

RECORD OF PROCEEDINGS

Minutes of

Meeting

DAYTON LEGAL BLANK CO., FORM NO. 10148

Etna Township Board of Zoning Appeals

Held

May 21,

2007

The special meeting was called to order by Chairman Goll at 5:00 p.m. on May 21, 2007 at the Etna Township Hall. The meeting was audio taped for township records. Mrs. Weber, Mrs. VanDyne, Mr. Goll, Mrs. Rogers, and clerk Laura Brown were present. Mr. Johnson was absent.

Cheri Rogers moved to go into executive session. Michelle Weber seconded. The executive session was per R.C. 121.22 meetings of public bodies to be public; exceptions (3) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action. The Board of Zoning Appeals alternates and Eric Fox with the Licking County Prosecutors office were invited into the executive session. Roll call: Michelle Weber, yes; Claudette VanDyne, yes; David Goll, yes; and Cheri Rogers, yes.

Cheri Rogers moved to get out of executive session. Michelle Weber seconded. Roll call: Michelle Weber, yes; Claudette VanDyne, yes; David Goll, yes; and Cheri Rogers, yes.

Cheri Rogers motioned to adjourn the special meeting. Michelle Weber seconded. Roll Call: Michelle Weber, yes; Claudette VanDyne, yes; David Goll, yes; and Cheri Rogers, yes; Passed 4-0.

Special meeting closed at 6:23 p.m.

Approved as read

June 26, 2007

Laura Brown

Laura Brown, Clerk

Approved as corrected/amended

David Goll

David Goll, Chairman

Etna Township Board of Zoning Appeals

Held

May 21,

2007

ADJUDICATORY HEARING

The adjudicatory hearing was called to order by Chairman Goll at 6:32 p.m. on May 21, 2007 at the Etna Township Hall. The meeting was audio and video taped for township records. Mrs. Weber, Mr. Cox, Mr. Goll, Mrs. Rogers, Mr. Chew, and clerk Laura Brown were present. Court Reporting was provided by Michelle Douridas with Fraley Coopers and Associates Pataskala, Ohio.

The purpose of the hearing is to continue the appeal number 3824 concerning the Zoning Inspector's decision that a zoning permit can not be amended and appeal number 3876 revocation of zoning permit #3517 that were submitted by Scott Hayes representing Freda, William, and Barbara Langel for the property located at 8941 Hazelton-Etna Road, Pataskala, Ohio 43062.

David Goll explained how the hearing would be conducted. Scott Hayes, Robert Meyer, Deborah Scott, and Stan Robinson were sworn in.

Robert Meyer, Jr. with Porter, Wright, Morris and Arthur 41 South High Street represented Wal-mart Stores in conjunction with the property owners. Mr. Meyer referenced the memorandum of appellants in support of appeal numbers 3824 and 3876.

Mr. Meyer references two letters from November 29, 2006 (**Tab D in book**) and January 2, 2007 (**Tab E in book**) addressing permit number 3517 issued by Dallas Maynard the zoning inspector at that time. Mr. Robinson stated a new permit was required and that there was not a provision of the code that allowed for amendments. That determination was appealed with appeal number 3824. The second letter issued by Stan Robinson dated January 2, 2007 in which Mr. Robinson revoked the permit for three reasons. The driveways and parking spaces were on the agriculture portion of the site, shortage of loading spaces, and the plans were different. Page two of the letter stated seven options that could be taken. An amendment or revision was not part of the seven options.

Mr. Meyers discussed res judicata regarding where a zoning permit has been appealed and upheld and all appeals times have been run it becomes res judicata. Mr. Meyers stated that Dallas Maynard stated the parking on the agriculture portion would not be a violation of the Zoning Resolution. Mr. Meyers stated this issue was brought about along with other issues to the Board of Zoning Appeals and permit 3517 was upheld. Wal-mart stores have expended over \$800,000 dollars to date. The other legal doctrine was estoppel and applies to protect the rights to permit 3517. Estoppel provides when a decision is made by one party and then is relied upon by another, the party that made the determination is estopped or prevented from changing their mind.

On January 24, 2007 Stan Robinson issued a letter (**Tab R in book**) to Scott Hayes indicating a different interpretation of the amendment possibilities in the zoning resolution existed.

On February 15, 2007 an application was filed to amend permit 3517 (**Tab F in book.**) This plan is the same plan that was issued as permit 3871 and was put through a through technical review process by Stan Robinson. To date the amendment is pending and has not been granted. They are willing to accept an amended permit.

Mr. Meyers has asked to submit the Memorandum of appellants in support of appeal numbers 3824 and 3876, specifically tabs A-S. These are documents that have been received and maintained in the township or produced by the township and have relevance to this appeal and asked that they be included in the record as evidence.

Deborah Scott objected to tabs Q and R as to the relevancy to their admission. Deborah Scott also stated J, K, L, M, N, O, P, S, and I that if this board believes they are their own records they can take judicial notice but they do not necessary need to be admitted as evidence. She does not have objections to A, B, D, E, F, H, or G being moved and admitted into evidence. The objection in tab C is a typo on the addendum to zoning permit application 2006031008 should be dated August 31, 2005 not 2006. Deborah Scott stated they believe the permit is not valid and no amendments can be made to the invalid permit. For the record she objects to the submission of the previously stated sections into evidence. The objections were noted.

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Robert Meyers referred to Stan Robinson's letter dated November 29, 2006 (**Tab D**) and asked Mr. Robinson to describe the determination he set forth. Stan Robinson stated the drawing that matched with permit #2 did not match with the permit that building code had. Mr. Robinson read from the letter. The reference to August 31, 2005 should have been the March 10, 2006 was permit 3517. The permit that was issued August 31, 2005 had already expired. At that time Stan Robinson felt there could not be any amendments or revisions. He has since reconsidered that. The second letter was dated January 2, 2007 (**Tab E**) that was regarding the revoking of permit 3517. Stan Robinson reviewed the letter. The new plans were for a smaller store. He did not include amending or revising the permit as options on page two of his letter. He did believe at that time that revisions were allowable.

Robert Meyers referred to the letter dated January 24, 2007 (**Tab R**) and Stan Robinson stated the letter was to inform Scott Hayes that Section 309 does state that amendments are permissible to a valid permit.

Robert Meyers asked Stan Robinson to review (**Tab F**) application to amend a permit. Stan Robinson stated he received the letter February 15, 2007 which was after his revocation letter and amendment letter. Stan stated it was an amendment to a permit that was not valid and he did not take any action on the amendment application. Robert Meyers asked Stan if a permit that has an error in it makes it a void permit. Stan Robinson stated possibly, if he could not issue a certificate of occupancy on the permit it would need to be corrected before occupancy. The permit could be void if it can not be amended.

Stan Robinson stated he did send Scott Hayes a zoning amendment form on December 12, 2006 but it was not filled out until after he revoked the permit. Robert Meyers stated Stan's letters dated January 2 and January 24 did not indicate an amendment option. The amendment form was sent over with a process disclaimer for legal review.

Robert Meyers asked Stan Robinson if the errors deemed in this permit were significant to prevent an amendment. Stan Robinson stated no, they have all been fixed with permit #3. If the amendment on February 15, 2007 were submitted on December 10, 2006 would they been able to amend the permit. Stan stated if it was December 13th yes he would have accepted it as an amended permit. It did resolve all Mr. Robinsons concerns with the exception of the parking space sizes.

Deborah Scott inquired if the amendment that Mr. Meyers questioned was part of the appeal. Stan Robinson stated the appeal was on the revocation only. Deborah Scott asked Stan to explain what type of errors would render a zoning permit void. Are they errors that are in complete violation of the zoning code? Stan Robinson stated any error in a zoning permit needs to be corrected because if it is built with the error it would always be in violation. The parking on the agriculture side would always be a violation. All of the violations are correctable. The corrections have to be made before the certificate of occupancy can be issued. Stan Robinson stated the zoning inspector can only approve something that is legal and in the zoning resolution. Stan Robinson does have the authority to interpret the zoning resolution as per section 508 of the zoning resolution.

Robert Meyers presented witness Aaron Matson with CESO Engineers & Surveyors 1700 Lyons Road, Dayton and he was sworn in. Mr. Matson is vice president of CESO which is a civil engineering firm out of Dayton and consulting engineer for Wal-mart. For this project his role is to supervise the design and engineering and has been involved with the project from the beginning.

The cost incurred is in excess of eight hundred thousand dollars to date for engineering and architectural. The plan that was approved as part of permit 3517 showed the store size as two hundred and three thousand eight hundred and nineteen square feet. It has one thousand and nineteen parking spaces. The zoning resolution requires six hundred and fifty-two determined by one space per two hundred and fifty square feet of floor area. Floor area is areas that exclude wash rooms, maintenance rooms, storage rooms, fitting rooms, and similar rooms. The plan shows there are six loading spaces. There are areas for up to twenty one loading spaces. The store this size requires twenty one spaces. There are seventy seven parking spaces located on the east side of the property that are on the agriculture zoned part of the property. Mr.

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Matson stated the store could be designed on the general business portion of the site with eight hundred twenty two parking spaces.

Mr. Matson stated the plan that was submitted with the amendment building a smaller store eliminates Mr. Robinson's issues. This plan went through a technical review. Cheri Rogers asked Mr. Matson to show the board where the twenty one available loading spaces were located. They were all on the general business side of the property.

Deborah Scott inquired if another permit was issued on which Wal-mart could build. Mr. Matson stated another permit was issued that has been appealed and the appeal is going through a legal challenge. The zoning inspector has approved plans for Wal-mart.

David Goll asked if Mr. Robinson had determined prior to January 24th that if amendments were allowed would you have amended the permit. Mr. Meyers stated they would have but it is unclear of when the door opened for an amendment. They sort of thought that since the revocation preceded the opening of the amendment door they were out of luck. Stan Robinson stated if the permit would have been amended and all the problems would have been taken care of he would have allowed it after he sent the form over on December 12, 2006.

Deborah Scott provided the township's legal memorandum. She feels appeal number 3876 should be considered first. This appeal goes to the validity of the zoning permit. The permit is not valid because of the parking on the agriculture portion. Case law was provided in the memorandum that mistaken advice does not give rise to the claim of promissory estoppel. She feels that Mr. Maynard was outside of his authority when he issued the permit and that it failed to conform to the resolution.

Deborah Scott feels that the doctrine of res judicata should not apply. The appellant failed to bring forth the issue of the parking and loading spaces and that issue was not litigated.

Deborah Scott stated the pending amendment is not relevant. They have not brought any allegations of the in actions on the zoning inspector as part of their appeals. When the permit is invalid because it does not meet the requirements of the zoning resolution it can not be fixed with an amendment.

Deborah Scott urges this board to uphold the decisions of Mr. Robinson made in determining the zoning permit was invalid. It is her position that something that is void and invalid can not be amended to correct it and that is the township's position.

Deborah Scott feels that during the application process is when the zoning inspector would have the applicant change the plans to make them conform to the zoning resolution. Amendments to a valid permit are allowed after the zoning permit is issued. Amendments can not be made to fix a zoning permit that was invalid and should not have been issued.

Michelle Weber asked where the process of the amendment form came from. Stan Robinson created the form. Deborah Scott stated there is a process to amend a valid permit.

Rick Cox asked if the building was built would Stan Robinson have issued the occupancy permit. Stan Robinson responded that he has avoided the problem and wanted the permit to be corrected before it was built.

Cheri Rogers asked if there would be parking allowed for a church or a park. Stan Robinson stated parking would be allowed. Deborah Scott clarified that the parking spaces would be permissible to something allowed in the agriculture district. These parking spaces are going to a commercial or general business activity and not agriculture.

Robert Meyers stated based on the testimony this evening. From Mr. Robinson's November 29th, 2006 letter they felt that a revision process was not permissible. Mr. Robinson indicated a form was provided in mid December. Mr. Meyers feels there is a difference between Mr. Robinson and his counsels' view as to what they might have been able to do with an amendment within some window that might have been open to us if we knew it. The January

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2nd letter gives options but not the amendment that was supposed to be available in December. They feel Mr. Maynard was the zoning inspector and it has been a year and a half based upon that permit. They feel they have rights in the permit as issued. They are willing to put forth an amendment that resolves the issues that were raised and are correctable. They would like this board to tell them the permit is ok provided they go with an amendment that resolves the issues that were raised here.

Deborah Scott stated the parking was discussed very minimally but the board did not take evidence of debate the parking. The parking is not in compliance with the zoning resolution. They have applied for a new permit, received the new permit and they can proceed. There is pending litigation and this is an attempt to get around the pending litigation.

Attorney Jonathan Veley 3 South Park Place Newark Ohio was sworn in. Mr. Veley stated the parking was not a part of the previous appeal. Rick Cox concurred the parking was left out of the previous appeal.

Robert Meyers stated the minutes showed the parking was discussed. The entire permit has been through the zoning inspector and the board of zoning appeals.

Cheri Rogers moved to close the hearing at 7:50 p.m. and move to discussion and reserve the right to question the witnesses. Philip Chew seconded. Roll call: Michelle Weber, yes; Rick Cox, yes; David Goll, yes; Cheri Rogers, yes; and Philip Chew, yes. The motion passed 5-0.

Cheri Rogers questioned the time line. They were sent a letter in November 29, 2006 that no amendments were allowed and the drawings did not match. Then mid-December Stan created an amendment form. Stan stated this was after Scott Hayes pointed out that amendments were allowed and Stan agreed with him. Cheri asked if Stan had anything that showed he faxed the form to Mr. Hayes on December 12. Stan did not have anything other than the documentation in his log sheet. On December 18th he received the appeal from the November 29th letter. Cheri stated that was three days after he faxed the amendment form and asked Stan if he tried to contact Scott Hayes and state that amendments were allowed. Stan stated it was six days later and no he did not try to contact Mr. Hayes. Cheri stated on the January 2nd letter again Stan did not mention the availability of amending the permit. Stan verified he did not. Cheri questioned if Stan was under the belief that they could amend the form. Stan stated that is why he created the form. Then on January 18th they filed another appeal. Stan felt they had their reasons to why they did not file an amendment. On January 24th Stan sent them a letter that they could make an amendment. On February 15th they filed the amendment paper work. Because the permit was revoked it could not be amended. It was revoked January 2nd. Cheri Rogers questioned why Stan would send them a letter on January 24th saying they could make amendments after the permit was revoked. Stan was not sure. Scott Hayes stated the form in December had a legal review language on the bottom of the form.

Cheri Rogers asked if the amendment in February had all the corrections that he required. Stan stated if it is the same as permit three then it is.

Stan Robinson clarified that the letter on the 24th was to clarify that the amendment form is available to make amendments. He did put on there subject to review and was a clarification of a valid permit. Scott Hayes did receive a document that was subject to legal review. At that time Stan was not sure what his legal advice would be and it would be a potential form that could be used after legal review. Stan could not find the document only the notes in his log. Scott stated because they had the time running on when they could appeal they could not wait for the legal opinion.

Rick Cox moved to close the adjudicatory hearing. Cheri Rogers seconded. Roll call: Michelle Weber, yes; Rick Cox, yes; David Goll, yes; Cheri Rogers, yes; and Philip Chew, yes. The motion passed 5-0. The hearing was closed at 8:00 p.m.

Philip Chew moved to deliberate at a later time to be determined by this board. Michelle Weber seconded. Roll call: Michelle Weber, yes; Rick Cox, yes; David Goll, yes; Cheri Rogers, yes; and Philip Chew, yes. The motion passed 5-0.

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Rick Cox moved to adjourn. Cheri Rogers seconded. Roll call: Michelle Weber, yes; Rick Cox, yes; David Goll, yes; Cheri Rogers, yes; and Philip Chew, yes. The motion passed 5-0.

Approved as read June 26, 2007

Approved as corrected/amended _____

Laura Brown

David Goll

Laura Brown, Clerk

David Goll, Chairman

The public meeting was called to order by Chairman Goll at 8:13 p.m. on May 21, 2007 at the Etna Township Hall. The meeting was audio taped and for township records. Mrs. Weber, Mr. Cox, Mr. Goll, Mrs. Rogers, Mr. Chew, and clerk Laura Brown were present.

Cheri Rogers moved to waive the public reading of the minutes from May 14th, 2007, approve them as written and include the final order. Michelle Weber seconded. Roll call: Michelle Weber, yes; Rick Cox, yes; David Goll, yes; Cheri Rogers, yes; and Philip Chew, yes. Motion passed 5-0.

Philip Chew motioned to adjourn the meeting. Rick Cox seconded
Roll Call: Michelle Weber, yes; Rick Cox, yes; David Goll, yes; Cheri Rogers, yes; and Philip Chew, yes. Motion passed 5-0.

Meeting closed at 8.15 p.m.

Approved as read June 26, 2007

Approved as corrected/amended _____

Laura Brown

David Goll

Laura Brown, Clerk

David Goll, Chairman

Final Order Mailed: Yes -