving.

Mr. Anthony Torre, 158 Sanford Street, said he understands the Gatchel's point and went through something similar on a piece of property he owns on Burton Street. He had to tear the house down and build a barn and put cars in it. He commented that the City should help these people.

More discussion ensued. Mr. Bob Scranton, father of Mrs. Gatchel, said he, among others, spoke to HUD and they hang up on him. The people at HUD say they can override the decision but they are not instructing them on what to do. Jeff (Gatchel) works for the County and Natalie works for the License Bureau and they are trying to move into this house to better this City and to better themselves. Mr. Scranton asked why they had to pay \$100 to apply to the BZA when the City already knew the answer to this dilemma. He said there is no purpose to this meeting.

Mr. Lewis replied that he disagrees with Mr. Scranton's last statement. This is the first step and this was discussed at length with Mr. Gatchel and the Law Director for the City. It was explained to Mr. Gatchel that although the deadline had passed, as new owners of the property, he could appeal the decision of the staff and prove that the City was incorrect when they determined the non-conformity. Mr. Lewis said that he also provided Mr. Gatchel with suggestions on how to make the appeal. By coming to the Board, it provided the Gatchel's the opportunity to move into this property should the Board decide to hear the appeal and make a decision regarding the accuracy of the staff's determination. Mr. Gatchel was informed of all this; he knew the Board was an independent Board. Many conversations with Mr. Gatchel occurred and plenty of conversations have occurred with HUD. This is a terrible situation but it is not of the City's making.

Mr. Gatchel commented that yes, although the City has been helpful, he was still of the belief that a decision could be made tonight and did not understand that this could be a much longer process. He indicated that he would have started to look for another residence by now if he knew this was the case.

Mr. Lewis said he explained to Mr. Gatchel that another option was a rezoning of the property that could take up to 3 months to complete. Mr. Gatchel said that he does not remember a 3 month time frame ever being mentioned because he would have walked away from this property. He stated he needs a place to live now.

More discussion ensued with regard to the rezoning process. Mr. Lyons commented that there is also another option. The Gatchel's could hire a lawyer to file a lawsuit in Common Pleas Court saying that they have property rights to this because they have a contract. They could state that the zoning is unconstitutional and maybe a judge would issue a temporary restraining order so that they could move in. However, the City still must follow the law and sent the letter in December 2009 because that is the procedure to follow under the Codified Ordinance of the City.

Ms. Waytes asked what the final step is if the Board makes a decision to hear this and determines the City to be in error. Mr. Lyons replied that the Gatchel's can purchase the house and reside in it. Ms. Waytes asked what the next option would be if the City's decision is found not to be in error. Mr. Lyons said they can appeal it to Common Pleas Court.

Mr. McElroy moved to accept that the Board of Zoning Appeals has jurisdiction to hear the Administrative Appeal pertaining to 381 Condon Court. Mr. Horacek seconded the motion. On roll call, Mr. Horacek, Mr. McElroy, Ms. Waytes and Mr. Behrens answered no. Motion failed, 4-0.

Mr. Lyons recommended that the City refund the \$100.00 fee since they moved that they have no jurisdiction to hear this appeal.

Mr. Horacek moved to refund the \$100 BZA filing fee to Mr. Gatchel. Mr. McElroy seconded the motion. On roll call, Mr. McElroy, Ms. Waytes, Mr. Horacek and Mr. Behrens answered yes. Motion carried, 4-0.

Mr. Lyons commented that Mr. Gatchel has 30 days to appeal this decision with the Court of Common Pleas. He indicated that he would be happy to wait until after the meeting to answer any questions, if he has any, regarding the other options that were mentioned during the meeting.

There being no further discussion, the meeting was adjourned at 8:42 pm.

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Jim Behrens, Co- Chairman

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Tina B. Pomfrey, Secretary