

November 19, 2009

Mrs. Pam Catullo, 2016 Lloyd Ct. said she lives in the development and did look at the drawings. Based on her experience serving on the Board of Zoning Appeals for several years, she hopes the Board approves the variance and does not think there would be any issues. It is the last house in the sub-development. It is all wooded. She has no problem with this variance.

Chairman Bennett closed audience participation.

Mr. Bello said anytime you hear the resident speak, and they have no objections, it certainly weighs on our decision. Chairman Bennett added that we do have a guideline that is 20%. This is in excess of that but he thinks that based on the fact that it does not interfere with anyone it is okay.

Mr. Nicholas moved to grant the variance for Case No. 2009-107. Mr. Bello seconded the motion.

AYES: Bello, Bennett, Levar, Nichols

NAYES: None

MOTION CARRIED

Chairman Bennett said next on the agenda is Case No. 2009-106

CASE NO. 2009-106

Request for Public Hearing to appeal the decision of the Building Commissioner denying a fence permit to Mr. William T. O'Brien, located at 30040 Euclid Avenue, Wickliffe, OH in a General Business District.

Chairman Bennett asked Mr. Sack if he had anything to add. Mr. Sack said the reason he denied the permit is he didn't want it to be a nuisance to the Market. The owner of the Market did go to the Planning Commission with Mr. O'Brien. Mr. Sack referred to the page he distributed earlier and quoted "there are two separate owners shown on the prints named William and Linda O'Brien, who own two parcels along with a long-term lease, met with Planning Commission to avoid future problems dealing with parking issues." That was part of the Planning Commission requirements that Mr. Sack applied, so they wouldn't have a problem with this and now a problem has arrived and that is why he didn't issue the permit. Also, Mr. Sack knows there are some problems between the owner of the market and Mr. O'Brien.

Chairman Bennett said anyone wishing to address the Board shall be sworn in now.

Mr. Stempuzis swore in Mr. William T. O'Brien.

Mr. O'Brien addressed the Board and said the problem is they gave East Side Farmers Market the property ownership at 30022 Euclid Avenue. The owner paid a sum of money for that property, and paid a sum of money for the house owned behind (south) the market. The sum of money was supposed to be in red. The problem That proceeds is we did have a long term agreement but the long term agreement has been six years and not a penny has been paid. Mr. O'Brien has been paying the taxes on the property for six years. He had another agreement where the owner is still going to pay for it and Mr. O'Brien is still going to get the money but hasn't seen anything. Technically it is still Mr. O'Brien's property for the past six years, so he would like to put up a fence there and that is the end of it.

Chairman Bennett asked what type of fence did he plan to put up. Mr. O'Brien said within code, 6 foot. Chairman Bennett asked chain link or split rail? Mr. O'Brien said a board-on-board, same thing the Fire Dept. requested when he bought the property from Mr. McGuinness. Chairman Bennett asked how close he planned to run it to Euclid Ave. Mr. O'Brien said whatever the setback requires, If it requires 4 ft. off the sidewalk, that is where it's going.

Chairman Bennett said this agreement was for both lots. Mr. O'Brien said the agreement was for everything. The corner was paid off but after 6 years, I haven't seen a penny and have been nice enough to let it go on and linger.

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Chairman Bennett said the parking lot is two lots. You are putting up the fence just between the market and the first lot. Mr. Sack asked if he is only running it on one side. Mr. O'Brien said he will run it however...he owns both pieces of property and if he goes out for a fence permit he will go to the Building Commissioner and will draw it through Joe Myers or whatever/however you want it. Mr. Bello referred to the drawing and questioned the location of the proposed fence. Mr. O'Brien pointed out what was planned. Mr. Levar questioned specifically the location referring to the drawing.

Mr. Nicholas asked where the shoppers will park. Mr. O'Brien said the area on either side of the market referring to the drawing. Chairman Bennett said if you read the Planning Commission minutes, they say about 70 spaces. Mr. O'Brien said it was a 2-part phase. Part A has been paid for; part B is not paid for. He wants to get part B paid for; I have to protect my property. Mr. Nicholas asked "did you sue him?" Mr. O'Brien said no. Mr. Sack said another problem he has is that when they went to Planning Commission in May for parking lot approval, all these spots were part of the plan. What is he supposed to do now? Go down there and shut them down? Mr. Nicholas said that is why he asked the question - don't the patrons of the market utilize those spaces? Mr. Sack said when they went to Planning Commission all these spots were included in the parking plan for use by the market. Mr. Levar asked Mr. O'Brien if he knew he (Market owner) had been paying you when he came to Board of Zoning Appeals for the fence. Mr. O'Brien said yes. He was supposed to be paying me \$10,000 or \$20,000. It was an agreement that had never been fulfilled. The man had gone to federal prison and they closed up the market. Linda Cappelli, my wife, against my wishes, cleaned up that place. We didn't want it to look like Doc Vit's place. We made it look nice for the five years that man was in jail, out of my pocket. I'm done. I should be able to put a fence on my property. I am looking at the other end. His problem is not my problem. My problem is I want to put a fence legally on my property. That's it. If it shuts him down, it shuts him down. Mr. Bello asked Mr. Stempuzis, as he was reading through the minutes of April 2004 Planning Commission, page 2, they were talking about the Code 1321.21 where there needs to be a covenant between the parties that would be filed with the County. Is there an agreement on record with Lake County? Mr. O'Brien said if there was an agreement on record, the agreement was never fulfilled. The agreement is that he can park there until the title transfers, then the agreement is null and void because nothing was ever done. Mr. Bello asked don't you think the courts of Lake County should make that decision if they have an agreement and that is on record within the county court house? I understand there is an agreement between you and the other party. I do not know what the terms of the agreement are. Chairman Bennett said we don't have any evidence of an agreement. As far as he's concerned, there is no agreement. We don't have it in front of us as evidence.

Mr. Nicholas asked whether or not Mr. O'Brien can legally construct a fence in the way he has indicted. Mr. O'Brien said he'd put up a chain. Mr. Sack said he can put up a board-on-board fence there. Mr. Bello said the reason he is asking if there was an agreement is that the approval of the parking lot was based on whether or not there was an agreement. I believe that was one of the conditions of the motion that was passed. It was condition No. 7 (P.C.). So there should be somewhere in the city that they should know whether or not this agreement exists. It would help me out if I knew what it said. I am not saying that you don't have a right to do it; I just don't know what the agreement said. Chairman Bennett said there is no evidence in front of us that there is a contract or whatever. He is just looking for a permit to put up a fence. Anything past that will get litigate out. Mr. O'Brien said 'if I put the fence up, maybe the money comes through.

Mr. Nicholas said, for the record, the reason I asked Mr. Sack whether the fence can be legally built, that is only one issue for me. I appreciate what you want to do. What I have a problem with is utilizing the Board of Zoning Appeals to get what you want because you want the guy that reneged on your deal to pay you. In my mind putting a fence on Euclid Avenue like that in this area, I don't think it's going to look very good at all. Your recourse is against him, if he reneged on your deal, as far as I'm concerned. That doesn't mean I would vote "no". I just have a problem on what your motivations are in coming to us, because what you are doing is asking us to do something to stick it to this guy because he hasn't paid. Mr. O'Brien replied that technically he is not. First of all, he shouldn't be here, shouldn't have to waste your time and \$150.00 of my money to try and get a fence on my property that I pay tax for that. I've been paying tax on my property. I should not be here at all. Mr. Sack denied me and he's a friend of mine and I love Mr. Sack. First of all I should not be here wasting my time. Mr. Nicholas asked isn't your motivation for putting this

fence up to essentially get your money? Mr. O'Brien said my motivation is it doesn't matter what my motivation is; I'm here for a fence permit. That's it. Mr. Nicholas said, for the record, what he stated is that he believes your motivations here are not proper. What you want is to get paid from this gentleman who hasn't paid you. If he paid you, you wouldn't be asking to put up the fence. Mr. O'Brien said let's put you in my shoes and I put me in his shoes. Let me go park my car on your property for 5 years. Mr. Nicholas said "I'd sue him." Mr. O'Brien said he's here for a fence permit, that's it. I don't think you can deny me for a fence permit. Chairman Bennett said what he takes from this is he's the guy that paid for it so I am denying him use of the property. Mr. Nicholas said that is exactly what he is saying. If he had gotten his money from the gentleman who owns the market, we wouldn't be here talking about this. Does anyone have any concern about what that fence is going to look when they drive up Euclid Avenue. Chairman Bennett said early on he asked what type of fence; he drove Euclid Avenue and has one request and that is to consider a split rail. What you are trying to do is limit access to the property. Mr. O'Brien said correct. Chairman Bennett said a split rail would do that and would look a lot better and be a lot cheaper. Mr. O'Brien agreed but also said 'you took out an eyesore after 10 years which is fantastic' and that property has a chain link fence from one side to the other with a nice big sign on it. He will put whatever will make it look desirable. Mr. Nicholas said that was his concern. Mr. Sack said, for the record, when Mr. O'Brien comes to me, if he gets this granted, the fence will not go up to the sidewalk; it will probably be 20 ft. back from the sidewalk. There is a line of sight so it might be 20 ft. from the inside of the sidewalk. Chairman Bennett made additional comments about the type of fence. Mr. O'Brien also added his comments and said that he is here to do anything that is good and not here to screw that guy because he owes me \$500,00. I am here to protect my property. I have been paying taxes on it for six years.

Mr. Bello asked if we approve the fence, do you also have to mandate alternative parking spaces for the market? Chairman Bennett said not in his estimation; this is strictly a fence permit. Mr. Bello said his concern is if he is allowed to up the fence and does so, where is all the business traffic going to go? Chairman Bennett said that is something that should have been addressed a couple years ago. Mr. Nicholas asked by whom? Chairman Bennett said the court system, if there was a contract and the contract was not being followed. Mr. Nicholas said that is what he was getting at. Chairman Bennett said there's two ways to solve it. You (Nicholas) probably would have done it through the courts. Mr. O'Brien said he probably should have done that and it is his fault for letting it linger for five years. Chairman Bennett said we have to look at all the evidence we have in front of us. Mr. Nicholas asked Mr. Stempuzis assuming we grant the variance/request to put up the fence, and now the guy that owns the market sues Mr. O'Brien, is there any cause of action he has against the city because it gave the variance. Mr. Stempuzis said he was required to file a covenant and if he didn't do that then he would say the market owner has unclean hands. He does have a recourse through city ordinances to file for injunction if he feels Mr. O'Brien is violating any of our ordinances, we actually have a provision for that. As to the Planning Commission, he had requirements to fulfill. Mr. O'Brien's point is that he's applying for a permit to put a fence on his own property. There is no evidence before the Board that the property belongs to anybody else. Mr. Levar said the covenant is irrelevant to the case. Mr. Stempuzis said yes, unless somebody brought something forth. He asked Mr. O'Brien if he recalled signing a covenant, something that was filed in the county on your property deed. Mr. O'Brien said said, no, if there was something, it would have been signed with a note that it was guaranteed on the premise of promissory money and promissory money has never come through. Mr. Levar said he wanted to make sure the proposed fence area you showed us on the drawing would be along the property and would only be used by people living in the 4-suite apartment and you would maintain it. If we would grant this what would happen if someone would park in the market area. Mr. O'Brien said, technically, probably nothing.

Chairman Bennett said this is not a request for a variance; it is a request to overrule the Building Commissioner's judgment. I understand his judgment. He's bound by different things than we are. We have different rules we can work with. Chairman Bennett said he does not like to overturn the Building Commissioner, but feels he understand why he did what he did.

Chairman Bennett made a motion to overrule the decision of the Building Commissioner
Mr. Nicholas seconded the motion.

AYES: Bello, Bennett, Levar, Nicholas
NAYS: None

Motion Carried

Chairman Bennett said we will have a hearing in December and due to the Christmas holiday, the Board of
Zoning Appeals will meet on December 17, 2009.

Mr. Bello moved and Mr. Nicholas seconded the motion to adjourn.

AYES: Bello, Bennett, Levar Nicholas]
NAYS: None

Motion Carried

Meeting adjourned at 8:14 PM

Mary Ann Boos, Secretary

Keith Bennett, Chairman