**VILLAGE OF EVENDALE**

**BOARD OF ZONING APPEALS**

Minutes from the June 30, 2020 Meeting

Evendale Municipal Building, 10500 Reading Rd. Evendale, Ohio

Pursuant to written notice, the meeting of the Board of Zoning Appeals was called to order by Chairman David Harwood at 6:00 pm on Tuesday, June 30, 2020, in Council Chambers. In attendance were BZA members Rhett McGregor, Thomas Shanks, and Doug Lohmeier. Supporting the BZA were Timothy Burke (Village Solicitor) and Andrew E. Rodney, AICP (Building, Planning, & Zoning Manager).

Those present recited the Pledge of Allegiance to the Flag of the United States of America.

Mr. Harwood read the Opening Statement.

Those present who intended on providing testimony were duly sworn in by Mr. Burke.

**NEW Business:**

1. EDB20-6: John & Peggy Altman, 3655 Sherbrooke Drive. Appeal of a Notice of Violation.

Applicant is appealing a Notice of Violation for parking on a non-paved surface in violation of Chapter 1468.05(f)(1) of the Property Maintenance Code at 365 Sherbrooke Drive (Parcel #611-0011-0080) in an R, Residential zoning district.

At the request of Mr. Harwood, Mr. Rodney summarized the Staff Report, noting the timeline of events leading up to the night’s proceedings and summarizing the conditions of the property.

The Applicant, John Altman, appeared before the Board of Zoning Appeals (the Board). Mr. Altman stated he has lived at the subject property for approximately seven (7) years. He has three children which live at or visit the home regularly, noting in some instances up to six (6) vehicles may be present at a time. Mr. Altman presented a series of photographs to the Board showing the driveway and the grass area adjacent to the driveway subject to the appeal where a parked vehicle was observed. He stated that to avoid “car-jockeying,” on occasion a vehicle may be parked in this grass area. Mr. Altman noted he has used this grass area as temporary parking for the seven years they have owned the property. He further stated his consideration of this area as a designated parking area and concern regarding the possibility of being charged with a minor misdemeanor subject to a $205 fine.

Mr. Altman continued by reading the purpose and intent of the Property Maintenance Code (PMC) as written in the Village Ordinances. He stated his disbelief that regulating the parking of a vehicle on a grass surface satisfies the purpose and intent of the PMC. Mr. Altman noted the first instance of the requirement to park on a paved surface was not enacted until 1986, approximately one year after his home was built. He argued the zoning code in place at the time the home was constructed – which did not require parking on a paved surface – should be the zoning code regulating current use of the property. Mr. Altman continued by arguing that the current zoning code and PMC are not applied retroactively and therefore should not apply to his property given the home was built prior to their adoption.

Mr. Altman shared additional photographs showing other vehicles throughout the Village parked on an unpaved surface. He concluded by requesting the Board allow him to continue using the property as he has in the past.

Mr. McGregor argued the law in this case was being applied in a discriminatory manner given the code enforcement officer can only observe violations from the right-of-way absent permission to enter onto private property. He continued by noting many properties in Evendale area along private drives which are inaccessible to the code enforcement officer. Mr. McGregor asked Mr. Burke if the law is discriminatory because not all observations can be made from the public right-of-way.

Mr. Burke responded in the negative, noting alternative methods that could be applied to gain access to private property for the purposes of code enforcement.

Mr. McGregor asked if it were necessary to have probable cause to enter onto private property.

Mr. Burke responded that such an issue is immaterial to the case at hand given the violation was observed from the right-of-way. He noted the enforcement of many laws is difficult or impossible from the public right-of-way, such as health or fire codes, but that does not invalidate the law.

Mr. Rodney reported a recent example of a code enforcement complaint where he could not readily observe the violation, but was invited by the complainant to observe the violation from their property.

Mr. Harwood noted probable cause is necessary in instances where the violation is not readily observable, but that there may be readily observable violations as well as hidden violations that are unobservable from the right-of-way.

Mr. Lohmeier asked Mr. Burke if the Applicant’s assertions could be applied to all residential properties in a similar manner under his argument that the current codes should not apply to homes built prior to their adoption.

Mr. Burke responded in the affirmative, but noted that is not how non-conforming uses are defined or regulated. He continued by stating that non-conforming uses are those uses legally established prior to the adoption of the most recent codes. Mr. Burke stated that no evidence has yet been presented by the Applicant establishing parking on an unpaved surface as legally non-conforming.

Mr. Lohmeier requested clarification that if the home was originally built with a gravel or otherwise unpaved driveway and had been used as such to the present day, then that would give his argument strength but that the Board has no evidence such a condition existed at the time the home was constructed.

Mr. Burke responded in the affirmative.

Mr. McGregor stated a belief that the matter was a judicial issue and noted his disagreement with determining how neighboring owners utilized their property. He expressed his desire that Village Council adjudicate the case.

Mr. Harwood responded the PMC requires a first public hearing and decision by the Board, with appeal rights to Village Council. He noted an appeal to an enforcement action has been rare during his time on the Board.

Mr. Burke reiterated the violation before the Board is not a citation. He continued by noting the Village is required to give a reasonable amount of time for compliance prior to the issuance of a citation. Mr. Burke stated it is not unusual for residents to appeal enforcement actions. He further noted that regulating the parking of motor vehicles on private property is also not unusual in urban codes.

Mr. McGregor referred to the Applicant’s letter which expressed concern with parking on the public street, noting the possibility for damage or theft. He reported on an incident involving his personal vehicle which was struck while parked on the public street during a yard sale event. Mr. McGregor stated the street is approximately 22 feet wide and expressed his belief there was not sufficient room to safely park a vehicle on the street.

Mr. Altman stated his belief that neighbors would be displeased if he parked vehicles on the public street.

Mr. Lohmeier asked if the Applicant would be offended if his neighbors also parked on the front lawn.

Mr. Altman responded in the negative.

Mr. Shanks stated his concern that the law states no parking on unpaved areas and granting an appeal in this instance will allow other similar property owners the same right to park on unpaved areas.

Mr. McGregor noted the grass in the area proposed for temporary parking is healthy and that it would appear that parking in that location is not permanent, but rather temporary on a limited basis.

Mr. Harwood responded by reporting a visit to his former neighborhood in Springdale where he observed several vehicles parked on the front lawn of several residential properties. He noted there are instances where such actions detract from the neighborhood.

Mr. Altman stated his use of the unpaved area was for temporary overflow parking. He reiterated his argument that the code is not retroactive and cannot therefore remove his use of the property prior to its adoption.

Mr. Burke reiterated his disagreement with the Applicant’s interpretation of the non-conforming provisions of the code.

Mr. Burke asked the Applicant if the provision requiring parking of motor vehicles on a paved surface was codified prior to his ownership of the subject property.

Mr. Altman responded in the affirmative. He asked a nearby property owner in attendance if a prior owner had parked a motor vehicle in a similar manner.

Ms. Susan DeRoos, 3738 Monets Lane, stated her desire to address the Board at some point during the public hearing, but could not under oath confirm that prior owners of the property had parked a motor vehicle in a similar manner. She continued by stating her belief that someone in the public right-of-way could not determine whether or not the area where the vehicle was parked was unpaved.

Mr. Lohmeier responded that such an observation would not matter if other visual evidence concludes the vehicle was parked on an unpaved surface. He referred to the photo in the Notice of Violation and asked Mr. Rodney if the photo was taken from the public right-of-way.

Mr. Rodney responded in the affirmative.

Mr. Lohmeier stated in his opinion the vehicle is clearly parked on the grass.

Mr. Shanks stated it would be difficult for him to grant the appeal in this case given that parking of motor vehicles on an unpaved surface is a violation of the zoning code.

Mr. Lohmeier requested clarification of which code was used to issue the Notice of Violation.

Mr. Rodney responded the PMC was the basis for the Notice of Violation. He further stated that provisions of the zoning code still apply even though they were not specifically listed in the Notice.

Mr. Burke instructed the Board to consider all applicable codes because they provide a general understanding of what is intended, which is to require parking only on solid surfaces.

Mr. Lohmeier asked if the PMC was part of the zoning code or simply part of the general codified ordinances.

Mr. Burke responded that it is not part of the zoning code specifically, but is part of the overall general codified ordinances of the Village of which the zoning code is a part.

Mr. McGregor asked if the violation falls under the PMC, then why is the appeal before the Board.

Mr. Burke responded that the Board is the initial body obligated to rule on appeals to PMC violations.

Mr. Altman asked Mr. Burke if his opinion on the applicability of the non-conforming statute would change if he were able to confirm through the testimony of prior owners of the property that they used the same unpaved area for the parking of motor vehicles.

Mr. Burke responded he is not prepared to answer the question because an appeal to the Court of Common Pleas is a record appeal subject to only that testimony submitted during the Board hearing.

Mr. Altman requested a continuance of the public hearing to contact former owners of the property and request they appear before the Board to testify in support of his position.

Mr. Burke responded that then the determination would have to be made whether parking on an unpaved surface once or parking on an unpaved surface continually constitutes a non-conforming use, noting it is a heavy burden to meet that test.

Mr. Burke noted that only legally established uses remain legal non-conforming uses upon adoption of future codes which no longer allow those uses to continue.

Mr. Harwood asked if the Applicant is requesting a continuance to gather further evidence.

Mr. Altman responded in the affirmative, further stating a desire to contact prior property owners to request their testimony regarding past practices for parking on the property.

Mr. McGregor asked if – under the regulations – someone were to park with one wheel on the grass would that be a violation.

Mr. Rodney responded in the affirmative, noting however the code enforcement officer has the authority to exercise personal judgement in enforcing the code and may not consider such a situation to be a violation. He provided an example whereby a violation may not be issued if guests for a large party on the premises were parking partly or wholly on an unpaved surface given the temporary nature of that particular occurrence. Mr. Rodney continued by noting the Notice in this instance was issued because no observable temporary event or action was the genesis for parking the motor vehicle on an unpaved surface.

Mr. McGregor stated there was no evidence that a vehicle had been parked in that location for any length of time given the grass in the area was healthy.

Mr. Rodney responded that he received no indication from the property owner that the observed instance was temporary in nature.

Ms. DeRoos requested that the Village take a further look at how its codes are enforced and that a gentler touch in this instance, and future instances, may be more beneficial and produce improved compliance. She further noted the presence of five (5) motor vehicles parked on unpaved surfaces between her home on Monets Lane and the Village Administration Building.

Mr. Lohmeier asked Mr. Altman if his intention is to continue to park a motor vehicle on an unpaved surface.

Mr. Altman responded in the affirmative, reiterating that on occasion there may be up to six vehicles on the property and his continued desire to use the grass strip for temporary overflow parking to avoid parking vehicles on the public street. He continued by noting his desire is not to use the grass area for permanent parking, but rather temporary overflow parking as needed.

Mr. Harwood requested a motion be made to either grant or deny a continuance of the proceedings as requested by the Applicant.

Mr. Shanks asked Mr. Altman if he intends to follow through on his wish to collect additional evidence from past owners of the property.

Mr. Altman responded his desire to collect additional evidence if the decision of the Board is to be binding on future use of his property.

Mr. Burke expressed his skepticism that the Applicant will be able to collect sufficient evidence to establish a legal non-conforming use. He further noted an affidavit from previous owners alone would be insufficient to submit as evidence.

Mr. Altman responded if he were able to convince former owners to appear before the Board to testify to using the grass area for parking on a temporary or regular basis, would that improve his argument.

Mr. Harwood responded that it would depend upon the Board’s interpretation of those terms.

Mr. Shanks requested the Applicant clarify his position regarding neighboring property owners parking on the lawn.

Mr. Altman confirmed he has no issue with neighbors parking their vehicles on unpaved surfaces in a similar manner in accordance with the law.

Mr. McGregor reiterated his position that the Board has no ability to alter the law and therefore the matter should be the purview of Village Council.

Mr. Rodney responded that if it were the Board’s desire for Village Council to render a ruling, then they should deny the appeal and offer the Applicant an opportunity to appeal that decision to Village Council under the appeal provisions of the PMC.

Mr. McGregor stated the Board does not have to vote on the matter to forward it along to the Village Council.

Mr. Rodney responded in the negative, noting the Board must rule before the case can be appealed to Village Council. He further noted the next appeal body after Village Council is the Court of Common Pleas.

Mr. Lohmeier expressed support for the continuance to allow the Applicant time to collect further evidence in support of his position.

Ms. DeRoos asked if the Board could allow temporary parking on the unpaved area for a prescribed, agreed upon period of time in consultation with the property owners.

Mr. Shanks responded the Applicant is arguing the opposite, that he desires the ability to park on the unpaved area in perpetuity without restrictions.

Ms. DeRoos asked Mr. Burke if the Board has the ability to negotiate a withdrawal of the appeal in return for some arrangement with the owners.

Mr. Burke responded the Board has such an ability.

Mr. Lohmeier responded that such an arrangement could be interpreted by other property owners as tacit approval to park on unpaved surfaces.

Mr. Burke responded that the challenge of what Mr. Altman is asserting is an unlimited right to decide how frequently he wishes to park on an unpaved surface when the code prohibits such an action.

Mr. McGregor responded by stating the Board has no ability to change the code, and ultimately the matter should be decided by Village Council.

Mr. Harwood stated there are two possibilities: hold a vote or continue the proceedings to the next meeting.

Motion by Mr. Shanks was seconded by Mr. Lohmeier to continue the proceedings.

Mr. Rodney asked Mr. Burke if the granting of the appeal in this case alters future interpretations of the PMC with regards to parking on unpaved surfaces.

Mr. Burke responded there would be an argument for the setting of a precedent.

Mr. McGregor stated his desire for the setting of a precedent under specific circumstances.

Mr. Rodney responded that such a precedent for only the subject property could be approved via the Variance process, which the Applicant chose not to pursue. By choosing an appeal, a decision in support of the application would apply universally throughout the Village therefore setting a community-wide precedent.

Mr. Lohmeier asked if the Board could grant a variance regarding this issue for this specific property.

Mr. Rodney responded that if the Board found the standards for variance could be met, then a variance could be granted, however the current application before the Board is for an appeal, not a variance.

Mr. Harwood requested a vote on the motion for a continuance.

There was no further discussion. The motion passed by a 4-0 vote.

Case EDB20-6 will be continued at the next meeting of the Board on Thursday, August 13, 2020.

**OLD Business:**

There was no Old Business to discuss.

**INTERNAL Business:**

1. Approval of the January 15, 2020 meeting minutes.

Motion by Mr. Lohmeier was seconded by Mr. Shanks to approve the minutes. There was no discussion. The motion passed by a 4-0 vote.

1. Availability for next meeting.

As noted in Case EDB20-6, the Board will next meet on Thursday, August 13, 2020.

1. Communications.

There were no communications.

Motion by Mr. Shanks was seconded by Mr. McGregor to adjourn the meeting. There was no discussion. The motion passed by a 4-0 vote.

The meeting adjourned at approximately 7:15pm.

Attest:

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David Harwood, Chairman

Board of Zoning Appeals

Meeting Minutes prepared by Andrew E. Rodney, AICP, Building, Planning, & Zoning Manager.