

Minutes of a Regular Meeting
of the
City of Bay Village Planning Commission
Held August 1, 2012

Present: Bruckman, Dzienny, Krause, Majewski, Persanyi
Absent: Jennifer Lesny Fleming, Clete Miller
Also Present: Building Director Dan Galli, Councilman Dave Tadych,
John O'Neill (arrived 7:40 p.m.)
Audience: Bruce Geiselman

Chairman Dzienny called the meeting to order at 7:30 p.m.

Motion by Persanyi, second by Majewski, to approve the minutes of meeting held July 11, 2012. Roll Call Vote: Yeas – Bruckman, Majewski, Persanyi. Abstained – Dzienny, Krause Nays – None. Motion carried 3 Yeas, 0 Nays, 2 abstentions. Motion carried.

Bradley Bay Health Center
605 Bradley Road
Expansion of Facilities

Prior to the arrival of Mr. John O'Neill representing Bradley Bay Health Center, Chairman Dzienny advised that although the applicant has been through the Board of Zoning Appeals process and the Architectural Board of Review process, receiving the approvals they needed, the Planning Commission is not comfortable voting without the applicant present. It was **MOVED** by Krause, second Majewski, to table the application of Bradley Bay Health Center to the meeting of September 5, 2012. **Motion carried 5-0.**

Council Update

In the absence of Mr. Miller, there was no council update this evening.

Motion by Majewski, second by Bruckman to adjourn at 7:40 p.m. Motion carried 5-0.

Bradley Bay Health Center
605 Bradley Road
Expansion of Facilities

Mr. O'Neill arrived at 7:40 p.m. It was **MOVED BY** Persanyi, second by Bruckman to reconvene the Planning Commission meeting at 7:41 p.m.

Mr. O'Neill advised that his application has received approval from the Architectural Board of Review and has received a use variance, rear yard variance, and sign variance from the Board of Zoning Appeals. Mr. O'Neill is present this evening to request final approval.

Motion by Majewski that the expansion of the Bradley Bay Health Center onto the adjacent parcel be referred to the City Council so that Council can draft and pass the necessary ordinance or ordinances to place on the ballot for voter approval, so that said expansion will be in compliance with Section 7.6 (1) (a) and/or Section 7.6 (1) (b) of the Charter of the City of Bay Village.

Mr. Dzienny stated that he is trying to determine if this is the proper place and time for that. Is that an agenda item of itself and Mr. Majewski is now taking up the applicant's time? Would that have been an agenda item that we could have discussed prior to adjournment?

Mr. Majewski stated that it is a motion.

Mr. Dzienny commented further that the applicant went through their process and this is their time in front of the commission. Mr. Majewski is taking it in a different direction, and should that have been discussed prior to this.

Mr. Majewski stated that his point is that he does not believe the application should go any further until it complies with the Charter. That is why he made the motion at this point in time. From his position and where he sits, the process is the most important thing and has to have some kind of credibility. The application doesn't have the proper zoning; it is not consistent with the Master Plan. It doesn't comply with the Charter; it is based solely on case law. A legal opinion is based solely on case law that is not relevant in Bay Village and we have no public opinion. Offering the motion to refer to Council, if Council acts as required by the Charter, the zoning question will be answered. The requirements of the Charter would be satisfied. The legal opinion will be moot. The public will have input through a vote, and the public can make a decision whether they want to change the zoning or the use of that parcel and they can use the Master Plan to help them make that decision. The process will maintain its credibility.

Mr. Dzienny stated that Mr. Majewski is asking them to change the law instead of asking them if this follows the current law.

Mr. Majewski stated that he is asking them to follow the Charter procedure for change of zoning or change of use, whichever applies.

Mr. Dzienny stated that Mr. Majewski asked them to draft an ordinance. That is a change of law.

Mr. Majewski stated that according to the Charter they have to draft an ordinance placing it before the voters.

Mr. Persanyi **SECONDED** the motion of Mr. Majewski.

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Mr. Dzienny questioned whether this is something that goes to Council telling them to draft an ordinance or it goes to them as an agenda item for their discussion. He noted that he asked Law Director Ebert if this is legal – what are our powers? It went to the Zoning Board, who has powers by the Charter through the Council to do this. Gary Ebert said yes, again, over and over. It goes to City Council for their own interpretation as to whether or not they want to take this any further. We can ask that question.

Mr. Persanyi stated that according to the Charter, that is exactly what is supposed to happen. He stated that about two weeks ago he woke up in the middle of the night and could not go back to sleep. He pulled out the codified ordinance book, started reading through it, and he is deeply disturbed by what is happening here. The Charter specifically states that any change of use has to be approved by the voters. This idea that a permit can override the Charter is not compatible with the law. We have a situation here where there is a proposal to move on to a parcel that is zoned attached residence district and put new uses on it. The current ordinance says 16 residential units can be built on the parcel. The only way I can see this being resolved is if Chapter 1158, the ordinance that covers attached residences, is amended to permit either a situation like this or it is considered as a conditional use of Chapter 1158, and then the conditions have to be set forth. In either case, then Chapter 1158 would have to go to the voters for approval. This is like an end run to avoid the spirit and intent of our Charter and our ordinances under the guise of a permit.

Mr. Dzienny called for a vote on the motion before the commission. Mr. Bruckman asked for additional time for deliberation.

Mr. Bruckman stated that this seems to be a very unusual turn of events. Granted, this is an unusual situation, noting that the Planning Commission has had unusual situations presented in the past. Both of the points of Mr. Majewski and Mr. Persanyi are interesting and very well made, although he would respectfully disagree about the comments about case law that was cited. This is a topic of concern that has come before other communities. The fact is that there have been quite a lot of case studies and case law that has been provided for the commission. That does have some bearing on the issue and should not be discounted altogether.

Mr. Bruckman continued, stating that given that we are introducing this motion in the midst of an opportunity for the presenter to have an opportunity to speak about his proposal, he would wonder if it would not be appropriate for him to at least provide some comments for the record.

Mr. Dzienny stated that the Planning Commission will continue with Bradley Bay as an agenda item. There is a motion before us.

Mr. Krause stated that he had some misgivings himself the last time it was referred on to the Architectural Board of Review. He spent hours looking over the various things that were provided to the commission including a memorandum from Jeanette McGovern with an attachment from an attorney about use variances. Mr. Krause stated that he came to the opposite conclusion of Mr. Majewski and Mr. Persanyi's comments. Mr. Krause stated that his impression was that it was like an end run circumventing the code. It should go to a vote of the

people. I would feel more comfortable if it had gone that route. But, what this section says is that an ordinance or resolution effecting a change in the uses permitted in any zoning use, classification, or district. This was not an ordinance or resolution; it was an action by the Board of Zoning Appeals and from what the material says, and there is case law, the Board of Zoning Appeals does have that authority to grant use variances. There are a lot of things that have to be met for it to be granted. But, after a period of time and soul searching, it shifted back to saying, because it was not an ordinance or resolution, that the Board of Zoning Appeals did have the authority to grant this variance.

Mr. Majewski stated that the case that is cited by the Law Director took place in the Village of Ottawa. Their zoning authority was the Planning Commission and their Village Council. They did not have a charter amendment which required voter approval of zoning changes. That is the difference and that is why I don't believe that the case cited as Mr. Ebert stated, was the "law of the land" was relevant in the City of Bay Village. We do have a charter amendment which requires voter approval of zoning changes. Mr. Majewski addressed Mr. Krause's comments, stating that if you read Chapter 7.6 (2), it also includes motions. "A resolution, proclamation, motion, and charter revision inconsistent with this amendment..." The motion passed by the Board of Zoning Appeals that granted that variance is inconsistent because it does not go to the voters. I do not believe that motion by the Board of Zoning Appeals is valid.

Mr. Krause stated that the Charter states that "All ordinances, resolutions, proclamations, motions and charter provisions inconsistent with this amendment are hereby repealed." Mr. Majewski stated that his point that he tried to make with the Law Director in a short meeting a couple of months ago was that the ordinance that allows a variance in our code cannot be considered to grant a use variance because it changes the use of a parcel without going to the voters. That would come under Section 7.6 (2). That motion, if it is interpreted to say that the Board of Zoning Appeals can change the use without going to the voters, changes it from a conforming use to a non-conforming use, then it should be repealed. That ordinance that grants the Board of Zoning Appeals the power to do that should be repealed, according to our Charter. It is inconsistent with the Charter. That was passed under Ordinance No. 08-59. That gives them the power to grant variances. But if it interpreted that they can change the use without going to the voters, then by Charter that ordinance should be repealed.

Mr. Krause stated that he had not looked at that piece. The Law Director brought up one case. Mr. Krause stated that when he looked at it he does not think it applies, but it is looking at what Jeanette McGovern gave as an attachment when she raised her own concerns about this whole thing. There are many cases cited in Ohio besides that one, related to use variances.

Mr. Dzienny stated that he does not think the motion of Mr. Majewski is necessary. The code states that "Any ordinance or resolution effecting a change in the use permitted in zoning use or classification of the City of Bay Village shall not become effective after the passage thereof until Council submits it..." It is out of our hands again. We can send them a notice asking them to read this section of the law, but it is already in there. We can go ahead, move forward and pass this, and Council can then submit it to be voted on. We are going to permit this to go through, maybe, but it is up to Council then to decide if it needs to go for a vote.

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Mr. Persanyi stated that Council can only act on this if it is turned down.

Mr. Dzienny reiterated, reading “It shall not become effective after the passage thereof until Council submits such an ordinance or resolution to the electorate at a regularly scheduled election.”

Mr. Persanyi stated that if Council does not act on their recommendation, it never gets submitted to the voters. Mr. Dzienny answered that this is out of the hands of the Planning Commission, that is for the Council to do. The proper thing to do is send a notice to the Council that the Planning Commission is going to pass this through but there are concerns that this doesn't meet this part of the code and put it back in the control of the City Council. The Planning Commission doesn't have the power to change that. The Zoning Board does, and the City Council does. We can throw up a flag, but we can't change that. There is already a process in place for this to happen. We can go ahead and approve this because everything else has been legally gone through. The variances have been granted, whatever we have asked for he has brought in to us, whatever the ABR wants has been taken care of, we can still go ahead and do this. There is nothing that says that the Planning Commission can't do that. Then, Council has to sit there and look at this and say does this change a use. If it does, then they have to make a decision whether they are going to put it up for a vote or not.

Mr. Majewski stated that it should not go to the point where the Planning Commission can approve it if the zoning is not correct.

Mr. Dzienny stated that there is a mechanism in place that is out of the hands of the Planning Commission. The mechanism is City Council; not the Planning Commission. Mr. Majewski stated that it why he is referring this to City Council. Mr. Dzienny stated that it is referred automatically. Reading from the code it states, “Shall not become effective after the passage thereof, until Council submits such ordinance or resolution to the electorate.” Mr. Persanyi noted that if they do not submit it, it never comes to pass.

Mr. Persanyi continued, stating that if the Planning Commission recommends a change in zoning, Council would then submit it to the people. In this case, they have no absolutely no reason to refer this to the people at all.

Mr. Dzienny stated that the motion should state that the Planning Commission is bringing this to the attention of the Council. We should not be telling them what they need to do. We should say this is a concern of the Planning Commission, please, at your next meeting bring this up. Everything we have been told by our Law Director up to this point says we can move forward with this. It has gone through all this process, and now we are stopping it again. Our process can still happen.

Mr. Majewski stated that there is a conflict on what the Planning Commission has been told by the Law Director. The Board of Zoning Appeals was told that the Schoemaker case was the law of the land. In the meeting that the Planning Commission had with the Law Director, he stated

that the Charter was the law of the land in Bay Village. That is conflict. As long as the Charter is the law of the land, that is why the motion was made this evening.

Mr. Bruckman asked for additional time for additional deliberation. He expressed appreciation for the insightful comments and analysis, stating that he finds himself agreeing in many respects with the points that have been brought up. We have been discussing this particular situation in terms of procedural issues, and legal implications of those procedural issues, for some time. What is being lost in the context in these deliberations about procedure is a dialogue about the character of the community in terms of what its future may be, specifically about what this facility has been within the community and what kinds of services, and tiers of services this particular establishment, which is unique in the community, offers the community. Mr. Bruckman stated that he finds that aspect of this process disturbing. We are not here just to talk about procedure, and issues of procedure, though those are very important. There is also regret that we have not had an opportunity to talk about this proposal in terms of its value to the community, be that in a positive sense or a negative sense. We have focused on technical issues such as the zoning and the history of this particular site within the context of the community.

Mr. Persanyi stated that the plan that has been presented by the applicant is a wonderful plan. Mr. Persanyi has absolutely no qualms about the plan. It is a beautiful plan and it would be good for the community. The problem is that it is not following the process that is called for in our zoning ordinance. Mr. Persanyi addressed Mr. O'Neill, stating that Mr. O'Neill might want to build a nursing home at the east end of town because there is a demand for it. Right now, there is no process to do that because the zoning doesn't exist. Mr. Persanyi stated that he would like to see that changed. That is why he would like to see Chapter 1158 amended so that Mr. O'Neill, or anyone else who determined that there is a need here for another nursing home because of the aging population, would have the opportunity to build a nursing home within the framework of the ordinances. Mr. Persanyi stated that he would recommend Chapter 1158 be changed. That parcel of land that Mr. O'Neill is proposing to place his facility on is primarily under Chapter 1158. Right now, that is the only parcel of land, and the existing Bay Commons, that falls under that category. If it were possible to find other locations, in parts of the city where there are large lots and small homes, someone could get options on a number of lots and propose building a nursing home by going to the people. Right now, that can't be done because it doesn't even exist in our zoning code. Mr. Persanyi has no fault with the plan. It is a beautiful set of plans; most of the problems associated with the previous plan have been addressed. I have no problem with the plan, it is the procedure that we are going through which does not conform to our zoning code and our Charter.

Mr. O'Neill stated that he appreciates all the positive things being said. When he presented the plan originally to the city officials and administration this is the route he was instructed to take, to go to the Board of Zoning Appeals to get these use variances. Mr. O'Neill stated that he took the administration's instructions and followed them. He is here today to continue to follow that process. Everything that he has done, he has done trying to conform to the requirements set forth by the Board of Zoning Appeals, Architectural Board of Review, the Planning Commission, the Law Director, the Mayor, and the Building Department. Mr. O'Neill stated that he has been in the city for fifty years; it is all about conformity, service and pleasing the customer; we are all

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customers. Mr. O'Neill stated that he is present today to ask to continue the process to serve the community.

Mr. Majewski stated that he is not making any judgment on the project as it stands right now because, in his opinion, this is a zoning question and before we can pass a project the zoning has to be correct. The Charter is specific about how that procedure goes and it hasn't been followed. He held that position from the start of this and he holds that position now. Council needs to act to put something before the voters. It is not our decision to make; it is the voters' decision to make. Council needs to act to put it in front of the voters before we can pass this project.

Mr. Dzienny expressed disagreement. When the roll is called on the motion, positive or negative, we are still going to move on with the agenda item of Bradley Bay. Whether we pass this or not, it is up to City Council to do their job. But it doesn't mean we should stop doing our job. It will be passed unless City Council says no, or the voters say no.

Mr. Majewski explained that the only part of the motion that he is sending to City Council is the expansion onto the adjacent lot. In his opinion, it is a change of use and he does not believe the zoning is correct and he does not believe the use can be changed without going to the voters. It is not about the project; it is about the expansion onto the adjacent lot.

Mr. Dzienny stated that the contiguous land portion was taken out of the ordinances in the midst of the Bradley Bay project. Mr. O'Neill bought the property with the intent of expanding onto it years ago. We went through this process once. It was grandfathered in because the whole process started before that. Now, this has gone away, he is reapplying, but nothing has changed except he is no longer grandfathered in by that technicality. Everything else is the same. Actually, the project has gotten to be smaller, fits the neighborhood more correctly. You can go back to what the zoning says about hardship. He bought this property with the intent of providing this type of service there. The hardship is that the law changed on him. That is almost like a retroactive enforcement of law. You can play with the dates and all that, but realistically he brought the property with the intent to build on it prior to the law change. The law changed in the process. He owns the land with the intent of doing that and now we are going to penalize him because we changed the law.

Mr. Majewski stated that we are bound by the way the laws are written at this point in time, noting that he has seen that in case law presented by Mr. Ebert. Mr. Dzienny stated that is where the variance comes in; the hardship was presented. He bought the land with the intent of that.

Mr. Majewski stated that is what he questions – a use variance – with a charter that says a change of use must go the voters. I question whether a use variance is valid in this city. That is why he is asking it to be referred to Council so he can put it before the voters.

Mr. Persanyi stated that at the time Mr. O'Neill bought the land he had no idea that the project would be approved. He bought the land knowing that the land was zoned attached residence district, but he did not know he would get approval. He got the approval and then he did not act on it. The grandfather zoning doesn't stay the same forever. There was an opportunity to do

what he had proposed, he did not take the opportunity and subsequently the land use or zoning was changed. It still permits him to build attached residence on that. Mr. Persanyi added that the question is a change of land use cannot be covered with a variance and some of the cases he has been reading and the information he will send out doesn't necessarily go that way.

On the motion before the Commission, the vote was called as follows:

Roll Call Vote: Yeas – Bruckman, Majewski, Persanyi
Nays – Dzienny, Krause

The motion failed to receive a majority affirmative vote of the total members of the Planning Commission. Motion failed.

Mr. O'Neill requested that the application of the Bradley Bay Health Center be tabled until September 5, 2012.

Miscellaneous

The Secretary advised that the Visconsi Company has sent a communication advising that they have withdrawn their application to the Planning Commission for development of property on Dover Center Road.

Mr. Will Krause

Chairman Dzienny regretfully informed the Commission that Mr. Will Krause, due to moving to the City of Westlake, has tendered his resignation as a member of the Planning Commission effective at the close of this evening's meeting. Mr. Krause has been a member of the Commission for the past eight years. Mr. Majewski stated that he has had the pleasure of serving with Mr. Krause. He appreciates his knowledge and his care for the community. He will miss his presence on the Commission. Mr. Persanyi stated that he appreciated Mr. Krause's analytical mind whenever the Commission has been drawn into these issues that have required thought and experience.

Bay Village Board of Education

Mr. Majewski stated that the Commission has received the landscaping details for the Normandy School project from the Board of Education. He thanked Clint Keener for supplying a copy of the Board of Education Facilities Study for our future planning.

Mr. Majewski noted the Board of Education was asking for the ability to occupy the building before the landscaping is planted because the landscaping will survive better if planted in the fall. This would be the decision of the Building Department. Mr. Persanyi stated that the plans contain actual pictures of what they are proposing to do, as requested by the Planning Commission.

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Motion by Krause, second by Bruckman, approving the landscaping plans dated July 23, 2012 presented by the Board of Education for the landscaping at the Normandy School Project.

Motion carried 5-0.

ADJOURNMENT

Meeting adjourned at 8:20 p.m. The next meeting of the Planning Commission will be held Wednesday, September 5, 2012 at 7:30 p.m.

Andy Dzienny, Chairman

Joan Kemper, Secretary