

Minutes of a Meeting
of the
City of Bay Village Planning Commission
Held September 5, 2012

Present: Dzienny, Fleming, Maddux, Majewski, Miller, Persanyi

Absent: Abe Bruckman

Also Present: Law Director Ebert, Building Director Galli, Commercial Projects Coordinator Milburn, Mr. John O'Neill, Ben Ockner, attorney for Mr. O'Neill, Ken Martin, architect for Mr. O'Neill

Audience: Councilman Dave Tadych, Bruce Geiselman, John Suter, Pat Mayer, John and Nancy Black

Chairman Dzienny called the meeting to order at 7:30 p.m. The Planning Commission welcomed new member, Dave Maddux, who has been appointed by Mayor Sutherland and confirmed by Council to fill the unexpired term of Will Krause, ending August 17, 2014.

Motion by Miller, second by Majewski, to approve the minutes of the meeting held August 1, 2012. Motion carried 5-0, with one abstention.

Review of Memorandum from Gary Ebert, Director of Law dated August 17, 2012 regarding Bradley Bay Use Variance Process

Law Director Ebert advised that he prepared a memorandum, as requested, dated August 17, 2012, regarding the Bradley Bay Use Variance Process. An additional memorandum was prepared by Mr. Ebert dated August 31, 2012, as a result of and addressing Taxpayers Demand Action filed by attorney Gerald Phillips on August 29, 2012. As a result of the special Council meeting held September 4, 2012, and discussion held therein, Council declined to put the Bradley Bay expansion issue on the ballot.

Mr. Dzienny confirmed with Mr. Ebert that, as of this time, all of the procedures for the application of Bradley Bay Health Center for expansion have been completed. The application has proceeded through, and been approved, by the Board of Zoning Appeals and the Architectural Board of Review. City Council has determined that the expansion does not need to be placed on the election ballot. The matter now proceeds for final approval to the Planning Commission.

Mr. Majewski stated that he would like to clear something up that was spoken about at the Council meeting held September 4, 2012. There was discussion about legislative action and administrative action. Mr. Majewski stated that if he is understanding correctly, the City Council is the legislative authority for the Board of Zoning Appeals. Mr. Ebert stated that City Council is the legislative authority of the City of Bay Village. Mr. Majewski asked if City Council, under the city charter, has the power to allow use in a district, where the use is not permitted, without a

vote of the people. Mr. Ebert stated that a use is permitted, not a change of zoning. The Board of Zoning Appeals has the ability to determine by variance. City Council cannot determine that. Mr. Majewski stated that if City Council is the legislative authority, how could they have granted that power to the Board of Zoning Appeals if City Council does not have that power themselves. Mr. Ebert stated that it is by charter, as far as the Board of Zoning Appeals. The decision of the Board of Zoning Appeals is not appealable to the Planning Commission or to any other board by the code itself. It is only appealable to Common Pleas Court (Section 2506). The Board of Zoning Appeals did not legislate anything. This was a non-conforming permitted use for Bradley Bay back to 2005 and 2006. When the issue came up before the Planning Commission and went to the Board of Zoning Appeals, it was a non-conforming use but permitted under Section 1141. The variances were granted, the issue went back to the Planning Commission. The authority was there. It wasn't a change of zoning. Bradley Bay decided not to go forward. After that fact, Council decided to remove the non-conforming use, being hospitals or nursing homes, as a non-conforming, permitted use on property not currently owned at that point in time. Mr. O'Neill, or Bradley Bay Health Center, owned that property adjacent to the Bradley Road Nursing Home at that time. The intent of City Council at that time was to prohibit further expansion after this property was purchased so any further expansion, after 2005 or 2006 when this was purchased and approved by Planning Commission, then the situation would not be a non-conforming permitted use any longer. Discussion of any member of City Council at that period of time included the understanding that Bradley Bay was allowed to build on the contiguous property. After that time, Section 1141 was changed to remove nursing homes as a non-conforming permitted use. Because Bradley Bay did not build at that time, and came back to file an application in 2011, we are here today. The intent in 2005 and 2006 was to allow that construction to go forward. Because the construction did not go forward the permits expired, the variances expired, and the process had to be started over.

Mr. Ebert continued, stating that it is not a change of zoning. The case law cited in Mr. Ebert's memorandum specifically states that it is not a zoning change; it is a variance which goes to the Board of Zoning Appeals. The only body that can determine whether the Board of Zoning Appeals acted properly is the Common Pleas Court, eventually the Court of Appeals and the Supreme Court, if it goes that far. The Board of Zoning Appeals approved the variances on May 3, 2012. The appeal time has lapsed.

Mr. Ebert stated that with all due respect to Mr. Phillips' argument, he believes the city has briefed this significantly. There were three cases brought concerning this particular issue in 2005 and 2006, and the issue hasn't changed. The only thing that has changed is Section 1141 of the Codified Ordinances was changed by Council after the approval process had gone through the various boards and Commissions.

Mr. Douglas Milburn expressed agreement with Mr. Ebert's comments.

There is a distinction between this and the issue with the Shell Gasoline Station, as brought up by Mr. Persanyi at the Council Committee meeting on September 4, 2012. That was not a permitted use at the time under Section 1141.

Mr. Persanyi asked if Council does not have the power to permit a change of use, how could they delegate that authority to a body when they do not have the power. Mr. Ebert stated that the Planning Commission can turn down anything that is before the commission. That is the only time City Council has a right to change anything, or review and vote on their decision.

Mr. Persanyi asked Mr. Ebert if he agrees with Mr. Majewski's statement that Council cannot change zoning and they cannot change a permitted use. Mr. Ebert stated that Council can change a permitted use as they have. They can change an ordinance and take something that was grandfathered in at the time. They did that with Section 1141 in 2005. They actually changed that permitted use in 2005, but you can't change to the detriment of someone who currently owns the property. That is a denial of property rights. You can't retroactively change something that someone has the right to build, or zoned today. A perfect example of that is the City of Westlake. They had two different cases that went all the way to the Supreme Court. You cannot change a conditional use, under the code, that is going to retroactively affect a property owner that currently has that ability to build or use the property as it is set forth in that code.

Mr. Persanyi read from Section 7.6 (2) of the city charter, stating, "All ordinances, resolutions, proclamations, motions and Charter provisions inconsistent with this amendment are hereby repealed." He stated that the Board of Zoning Appeals made a motion to grant a change of use. Mr. Ebert stated that they granted a variance as a permitted use and they have the ability to do that.

Mr. Dzienny stated that this discussion has been happening since the beginning of this review. It has been told to the Planning Commission over and over by our legal counsel that this is acceptable. The City Council doesn't have a problem with this. The Planning Commission seems to have a problem with this and it isn't even the authority of the Planning Commission. The Planning Commission is supposed to be reviewing Section 1129, reviewing the merits of the project, not whether it is allowed to be a conditional use. Mr. Dzienny stated that the Planning Commission is trying to see how this looks, how it fits the community, and how it fits in the site. Mr. Dzienny stated that he is trying to put this to rest to let Mr. O'Neill move forward with the project and they have patiently been waiting for the Planning Commission to do their job.

Mr. Majewski replied that it is also the job of the Planning Commission to make sure the project meets the code, meets the plans of the city, and meets the Charter. Mr. Dzienny stated that the Planning Commission has been told over and over that it does. Mr. Majewski repeated his previous question as to how the Board of Zoning Appeals got the power, if City Council couldn't give it to them. Mr. Ebert stated that the Board of Zoning Appeals has the power to grant a conditional use, a variance, under their authority. No one can challenge that other than an individual to the Court of Common Pleas. Court cases cited in this issue have been tried, up to three times in the Court of Appeals. The exact issue has gone through the process of the Court of Appeals and withstood the test of time. We are here again with some of the same issues being discussed. Mr. Ebert noted that he has given his legal opinion and stands by it. There has been ample discussion and ample exchange of documents among the parties. The proper procedures have been followed and the proper administrative bodies have heard the case and it should go

forward tonight on final approval. Mr. Milburn has been asked if he has anything further to say because he has reviewed this as part of the process as Building Director for a number of years.

Mr. Majewski stated that this is an issue he has been involved in for twenty years, since 1992. The night the legislation was passed to eliminate Section 1141.01 (c), the minutes refer at that meeting to the audience applause. Everyone thought we were finally finished with this. This is the first real test of the removal of that legislation. We have to get this right because it is going to set a precedent. Mr. Majewski stated that this is his position, this is his concern, and that is why he is raising these questions.

Mr. Majewski referred to Mr. Ebert's memorandum of August 17, 2012. In the first paragraph of Section two he states that "Mr. Majewski's motion appears to have the intent and purpose of superseding the BZA process by asking Council to override the decision and present the matter as a 'rezone' issue for ballot consideration." Mr. Majewski addressed Mr. Ebert, stating that he wished Mr. Ebert would have asked him what his intent and purpose was and he would have gladly told him. His purpose was that he did not believe that the Charter was satisfied. The only way he could think of to satisfy the Charter was to send it to City Council and have them put it on the ballot. He stated that is the reason he made the motion he did. Mr. Majewski asked Mr. Ebert to please ask him, next time, and he will gladly tell him.

Mr. Miller asked Mr. Ebert, prior to the BZA rendering variances, what kind of discussions led them to their decision. Was there any question by the BZA that it was their power or not within their power to provide the applicant with these variances? Mr. Ebert stated that the applicant has to meet the criteria set forth by the BZA specifically. The minutes indicate that the criteria were met to grant the variance. As far as the issue as to whether they had the power, there was no discussion. They did not ask for a legal opinion. They knew they had the ability to grant a variance/permit. There was concern by Mr. Milburn whether it was a variance, use, or permit, because we have done it one way in some situations, but it was still discussed in open session. It wasn't something that was discussed prior. There was no prior discussion concerning the ability or authority to grant the variance.

Mr. Miller asked if there has been any subsequent discussion about the result of that variance being granted. Mr. Ebert stated that there was discussion by the court in 2006 that the BZA was directly involved in because they were the ones that were the defendants in the case. The BZA members were given copies of the discussion of the court.

**Bradley Bay Health Center
605 Bradley Road
Expansion of Facilities**

Mr. John O'Neill introduced Ben Ockner, attorney, and Ken Martin, architect for the project. He stated that they are present today for final approval of their application for expansion of their facilities.

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Mr. Dzienny noted that the application has moved favorably through the Board of Zoning Appeals and the Architectural Board of Review. Variances have been received for setbacks and signs. He asked if there is anything else required by the approval process set forth in Section 1149 that the Planning Commission needs to review. Mr. Miller asked if there have been any changes to the plan since the last review. Mr. O'Neill stated that there have been no changes to the plan. The Board of Zoning Appeals has granted approval for signage.

Mr. Ebert stated that he does not believe it would be proper for new member, Dave Maddux, to vote on the approval this evening since he has not been present for the previous discussions.

Mr. Dzienny asked Mr. Majewski and Mr. Persanyi if they were going to vote on the approval process of Section 1129, or the legislative issue.

Mr. Majewski stated that he will vote his conscience.

Mr. Dzienny suggested that the application be tabled.

Mr. O'Neill stated that in accordance with the requirements of Section 1129, Bradley Bay was required to submit several items. These have been submitted and reviewed by the committee and the Building Department. According to the code, the Planning Commission is being asked to vote on whether the process has been completed as required. He stated that they have submitted all items as requested for approval.

Mr. Persanyi commented that, as he told Mr. O'Neill at the last meeting of the Planning Commission, he feels this is a wonderful project. He has not spoken to a single person in Bay Village that is against it. He is personally not against the project. If it was on the ballot he would vote for it. But, he does not believe the Charter is being followed. Mr. Persanyi has no objection to the project at all. But, it is a matter that the way the Charter reads any change in use has to go to the voters. Mr. Persanyi stated that he asked Mr. Ebert yesterday about the party that came in to allow the construction of attached residences in the parcel across the street. Why didn't they go to the Board of Zoning Appeals with their request to build attached residences on land that is zoned retail business? Why is this different? Mr. Persanyi does not believe he got a satisfactory answer on that question.

Mr. Ebert stated that he gave his opinion.

Mr. Persanyi stated that the retail business district spells out the permitted uses. Obviously, attached residences were not a permitted use. In a residential district, nursing homes are not a permitted use. Why did they have to go to the voters to amend the retail business district to permit that use? Why didn't they just come to the BZA and say they would like to build 12 units of condominiums on that land?

Mr. Milburn stated that retail business never had a section in the chapter that stated you could construct on contiguous property, whether it was zoned retail business or not. Section 1141 had that statement and the first time this was in front of this commission and in front of the Board of

Zoning Appeals and Architectural Board of Review, it was permitted to expand on contiguous property at that time. Mr. Ebert feels that this carried on. Mr. Ebert commented that you cannot make retroactive legislation of something that was permitted to the detriment of the property owner. That is what the case law indicates.

Mr. Persanyi asked how long retroactive legislation is allowed to stay in place as far what is permitted. Mr. Ebert stated that this is why grandfather provisions affect a lot of people in any city. It stays until the property is sold to another use. That is why there are businesses mixed with residential on Dover Center Road, or cottages on Lake Road. They are grandfathered in.

Mr. Persanyi stated that the properties on Lake Road cannot build to what was permitted in 1929, if they want to build on it today. Mr. Ebert stated that they can, as far as their property and what it was zoned when they bought the property.

Mr. Ebert stated that no matter who you would ask on Council, they would say when they changed Section 1141 they knew full well the contiguous property of Bradley Bay had the ability to be built upon. Mr. Milburn added that Council knew this addition was going to go forward when they removed the expanding onto contiguous property.

Mr. Persanyi stated that the expansion did not go forward at that time. Mr. Ebert stated that it didn't go forward, but you can't change legislation retroactively to deny someone property owner's right to build, even though they did not build at the time and their permits and variances expired. That's the difference between this and the Shell Gasoline Station rezoning.

Mr. Dzienny asked if City Council has the right to overturn the decision of the Planning Commission if the application of Bradley Bay Health Center is voted down by the Planning Commission.

A five minute recess was called at 8:00 p.m.

The meeting was called back to order at 8:05 p.m.

Mr. O'Neill requested that the application of expansion of the Bradley Bay Health Center be tabled until the next meeting of the Planning Commission.

It was **MOVED** by Miller, second by Fleming, to table the application of Bradley Bay Health Center to the meeting of October 3, 2012. **Motion carried 5-0, with Mr. Majewski abstaining.**

Council Update

Mr. Miller advised that Council has been on summer recess. A special meeting was called to pass a standard resolution for the 2013 tax budget. The county did not ask the state for an extension of time, therefore Council had to submit the tax budget to the county by mid-August.

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An additional special meeting was called on September 4, 2012, with an ordinance passed that will permit the city to engage a contractor to renovate and improve the tennis court facilities in Cahoon Memorial Park, adjacent to city hall. The cost of the project is \$308,000. The same number of courts will be maintained and the lighting will become an LED system with energy savings to be realized. New light poles are included in the plans.

Mr. Miller advised further that Council received an update from Service Director Galli on the railroad crossing and intersection at Bradley and Naigle Roads. The railroad intends to modify some of their equipment based on requirements of the Ohio Rail Way Commission to include equipment that was not part of the initial schematic. That equipment will probably not be installed until the end of the year. The through street on Bradley will be maintained with a stop on Naigle until the traffic light situation is resolved.

Other improvements are being made throughout the city with the paving of streets. The Sunset Area will be reviewed by the Public Improvements Committee for possible improvements to bring their streets up to a modern standard instead of the dilapidated state they are in currently.

Mr. Dzienny stated that before adjournment he would like to propose to the Planning Commission that the voting process for the Planning Commission be rotated alphabetically among the members.

Mr. O'Neill asked the possibility of having a special meeting of the Planning Commission prior to October 3, 2012, based on his need to schedule spring start of construction and the requirement of approval of the plans for loan application. After further discussion, it was determined that all of the Planning Commission members may not be available until the next regularly scheduled meeting. Mr. Persanyi noted that he feels disturbed that the applicant was late for a previous meeting that was necessary to be reconvened. Mr. O'Neill expressed his apologies.

Mr. Miller will request an extension of time by the City Council for review of the plans of Bradley Bay Health Center for expansion, in the event that an extension of time is needed.

Mrs. Fleming commented that there is always a possibility that not all of the members may be able to attend the next regularly scheduled meeting. She stated that while she appreciates that Mr. Majewski may have issues with the way things were handled, what the Planning Commission is charged to do is very limited.

Mr. Ockner asked if the vote of the Planning Commission will be on whether Bradley Bay meets the requirements of Section 1129 of the Codified Ordinances of the City of Bay Village. Mr. Dzienny stated that this is what should be voted on. Meeting adjourned at 8:10 p.m. The next meeting of the Planning Commission will be held Wednesday, October 3, 2012 at 7:30 p.m.

Andy Dzienny, Chairman

Joan Kemper, Secretary