

RECORD OF PROCEEDINGS

Minutes of

Meeting

BEAR GRAPHICS 800-325-8094 FORM NO. 10148

Held _____

Thursday, August 12, 2021

20 _____

CALL TO ORDER: Mayor Williams called the Riverside, Ohio City Council Work Session to order at 6:00 p.m. at the Riverside Administrative Offices located at 5200 Springfield Street, Suite 100, Riverside, Ohio, 45431.

PLEDGE OF ALLEGIANCE: Mayor Williams led the pledge of allegiance.

ROLL CALL: Council attendance was as follows: Ms. Campbell, absent; Mr. Denning, present; Mrs. Franklin, present; Ms. Fry, present (arrived at 6:06 pm); Deputy Mayor Lommatzsch, present; Jesse Maxfield, present; and Mayor Williams, present.

Planning Commission members in attendance: Mrs. Denning, Mr. Hairston (arrived at 6:13 pm), Mr. Owens, Mr. Rodgers, and Mr. Vazquez.

BZA members in attendance: Mr. Childers, Mr. Pultz, Mr. Schneider, and Mr. Timbrook. Absent from BZA: Mr. Richardson.

Staff present was as follows: Chris Lohr, Interim City Manager; Gary Burkholder, Community Development Director, Nia Holt, Zoning Administrator, Jim Miller, and Katie Lewallen, Clerk of Council.

EXCUSE ABSENT MEMBERS: Mr. Denning motioned to excuse absent members. Deputy Mayor Lommatzsch seconded the motion. All were in favor; none opposed. **Motion carried.**

ADDITIONS OR CORRECTIONS TO AGENDA: Mr. Lohr stated Ohio House Representative Andrea White was present to introduce herself to Riverside.

APPROVAL OF AGENDA: Mr. Denning motioned to approve the agenda. Mr. Maxfield seconded the motion. All were in favor; none opposed. **Motion carried.**

INTRODUCTION: Mr. Lohr introduced Ms. Andrea White, who represents Riverside residents in the 41st district at the state level. Ms. White stated that her office is open to any residents, city staff, and any individuals living and working in Riverside. They have received a lot of phone calls related to unemployment issues, fraud issues, and UA assistance. Her email is rep41@ohiohouse.gov. Her phone is 614.644.6008. She has stayed in touch with city leaders to work on the budget to protect income tax and get grants for cities and communities to work on roads and infrastructure and other business needs. Mayor Williams added that Ms. White has always taken his phone call and gotten a hold of him and the previous city manager with the health orders making sure that input of Riverside residents were considered for the portion of Riverside she represents.

WORK SESSION ITEM: Land Use Legal Updates – James D. Miller, Esq., City Law Director’s Office: Mr. Jim Miller provided his background working with public agencies, land use and zoning. The presentation he has prepared is to provide education, updates, and legal frame work to what each of the bodies present does and how their roles contribute to land use in the City of Riverside. He provided a brief overview of what would be covered: zoning overview, role of each body, and case law updates.

Zoning Overview: Zoning is granted to municipalities by the Ohio Constitution. The city has enacted a comprehensive plan and a Unified Development Ordinance (UDO), codified ordinances that administer the zoning provisions thorough out Riverside. He provided an overview of each of the bodies and their role in the city.

Role of Each Body: The **BZA** is outlined in the UDO Section 1103.07. The BZA hears appeals from determinations made by city staff with respect to permits, zoning violation appeals from residents, and other specifics listed in the UDO. The BZA mostly deals with variances on appeals from decisions made by staff. A variance is a deviation from the strict application of the UDO. A property owner has to make a strong showing as to why a variance is appropriate; it is also limited. It is not a vehicle to change the UDO as that is up to council. It is a vehicle to provide a property owner that is facing an unnecessary hardship due to a

RECORD OF PROCEEDINGS

Minutes of

Meeting

BEAR GRAPHICS, 800-325-8094, FORM NO. 10/14E

Held

Thursday, August 12, 2021

20

unique situation on a property that is not the fault of or caused by the property owner. Variances are defined in the UDO and are basically dimensional or other type changes that are needed to a parcel with respect to things like parking, set back, height, mass, etc. It is not really aesthetic or design; it is essentially a change that is needed on the property to a dimensional requirement the UDO would otherwise oppose. The burden is on the applicant to show the undue hardship they face because of a strict application of the UDO. They are to address the standards of approval listed in the UDO, and submit an application with all documentation. City staff is responsible for ensuring the application process is properly followed by an applicant. Standards are rigorous because a variance is unlike a conditional use; it is a total deviation from the UDO requirements. It is a heavy burden, and it is on the applicant to prove that. When city staff presents cases to the BZA at the public hearing, staff makes recommendations and reviews the standards of approval, found in the UDO Section 1105.15(E). The BZA's role is quasi-judicial. It is not legislative; it is not administrative; it is acting as a court. It is responsible for reviewing evidence presented, hearing testimony, reviewing exhibits, and taking into account staff's report. It applies all the facts to the standards set forth in the UDO and determines whether or not the applicant has met his/her burden to justify a variance. There is court case law about this because these decisions affect property owners in one of the most personal ways – people's property, their liberty and life. It is a strong due process right. The BZA is to interpret the City's zoning code to determine whether or not to approve the variance based on the specific facts presented to it by the applicant. He stated the UDO is specific on this and staff will always review the seven standards and present to the BZA along with evidence in the public hearing.

The **Planning Commission** is outlined in the UDO Section 1103.05. One of their major areas of authority is for conditional uses and other types of decisions such as plats. Conditional uses are an area with replete case law as courts weigh in on when conditional uses are appropriate or not. The UDO defines a conditional use in Section 1105.09(G). Conditional use has to do with the use of a property. The applicant needs to show there is a reason why he/she needs to engage in a use that is permitted in the zoning district, but needs conditions to be applied to that use in order to make it compliant with that particular zoning district. The burden is on the applicant. There are nine approval standards for conditional uses in the UDO, which the applicant must address along with submitting an application with all documentation. City staff presents cases to the planning commission at a public hearing and comments on all the standards of approval and if conditional use is granted how it will affect the property in question. When the commission examines the conditional use, it goes through a similar process as the BZA by hearing testimony, looking at documents, hearing staff report, and weighing that against the standards of approval in the UDO to determine if enough evidence has been presented by the applicant to justify the conditional use. There is also a lot of case law on conditional use.

The **City Staff** is the administrative arm of enforcement in the city. They work to make sure the BZA and Planning Commission have the tools and information necessary to undergo the independent reviews in the quasi-judicial setting and make the determination based upon what the UDO says. They always refer to standards of approval and provisions of the UDO. Their responsibility is defined in UDO Section 1103.11. There are duties provided to staff such as issuing zoning violations, interpreting the UDO, interpreting the zoning map, reviewing certain permits and other items in their purview, acting as a liaison with residents of the city, helping with the application process, and enforcing the UDO. Code enforcement is responsible for conducting inspections, acting upon complaints and concerns brought to their attention, and issuing violations based on the result of their investigation. They make recommendations to the planning commission and the BZA. City staff has the ability to approve or deny permits based on the relevant provisions of the UDO such as for signs, fences, and other types of matters. They are responsible for issuing zoning violations when they investigate and inspect property and find there is non-compliance with the UDO. They also review applications for conditional uses, variances, site plans, any kind of application that comes before a land use body. The UDO is specific and indicates if the application is not complete or missing items, then it is not to be moved forward. City staff has to follow

RECORD OF PROCEEDINGS

Minutes of

Meeting

BEAR GRAPHICS 800-325-8094 FORM NO. 10148

Held

Thursday, August 12, 2021

20

that and work with the applicant and get the necessary information in order for it to move forward. There is a built-in appeals mechanism, UDO Section 1105.07. A zoning violation or permit denial is appealed to the BZA. There is a time frame and if the applicant does not appeal within the time frame, then the city staff decision is final. This is spelled out in a notice of violation how an individual can appeal. Courts have weighed in on how appeals of the administrative arm of zoning enforcement should be considered when on an internal administrative appeal track. Case law indicates the administrative enforcement arm of the code are presumed to be the experts and have investigated all facts. They are to be subject matter experts on the UDO. Their decisions, reports, and recommendations should be deferred to and independently reviewed. Case law indicates their administrative judgments are the product of significant, complex decision making and gathering of evidence, and there is a level of deference that is afforded to those decisions when reviewing the UDO, interpreting it and applying it.

The **City Council** is the legislative arm of code enforcement and zoning. Their role and responsibility are outlined in UDO Section 1103.03. They are responsible for enacting, amending, or repealing ordinances when it is deemed to be in the best interest of the city. He reviewed the powers and duties of City Council for the purposes of the UDO. State law and the Ohio Supreme Court authorizes legislative authority upon municipal city council to adopt and enact legislation within the city.

The four bodies come together in this manner: 1 – City Council enacts the UDO and amends and repeals as necessary, 2 – City Staff enforces and administers the UDO, and 3 – the BZA/Planning Commission review applications in accordance with the UDO and make quasi-judicial determinations upon receipt of evidence and testimony at public hearings that confer legal rights and responsibilities upon the parties, including the right to appeal in court. City staff presents all standards of approval to those bodies during a public hearing so a proper determination can be made. Legal counsel is to protect the city from being in court.

Case Law Update: Administrative appeals under the ORC are appeals from the decision of the BZA. The way the UDO is written, the planning commission's decisions can be appealed to the BZA, but the BZA is the decision-making body of the city that can be appealed to the Court of Common Pleas under an administrative appeals structure of the ORC Section 2506.01. One party is asking the court to review what has happened at the administrative level to see if it met the proper legal standard. The UDO also aligns with state law in Section 1105.17, outlining the appeals procedure. Appeals of BZA decisions go to the Montgomery County Court of Common Pleas under state law structure. When a common pleas court is asked to do this, it can be invoked by any party to the quasi-judicial proceeding. The common pleas court reviews the decision to determine some very specific legal determinations. The court determines if the decision is unconstitutional, illegal, arbitrary, capricious, or unreasonable. These are legal determinations the court will apply the law to the determination made by the body and see if it falls into one of the categories. Then, the court can reverse it, vacate it, or modify it. The court could also look at factual determinations, which are whether or not the decision was supported by a preponderance of substantial, reliable, and probative evidence on the whole record. These are appeals from land use bodies, classified personnel decisions, township trustee decisions, any sort of appeal from an administrative body files this law. There is a plethora of case law specific to zoning appeals. At the end of the review, the common pleas court can affirm the determination, reverse it, vacate – wipes the determination away as if it never happened, or modify the order; or, it can remand it by sending it back to the agency with instruction on how to proceed.

Common Issues Prevalent to the Court – *Legislative vs. Quasi-Judicial Function*: There are case law decisions that overturn a ruling. There is a supreme court case that determined the quasi-judicial nature of the BZA decision did not occur correctly and they ended up doing a legislative determination where the UDO for Richfield Township was legislatively modified by the BZA instead of a determination being made in a quasi-judicial manner. The court reversed that every time. Mr. Miller explained the difference between legislative and quasi-

RECORD OF PROCEEDINGS

Minutes of

Meeting

BEAR GRAPHICS 800-325-8094 FORM NO. 10148

Held

Thursday, August 12, 2021

20

judicial, for example, when sitting on BZA and determining a request for a variance, they are determining that particular request for that property owner. It doesn't have an effect on other property owners in the city. The BZA are looking at factors under the standards for approval and applying the facts to those standards like a court does. A legislative change would be coming to a decision that this is what the law says they should do, but they do not feel that is right so they will issue another decision. City council is responsible for that part – a legislative act; to dishonor the standards of approval for what the UDO says. The law is only as strong as it can be enforced. If the UDO is not consistently applied or ignored or applied in a non-uniform manner, it causes due process problems. That is a legislative function. The judicial function is to accept facts, apply them to what the law says (what city council has passed), and make a determination consistent with that. Either the property owner or the city can invoke the administrative appeal to a common pleas court. It is more common for the property owner that is aggrieved to bring a suit, but there is plenty of case law where the public agency has brought it to have the court review it. The common pleas court acts like an appeal court and reviews what an administrative body did under those parameters previously mentioned. The UDO allows for this process.

Evidentiary Support in the Record: Courts will reverse decisions of these bodies if upon review they do not find ample evidence in the record to support the decision that was made by the body. They will remand it back or reverse it for further proceedings. The court will look at what is determined at the end of the public hearing is supported by the evidence that was submitted at the public hearing.

Deference to Municipal Interpretation: This is an area where there is a lot of litigation about how does the city interpret its own zoning code. The law looks at any agency that is interpreting its own codes and regulations as presumed to be expert so deference is provided to the municipal interpretation of its own UDO. This is why staff give reports; this is why the staff attends the public hearing to provide feedback on the factors. The court will look to make sure there was no substitution of judgment and make sure the principle is followed.

Improper Application of City Code: A court will look to see if the administrative body actual followed what its code states. For a variance, there are seven standards. On an administrative appeal, the court will look to see if those standards were followed and if they were applied to the facts presented before the hearing. If it finds otherwise, it will say the decision was arbitrary, capricious, or unreasonable. The court could return it to the body or can just vacate it like it never happened depending on the circumstances.

Mr. Miller stated that all four bodies have a role in the zoning and enforcing their zoning resolutions that carries the full force of the law as any ordinance passed in the city. All bodies have a distinct and interrelated role. The UDO must be applied uniformly, consistently, and evenly to prevent due process arguments, which is one person being treated differently than another for an arbitrary reason. This will get them in court. City staff will always give standards of approval for any particular case it comments on. The UDO may be changed by legislative act only and not a quasi-judicial function.

COUNCIL MEMBER COMMENTS: Mayor Williams thanked legal counsel and staff for taking the time to put together the meeting and providing the legal expertise. He thanked State Representative Ms. White for being in attendance.

Deputy Mayor Lommatzsch thanked everyone for being present and for the time they spend serving as she has done it before and it is not as fun sometimes.

Ms. Fry stated there is another blood drive on August 30, 2021.

Mr. Denning thanked the Lions Club for donating \$2,250 to the Mad River Local Schools for their supply drive. He reminded everyone there is a free movie in the park this weekend at Shellabarger Park. Mrs. Denning stated that seating at 8:30 pm with movie starting

RECORD OF PROCEEDINGS

Minutes of

Meeting

BEAR GRAPHICS 800-325-8094 FORM NO. 10148

Held _____

Thursday, August 12, 2021

20 _____

between 8:45 – 9:00 pm. There will be free hot dogs, chips, sno-cones, popcorn and drinks, courtesy of 7-Up in Riverside.

EXECUTIVE SESSION: At 6:46 pm, Mr. Denning motioned to go into Executive Session for a conference with legal counsel. Mrs. Franklin seconded the motion. Roll call went as follows: Mr. Denning, yes; Mrs. Franklin, yes; Ms. Fry, yes; Ms. Lommatzsch, yes; Mr. Maxfield, yes; and Mayor Williams, yes.

RECONVENE: Council reconvened at 7:42 pm.

MOTIONS: Mr. Denning motioned to bring forth legislation to require training determined by city staff of both the BZA and the planning commission. Ms. Fry seconded the motion. All were in favor, none opposed. Motion carried.

Mr. Denning motioned to bring forth legislation to appeal the BZA decision in Case Number 21-0009 to the Montgomery County Common Pleas Court. Mrs. Franklin seconded the motion. All were in favor, none opposed. Motion carried.

ADJOURNMENT: Mr. Denning motioned to adjourn. Mr. Maxfield seconded the motion. All were in favor; none were opposed. **Motion carried.** The meeting adjourned at 7:44 pm.



Clerk of Council

RECORD OF PROCEEDINGS

Minutes of

Meeting

BEAR GRAPHICS 805 325 8094 FORM NO. 1014B

Held _____ 20____