

BOARD OF ZONING APPEALS

September 16, 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, James Lyons; 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. The minutes of August 19, 2010 were approved as submitted.

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

REFUSAL NO. 2189

APPLICANT: Jeffery B. Smith

DISTRICT: R- 1 Single Family Residential

LOCATION: 62 Mul Wal Drive

VARIANCE: Section 1127.06(d) 1

An application has been submitted by Mr. Jeffery B. Smith, 62 Mul Wal Drive, requesting a variance to Section 1127.06 (d) 1 of the Painesville Codified Ordinances. The applicant is proposing to construct a garage that is two (2) feet from the side and rear property lines. Section 1127.06(d) 1 states that detached accessory structures shall meet the minimum side yard setback of five (5) feet and the minimum rear yard setback of three (3) feet. A variance of three (3) feet on the side yard clearance and one (1) foot on the rear yard clearance is being requested.

Mr. Smith was present for the meeting and had no additional comments regarding his variance request. Mr. Schaedlich stated that there is very little space presently in the yard and it will be very difficult to meet the setback requirements in order to construct a new garage. He instructed the Board to view the photos that were included in their packets. The recommendation of the City is approval with three (3) stipulations, that the Ohio Utilities Protection Service (OUPS) is notified prior to building commencement, that the homeowner first obtain a demolition permit for the present garage that is on site and that the owner obtain all necessary permits in order to construct a new garage.

Mr. DeLeone moved to grant the variance request with the attached stipulations recommended by the City. Mr. Behrens seconded the motion. On roll call, Mr. DeLeone, Mr. Horacek, Mr. Behrens and Ms. Bacho answered yes. Motion carried, 4-0.

REFUSAL NO. 2190

APPLICANT: Tia Odom

DISTRICT: R- 1 Single Family Residential

LOCATION: 383 Mildred Street

VARIANCE: Section 1137.12 (b) (2)

An application has been submitted by Mrs. Tia Odom, 383 Mildred Street, requesting a variance to Section 1137.12 (b) (2) of the Painesville Codified Ordinances. The applicant is proposing to widen the paved parking area by adding an 8 ft. by 20 ft. concrete pad to the existing driveway. Section 1137.12 (b) (2) allows single family zoned properties to locate additional parking within the front setback provided that not more than 40% of the setback shall be paved and a minimum ten-foot setback shall be maintained from the front property line.

Mr. Schaedlich clarified the last line that appeared on the legal notice that was mailed out should be stricken. It states that a variance of 4 feet is being requested. They are asking for a variance in percentages rather than feet. If they install at pad with 8 ft. x 20 ft. dimensions, front yard coverage will be 45% within the front setback.

Ms. Tia Odom, 383 Mildred Street, was present for the meeting. Ms. Odom commented that she and her family moved into a new house with very little driveway space. Presently they have a truck and 2 cars, and will soon have another vehicle as her step daughter is learning to drive. The garage that is attached to the house can only comfortably contain one vehicle although it was built as a 2 car garage. Ms. Odom stated that their vehicles have been hit while parked on the street and during the winter, street parking is not permitted. Additionally, whenever her family comes into town from Pittsburgh, additional parking arrangements must be made at Ms. Odom's place of work. She stated that there is a pretty significant slope at the front of the driveway and no yard drain at that location. At the time of construction, 2 yard drains were installed in the backyard and one on the opposite side of the front yard. The rainwater sits and drains into the side-yard as well as the neighbor's driveway. Ms. Odom stated that they plan on alleviating some of the rainwater problems through fill and landscaping. Since she and her husband will be doing the work themselves, they are going to fix it a bit at a time.

Mr. Schaedlich asked what Ms. Odom's intentions are for the camper that is parked in the driveway. Ms. Odom stated that they are going to move it to either the garage or the backyard for the winter. Ms. Schaedlich stated that per the zoning code, recreational vehicles cannot be parked in the front setback.

Ms. Bacho asked for the recommendation of the City. Mr. Schaedlich stated the City recommends approval of the variance request with the stipulation that the recreational trailer be moved out of the front setback, that the City Engineer should be consulted to determine if fill is required for the new pad should it be approved. This is to deal with drainage and run-off, and lastly, the new concrete pad be tapered back to the existing driveway on the side closest to the sidewalk to avoid rutting of the front yard.

Discussion ensued regarding the drainage issue in the front corner of the yard. Mr. Schaedlich encouraged the applicant to consult with the City Engineer to determine the best way to obviate the water from the property. Ms. Odom indicated that her house was built at a much higher grade than the existing surrounding properties so that is a problem in itself. Additionally, a yard drain was not installed at one of the front corners of the property as it was on the other side of the yard.

Ms. Bacho asked how long they have lived in the house. Ms. Odom replied it was built 2 years ago and they bought it from Western Reserve Community Development.

Mr. DeLeone moved to grant the variance request with the stipulations as recommended by the City: 1. The recreation trailer should be removed from the front setback area. 2. The property line survey should be completed to accurately determine the southerly side line location. 3. The City Engineer should be consulted to determine the best way to manage drainage and water run-off. 4. The end of the new concrete pad closest to the sidewalk should be tapered back to the existing driveway to prevent rutting of the front yard. Mr. Horacek seconded the motion. On roll call, Mr. Horacek answered yes, Mr. Behrens answered no, Mr. DeLeone answered yes and Ms. Bacho answered no. Motion failed, 2-2.

Mr. Lyons explained that the BZA ordinances stipulate that 3 members must answer in the affirmative in order to grant a variance. In this case, they did not and the variance request was not granted. Mr. Lyons commented that if the applicant desires, she can appeal this decision to the Court of Common Pleas, within 30 days of the letter that the City will send to her stating the decision of the Board.

Ms. Odom asked if she could expand the driveway 4 feet without permits. Ms. Bacho replied that she should speak to the Community Development Department to determine how to proceed.

ADMINISTRATIVE APPEAL

APPLICANT/OWNER: Steven L. Wasserman, Esq. for Ron Skowronski

DISTRICT: B-2 General Business

LOCATION: 259 Richmond Street

In accordance with the Zoning Code of the City of Painesville, Ohio, an appeal has been submitted by Steven L. Wasserman, Esq., on behalf of Mr. Ron Skowronski. The Board of Appeals will meet to consider the appeal dated August 16, 2010: Denial of Certificate of Compliance - Non Residential Use and Occupancy.

Mr. Lyons stated that this particular case is an Administrative Appeal and not a variance request. He also commented that the actual applicant is CARM Development LLC and not Mr. Skowronski. Mr. Lyons indicated that per Section 1141.05 of the Painesville Codified Ordinances, the Board of Zoning Appeals has jurisdiction over the interpretation of the code by the Administration. It is up to the Board to determine if an error was made in the decision to deny the Certificate of Compliance (zoning permit) to the applicant. Mr. Lyons stated that the applicant filed for the Certificate of Compliance in the Community Development Department. Section 1145.05c of the Zoning Codes determines Zoning Code compliance. Under the Code, the ordinance does not address the specific use and parking requirements of this business. The issue was referred to the Planning Commission to examine the appropriate parking regulations under the code as pertaining to the internet café that was proposed at the site. As a result of this meeting, Mr. Skowronski revealed a sweepstakes component to the business and the need to purchase internet phone time on computers in order to be eligible for the sweepstakes. Based on Mr. Skowronski's description, the City determined that this operation was a game of chance conducted for profit and fits the gambling status for the State of Ohio. Consequently the Certificate of Compliance was denied in an August 16, 2007 letter to Mr. Ron Skowronski. In the letter he was notified of the opportunity to submit additional documentation regarding the operation to the City. At this date, no additional documentation has been submitted. Mr. Lyons elaborated that this is not a meeting to submit new evidence or submit additional facts, only to decide if the City was in error based on information given to the City at the time of the Planning Commission meeting. If the Board believes the City to be correct the applicant can appeal the determination to the Court of Common Pleas and/or resubmit a different application with additional facts to the Administration. That decision will be a new decision and it is important to put those facts on the record. Mr. Lyons stated that he does not believe this is a testimonial hearing.

Mr. Steven Wasserman stated he signed the Appeal application and is representing the landlord of the property, CARM Development, Richard and Michael Favazzo. Mr. Wasserman said his friend and colleague, Dominic Vitantonio, represents 3W1P, the tenant of the property. Mr. Wasserman commented that he agrees with Mr. Lyons for the most part. He indicated, however, that he believes that there was a procedural deficiency in the testimony presented to the Planning Commission meeting. The testimony that was given regarding the internet café was only to determine if parking requirements for the operation had been met. Mr. Schaedlich's decision with regard to actual use was made with no analysis or determination or background that this business satisfied zoning requirements. His determination was solely based on a legal opinion from the City's Law Department based upon a limited question and answer session with Mr. Skowronski. Mr. Wasserman stated that he had hoped this evening to provide the Board a more factual picture of the business as everything that they will submit is already in the public domain and is in fact operational in other cities. Mr. Wasserman stated that he believes that the Board would come to a different conclusion (than the City Administration) if they were able to view the information contained on the disc (computer disk that contains additional info to the Board).

Mr. Lyons replied that the position of use that the Board must make is a decision based on the information given at the time of application. Mr. Wasserman may give more information by way of another application and can make a complete record of what they want the City to review and if the Administration still says no (to the Certificate of Compliance), Mr. Wasserman can appeal the decision. Mr. Lyons added that he is only trying to protect the process and trying not to place this responsibility on the BZA.

Mr. Behrens stated that this issue started out as a parking discussion and evolved into a discussion regarding the type of operation that it is. Mr. Wasserman replied yes, and there was no evidence taken or intention of issue if this use violated Ohio gambling laws and only became an issue after the brief informational exchange between Mr. Lyons and Mr. Skowronski at the Planning Commission meeting. The applicant submits that there was no evidence to support that this was an illegal operation and hence its application for a Certificate of Compliance should not have been denied.

Mr. Dominic Vitantonio, 6449 Wilson Mills Road, Mayfield Village, was present to represent 3W1P LLC. Mr. Vitantonio stated that if the Board views the highlighted part of the Planning Commission minutes they will notice the discussion regarding parking requirements exclusively until the last sentence of the second page when Mr. Lyons asks the Commission to determine what an internet café is similar to, based on the listing of uses in the code. At that point, dialogue begins regarding what an internet café is related to. Mr. Skowronski was not prepared to try to convince someone that this was a permitted use, only what the parking requirements might be. Four days later, Mr. Skowronski received a letter from Russ Schaedlich dated August 16th 2010, stating that the business is considered gambling under the Ohio Revised Code. The intent tonight was to present a preliminary position and support it with testimony and evidence from Mr. Skowronski. This will not be done because Mr. Lyons is trying to preserve the integrity of this process, and the BZA has no authority to hear this argument. Mr. Vitantonio stated that in light of this argument, it is fruitless to proceed with this meeting, as new information cannot be submitted at this time to support an argument.

Mr. Lyons stated that all information has to be submitted to the Zoning Department. It must be reviewed and decisions are initially made in the Zoning Department. If the applicant thinks that the Administration is wrong then the decision can be appealed. If the City decides in favor of the applicant, then the business is free to open. Administratively, the City has the right to consult with other cities to do their own investigation and that could not be done in this venue. Mr. Lyons indicated that this process is consistent with the way the law works. As to the questions posed to Mr. Skowronski at the Planning Commission meeting, Mr. Lyons said he began by asking questions regarding parking requirements. Upon further questioning, the sweepstakes issue was mentioned and Mr. Lyons stated that it troubled him. Mr. Lyons stated that the time frame of sweepstakes led him to believe that the purpose of the business was being driven by the sweepstakes and not the machines inside. If many people wanted to participate in a chance to win \$2,500, it could have an impact on parking requirements. Internet cafes are a new concept in the City not defined clearly in the Painesville Codified Ordinances. Mr. Lyons said that he believed the questions were fair to Mr. Skowronski, who was given an opportunity to submit additional information to the City. He did not submit additional information and now we are here in front of the Board. The Board should take a vote on how to proceed. Mr. Lyons stated that if the Board agrees with him procedurally, then there is nothing more to hear tonight.

Mr. Vitantonio asked if there are any ordinances that dictate what the record is and what should be considered by the Board of Zoning Appeals. Mr. Lyons said the BZA ordinances are brief and do not address what should specifically be considered at this kind of hearing. Mr. Lyons commented that his perspective is one of judge to magistrate. Mr. Wasserman stated that it would be difficult for the Board to evaluate the merits of the appeal without having the benefit of the underlying factual data and information that would have been in the Boards informational packet to describe it were we to have known that that was going to be an issue; if the use violated state law. Mr. Vitantonio stated that they (the tenant and the landlord) operated under the assumption that the use satisfied the zoning code. It was not until the questioning, and a decision was made based on the questioning, that it was determined

that this is an illegal use. There is nothing in the record to support the decision denying a Certificate of Occupancy.

Discussion ensued with regarding the procedure for acquiring a Certificate of Compliance. Mr. Horacek moved to enter into Executive Session. Mr. DeLeone seconded the motion. All members of the BZA answered yes. Motion carried. The Board entered into executive Session at 8:33 pm. They commenced the meeting again at 8:43 pm.

Mr. Horacek moved to consider the appeal based solely on the record as it now exists. Mr. DeLeone seconded the motion. On roll call Mr. Behrens, Mr. DeLeone, Mr. Horacek and Ms. Bacho answered yes. Motion carried, 4-0.

Mr. Lyons stated that the record consists of the application for the Certificate of Compliance, the letter dated August 3, 2010 to the City from Mr. Skorwronski, the Planning Commission minutes from August 12, 2010, the letter of denial of the Certificate of Compliance by Mr. Schaedlich to the applicant dated August 16, 2010, and the appeal to the Board that was filed by the applicant.

Mr. Wasserman stated that in light of the results at this evenings meeting he and the applicant have decided to withdraw the appeal and will resubmit the application based upon the use to the Zoning Department.

There being no further discussion, the meeting was adjourned at 8:48 pm.

Julie Bacho, Chairman

Tina B. Pomfrey, Secretary