

## BOARD OF ZONING APPEALS

August 19, 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 p.m. and asked the Secretary to call the roll. Members in attendance were Mr. DeLeone, Mr. Horacek, and Mr. Behrens. Also in attendance were the Law Director, Joseph Gurley; the Assistant City Manager, Doug Lewis; the City Planner, Russ Schaedlich and the Secretary, Tina B. Pomfrey.

**MINUTES:** The minutes of July 15, 2010 were not approved due to the lack of a voting quorum. They may be voted on at the next regularly scheduled meeting.

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

### NEW BUSINESS

#### ADMINISTRATIVE APPEAL

**APPLICANT/OWNER:** Martin & Christine Petrof

**DISTRICT:** M-2 Industrial

**LOCATION:** 130 Chester Street

In accordance with the Zoning Code of the City of Painesville, Ohio, an appeal has been submitted by Mr. Daniel F. Marinucci, Attorney at Law, on behalf of Martin and Christine Petrof. The Board of Appeals will meet to consider the appeal: Loss of Non-Conforming Use.

Mr. Gurley explained to the Board that this issue developed with regard to the use of the property. At one time, the use of this property was "grandfathered"; however the property lost its right to be grandfathered. The BZA must now make a decision as to whether the administration has ruled appropriately in this situation.

Mr. Daniel F. Marinucci, the attorney representing the Petrof's, was present for the meeting. He stated that the Petrof's purchased the property for \$27,000 for their daughter to live in. When he and the Petrof's discovered the "nonconforming issue" regarding this property, they tried to "kill" the contract with HUD, to no avail. Mr. Marinucci stated that if the realtor and the auditors department had done its job, the Petrof's would not be standing in front of this Board. Mr. Marinucci stated that nevertheless, this is a beautiful property. The house has been remodeled and is nicer than any of the surrounding houses and it would be a shame if the Petrof's could not use it as a residence.

Mr. Anthony Torre, 158 Sanford Street, commented that he had a similar situation behind property that he owns on Burton Street. He indicated that he would like see the house lived in again.

Mr. Anthony Cimaglio, 477 Owego Street, commented that this house deserves a family. He stated he would like to see the Board use common sense and allow the home to be lived in.

The Chairman asked for the comments from the City. Mr. Schaedlich indicated that HUD was notified about the loss of non-conforming use. He commented that he could not be sure that HUD was aware of the appeals process, as the letter typically outlines the appeals process.

Mr. Behrens asked if all the steps and notifications were done properly.

Mr. Lewis commented that for prior non-conforming notifications, a letter was sent; however in this case, correspondence occurred through e-mail and phone conversations.

Ms. Bacho asked the dates the discussion began. Mr. Schaedlich replied that it began in the summer of 2009; the property lost its use in June, 2009.

Mr. Behrens asked if the City made an error regarding the loss of non-conformity and asked what the City's new position is if they did in fact error in the decision. Mr. DeLeone asked if a notice was issued to the owner directly.

Mr. Schaedlich replied that the loss of non-conformity as determined by the administration is correct, however, the notification regarding the non conforming status was not done by a direct letter.

Mr. Behrens asked if NMHIS.com is HUD. Mr. Lewis replied it is not HUD, but a representative of HUD. Discussion ensued. Mr. Lewis stated that HUD hires a local realtor to manage sales of local properties. Howard Hannah is the local realtor.

Ms. Bacho asked if the City monitors the pre-existing, non-conforming properties, and asked how the City notifies the residents when the status of the properties changes.

Mr. Schaedlich explained that since zoning was instituted in the City in 1927, this property was always zoned industrial. Painesville had something called "Pyramid Zoning" which allowed a lot of different types of uses in the same zoning district. This house was built in a zoned industrial district. Since that time, this property's zoning district has changed back to manufacturing exclusively, thus creating non-conforming properties. Mr. Schaedlich added that the City has notified the property owners once the nonconforming status is lost, however, the City is now mapping the non-conforming properties throughout all zoning districts in the City in an effort to allow notification before non-conformity is lost.

Mr. Cimaglio asked if a non-conforming property could be rebuilt if it were damaged. Mr. Schaedlich replied if it is damaged 50% or more of replacement cost, a non-conforming property could not be rebuilt.

Mr. DeLeone asked if notification (to owners of non-conforming properties) is as a courtesy or if it is mandatory. Mr. Schaedlich replied that it is a courtesy at this time; however, Mr. Lewis added that earlier in the year, it was the BZA Board who recommended that the City give notification before non-conformity expired and that is what the Community Development Department is trying to do.

Mr. DeLeone asked if it will be written policy. Mr. Schaedlich replied, yes, it will be, and having the policy will allow the City to avoid a lot of appeals and allow property owners an advantage.

Mr. Marinucci stated that written notification will have to occur on non-conforming houses; oral statements are not "good enough". HUD should have been sent a certified letter. He added that this house is just too nice to tear down; it is not "junk".

Discussion ensued regarding "use variances". Mr. Gurley stated that the question to the Board is because HUD did not receive written notice of the loss of non-conformity, are you willing to save the grandfather exception and let the use continue.

Mr. Behrens indicated that in past Administrative Appeals, HUD did receive letters from the City and still did not act on the letters. A letter regarding this property would not necessarily guarantee action on HUD's part and in all likelihood a letter would not change the situation.

Ms. Bacho asked if there is any plan to develop industry in the area in question. Mr. Schaedlich replied no, and a non-conforming use can go on forever as long as there are no vacancies over 12 continuous months.

Ms. Bacho asked Mr. Marinucci if there is an alternative plan for this property if this appeal is denied. Mr. Marinucci said no, he does not see this property used industrially. If the appeal is approved however, Mr. Marinucci said the Petrof's daughter will move into the house and live on the property.

Ms. Bacho asked who has the power to rezone the parcel. Mr. Schaedlich replied that the Planning Commission rezones and then is referred to Council.

Mr. Horacek asked Mr. Gurley the definition of use and what constitutes use of a structure. Mr. Gurley indicated that one could argue that actively marketing a property constitutes use and courts are leaning toward property owners in this economy. Trends in the court are tending to be more generous and they are expanding definitions of use.

Mr. Behrens asked if the City's position is now approval. Mr. Schaedlich replied yes.

Discussion ensued with regard to the use of the property and HUD's marketing of the property to Mr. & Mrs. Petrof. Mr. DeLeone questioned whether HUD communicated to the realtor the non-conforming status of the property. Ms. Bacho noted that if no documentation was sent to HUD, they might not have been aware that the property is zoned industrial.

Discussion ensued regarding whether the City was required to send a letter regarding loss of non-conformity. Mr. DeLeone asked that if no letter is required, a property owner would not necessarily know about the appeals process and the time frame for appeal. Mr. Lewis stated that past practice has been to send a letter once the property has lost its non-conformity. Once the letter is sent, the property owner has a 20 day time frame in which to appeal the decision of the Administration. Because of the volume of recent Administrative Appeals, the Board asked that the City start giving notification of pending loss of non-conformity so that property owners are aware and can prevent the loss if they desire. The City is now in the process of identifying all non-conforming properties in the City so that everyone has a better understanding of non-conformity and the procedures involved in retaining or appealing non-conformity.

Mr. Horacek moved to grant the administrative appeal. Mr. Behrens seconded the motion. On roll call, Mr. Behrens, Mr. DeLeone, Mr. Horacek and Ms. Bacho answered yes. Motion carried, 4-0.

## **OTHER BUSINESS**

Mr. Lewis stated that Council has questioned the Condon Court decision and Council asked that the City look at nonconforming uses much closer.

Ms. Bacho stated that there has to be a way to avoid this in the future and a procedure must be implemented to deal with realtors and HUD. Discussion ensued regarding residential properties in industrial districts. Mr. Schaedlich indicated that when this zoning for this particular property was put into place, some time ago, there was a lot of industrial activity in the area. However, it hasn't taken over as it initially was thought that it would.

Mr. DeLeone said that if the use definition changes as Mr. Gurley explained, non-conforming properties will never revert back to the proper zoning. Mr. Gurley replied that that definition is up to the courts. Mr. Lewis stated that the process has been established to pursue an appeal in a number of different ways. Going to court is the final step in the appeal process. Mr. Gurley stated that the Board has more flexibility in interpreting the code than the Administration. Mr. Gurley commented that the Board may be conflicted because the appeals process is a conflicting situation. If you are a purist, and you have confidence in your zoning code, Mr. Gurley commented that all non-conforming properties will be eliminated. Mr. Gurley stated that the trend in the courts at this time, however, is to protect the property owner. Unfortunately, the BZA is in the firing line.

There being no further discussion, the meeting was adjourned at 8:45 pm.

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Julie Bacho, Chairman

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Tina B. Pomfrey, Secretary