



**BOARD OF ZONING APPEALS  
MEETING MINUTES  
FEBRUARY 2, 2023**

**CALL TO ORDER/ROLL CALL**

Chairman Jim Hrivnak called the Board of Zoning Appeals Meeting of February 2, 2023, at 6:30 p.m. Board Members in attendance were Jim Hrivnak, Randy Duncan, Don DePalma, Ryan Brickner, and Tyler Herrmann. Staff in attendance were Claudia Husak, Planning Director; Peyton Kaman, Zoning Technician; and Jesse Shamp of Frost, Brown and Todd.

**OATH OF OFFICE FOR NEW COMMISSIONERS HERRMANN AND DEPALMA**

Mayor Daniel Swartwout swore in the new Board of Zoning Appeals members, Tyler Herrmann and Donald DePalma.

**CHAIR ELECTION**

MOTION: Don DePalma moved to nominate Jim Hrivnak as the Chair of the Board of Zoning Appeals. Randy Duncan seconded the motion.

Chairman Hrivnak requested a roll call for passage: Ryan Brickner, yes; Jim Hrivnak, yes; Randy Duncan, yes; Don DePalma, yes; and Tyler Herrmann, yes.

VOTE: Y 5 N 0 (None) AB 0 (None)

Motion passed with a vote of 5-0-0.

**VICE CHAIR ELECTION**

MOTION: Jim Hrivnak moved to nominate Randy Duncan as the Vice Chair of the Board of Zoning Appeals. Don DePalma seconded the motion.

Chairman Hrivnak requested a roll call for passage: Ryan Brickner, yes; Jim Hrivnak, yes; Randy Duncan, yes; Don DePalma, yes; and Tyler Herrmann, yes.

VOTE: Y 5 N 0 (None) AB 0 (None)

Motion passed with a vote of 5-0-0.

## HEARING OF VISITORS FOR ITEMS NOT ON THE AGENDA

Chairman Hrivnak opened the floor for visitors to address the Board with items not on the agenda. Seeing none, he closed this portion of the meeting.

## APPROVAL OF MEETING MINUTES

### November 3, 2022 Meeting Minutes

[11032022\\_BZA\\_Minutes.pdf](#)

MOTION: Randy Duncan moved to approve the Board of Zoning Appeals Meeting Minutes of November 3, 2022. Ryan Brickner seconded the motion.

Chairman Hrivnak requested a roll call for passage: Randy Duncan, yes; Don DePalma, abstain; Ryan Brickner, yes; Jim Hrivnak, yes; and Tyler Herrmann, abstain.

VOTE: Y 3 N 0 (None) AB 2 (Tyler Herrmann, Donald DePalma)

Motion passed with a vote of 3-0-2.

## STAFF ITEMS

## OTHER BUSINESS

### 2023 Board of Zoning Appeals Work Session

Planning Director Husak advised the Board, in December, 2022, City Council approved the edits that all were working on regarding the Zoning Code pertaining to the Board of Zoning Appeals. She advised she would put the PDF of the Zoning Code edits into the next Agenda/Packet so the Board may have it for their reference.

Jesse Shamp, of Frost, Brown and Todd, gave a presentation. He began by speaking on his Legal Topics Agenda, specifically, open meeting, public records, and quasi-judicial proceedings – role as public official (ex parte communication and conflict of interest/ethics).

Attorney Shamp stated in open meetings, public officials are required to take official action and conduct all deliberations upon official business only in open meetings so that the public may attend and observe. Additionally, "Meeting" is defined as "any prearranged discussion of the public business of the public body by a majority of its members" and "an occasion for the transaction of business." Also, a public body must not circumvent the act by scheduling back-to-back discussions of public business, which, taken together, are attended by a majority of its members.

Continuing, Attorney Shamp stated the minutes of regular and special meetings of public bodies must be maintained and open for public inspection. Also, public officials cannot participate in meetings via Skype or similar videoconferencing technology under Ohio law. Additionally, he stated to be careful that message exchanges over the internet (on personal and on city social media pages), as well as emails and text messages, do not become "meetings."

Board member DePalma asked if you could open a door for scrutiny by receiving an e-mail from the City containing minutes?

Attorney Shamp advised, no, if that is all there is. If there is some type of contested issue before the Board and someone finds out you have an email about the content of a meeting, that would open the door. Minutes themselves, are not anything you would have to divulge, as they are public minutes.

Executive sessions are an exception to open meetings. An executive session is a portion of a meeting from which the public is excluded and at which only such persons as the public body invites are permitted to be present. Before a public body can hold an executive session, it must conduct a roll call vote of its members (need majority of quorum). The minutes for authorized executive sessions only need to reflect the general subject matter discussed. Meetings must always begin and end in open session and cannot adjourn from executive session.

Attorney Shamp moved onto the topic of Public Records. He advised a "record" is any document, device, or item, regardless of physical characteristic, created or received by or coming under the jurisdiction of any public office which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. A "public record" is any record kept by any public office. "Kept by" means any record that is actually in existence and in possession of the public office or person responsible for public records. Examples of records not "kept by" a public office would be a record not yet in existence or a record that has been disposed of lawfully.

Further, Attorney Shamp stated that public records are analyzed based on their content, rather than their storage medium. Electronic records (e-mails and text messages) are treated no differently than any other tangible record. A private e-mail account can be subject to the Public Records Act if the content of the e-mail serves to document the organization, functions, policies, procedures, operations, or other activities in the public entity. Personal Notes can be "records" and are often considered "transitory records" (created for the purpose of transferring their content to an official file, database, report, etc.) Notes are not records if they are (1) kept as personal papers; (2) kept for the employee/official's own convenience; and (3) not accessible to other members.

Planning Director Husak asked if Attorney Shamp could explain if someone would take personal notes or write down questions prior to a meeting. Attorney Shamp advised if it is solely organizing your thoughts, that is not a public record. You can keep your thoughts to yourself and write it down and not worry about this being a public record.

Attorney Shamp spoke next of the Administrative/Quasi-Judicial Role. He stated the BZA is an administrative/quasi-judicial body, meaning the applying existing law to specific facts based on competent evidence produced in a fair hearing. The legislative roles of the BZA are they may make advisory recommendations to Council and Planning & Zoning Commission concerning zoning matters. (Charter 7.04) Also, the quasi-judicial roles of the BZA are they hear and decide appeals for exceptions to and variances in the application of legislative measures and administrative determinations governing zoning, as required to afford justice and avoid unreasonable hardship (Charter 7.04)

Continuing with the quasi-judicial role, Attorney Shamp stated the decisions are based on documents submitted and testimony at meetings. A view of the property is ok, you do not have to leave your experience at the door. No substantive communication with applicants. It is



preferable to avoid the disclosure of substantive communications with residents, and advised the Board to see the BZA Rules and Regulations. Also, all decisions are based on standards set by ordinance.

Further, Attorney Shamp advised with regard to quasi-judicial roles, in the administrative appeals, the BZA's decisions are subject to administrative appeal under Chapter 2506 of the Ohio Revised Code. Sworn testimony; application of standards; opportunity to cross examine are all utilized. Also, the BZA's decision will be upheld unless the court finds it is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

Attorney Shamp spoke of the BZA members' role as public officials. He stated to contact the Law Director if you have a question about a potential ethics or conflict of interest issues. If prohibited conflict is identified, the member should abstain from discussion (formal or informal) and voting. Also, the member cannot participate in matters involving immediate family members; cannot receive benefits for performance of public duties.

Chairman Hrivnak asked what if it is someone that you know? Attorney Shamp advised this would not be a conflict of interest as the Board are impactful members of the community and you will know some of the people that appear in front of the Board.

Chairman Hrivnak asked what if it is someone you have had business dealings with? Attorney Shamp this would not be a conflict provided the subject matter of this hearing could in anyway effect your business dealings.

Attorney Shamp went on to explain the seven (7) factors needed to be considered when the official record is made:

- (1) Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property;
- (2) Whether the variance is substantial;
- (3) Whether the character of the neighborhood would be adversely affected or whether adjoining properties would suffer an adverse impact as a result of the variance;
- (4) Whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage);
- (5) Whether the property owner purchased the property with knowledge of the zoning restriction;
- (6) Whether the property owner's predicament feasibly can be obviated through some method other than a variance; and
- (7) Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

Chairman Hrivnak asked for a detailed explanation of number one. Attorney Shamp explained will it yield a reasonable return if the Board says no to the variance and they have to sell the property, is one way to look at it. Further, if the property is odd in shape, a reasonable thing this Board can say is they cannot use their back yard unless we grant the variance and if they cannot use the backyard, is there any beneficial use for that property. This is a factor in favor of granting a variance.

Attorney Shamp continued by providing a process to use the seven factors. Number one (1) is not determinative, you could say he could fix the problem some other way, therefore I am not

granting the variance because number six (6) is not met. Weigh them, balance them, just talk it out and explain your reasons why.

Attorney Shamp stated it is on the applicant to present the burden of proof.

Chairman Hrivnak added the Board should avoid the temptation of helping the applicant make their case.

Board member Duncan gave a scenario of the Board has been given feedback on why they have denied an application, and the application has been modified, changes were made and the applicant reapplied.

Planning Director Husak advised there was an applicant last year, a different perspective owner, or the first request for the variance was someone trying to buy the property to build a home on, and that variance got denied, and then the property owner came back with a different variance request, but not much more different evidence.

Further, Planning Director Husak stated for the BZA specifically, every single case is unique and the standards might be applicably clear in a certain case, but not in another. She added in working the BZA's before where precedence was thrown out, and that is the least of the standards for the BZA because it is intended to be weighed for every single case and the circumstances around it.

Chairman Hrivnak stated the example of an applicant saying the Board has given a variance to his neighbor for the same request, this really has no weight. Attorney Shamp affirmed.

Chairman Hrivnak asked if the Board had to decide at the meeting an application was presented. Attorney Shamp advised he did not believe the Board had to make an immediate decision, as it has to come within thirty days. The Board can always table an application.

Board member DePalma asked when they have a vote, and a member is absent, and the vote is a two-two tie, what happens? Attorney Shamp advised it becomes a denial, as it has to be a majority of the entire board.

## ADJOURNMENT

MOTION: Chairman Hrivnak moved to adjourn. Ryan Brickner seconded the motion.

Meeting was adjourned at 7:15 p.m. by consensus.

**MINUTES APPROVED: MARCH 2, 2023**

 4-6-23  
Jim Hrivnak, Chairman Date

 4/6/23  
Pam Friend, Administrative Assistant Date

