

The regular meeting of the April 19, 2006 Board of Zoning Appeals was called to order at 7:10 p.m. Present were Chairman Charles Cvitkovich, Larry Maser and Brian McElroy. Also present were secretary Nicole Rosiu, Building Commissioner Keith Foulkes and Building Inspector Larry Ellis. Mr. Cvitkovich asked the audience to stand for the Pledge of Allegiance.

Mr. Cvitkovich moved to postpone the approval of the minutes due to lack of a quorum. Seconded by Mr. Maser. Roll call, all approved.

Old Business

**Kurtz Bros., Inc. conditional use for a sign**

Mr. Cvitkovich moved to postpone Application #20060245 until after the conditional use of the property is heard at the end of the meeting. Seconded by Mr. Maser. Roll call, all approved.

New Business

**Conte Variance**

The secretary read the public notice for Application #20060300.

Greg Conte was sworn in representing this variance. Mr. Conte stated that he would like to improve his property by putting up a pole barn/garage and that it is only 5 square feet over what is allowed. Mr. Conte stated that he would be storing his snowmobile, ATV and boat inside a structure on his property. Mr. Cvitkovich asked if the building is going to be a pole barn or a garage. Mr. Conte said it's a garage. Mr. McElroy asked Mr. Conte if there is already a garage on the property. Mr. Conte said yes. Mr. Cvitkovich stated that the garage is also higher than what is allowed. Mr. Conte stated that he was told 15 feet to the mean. Mr. Cvitkovich said that he is allowed 15 feet to the top of the roof. Mr. Cvitkovich stated that the garage is about 8" over in height and with the maximum area allowed for a garage, the proposed garage would be 440 square feet over.

Mr. Conte stated that he wants his neighbors to see a nice yard. Mr. Cvitkovich said that there are other options like off-site storage. Mr. Conte said that he has stuff in off-site storage already and it is very expensive. Mr. Cvitkovich stated that Mr. Conte wants to store his things on site, he does not need to. Mr. Cvitkovich said that is not a hardship. Mr. Conte stated that he was told he could go 875 square feet on the new garage. Mr. Cvitkovich stated that the board did not say that. Mr. Conte said that his hardship is that he does not want to go back and forth from an off-site storage facility to his house and keep shoveling out money. Mr. Maser asked Mr. Conte if he considered constructing a carport instead of a garage. Mr. Conte said that he would like his stuff enclosed. Mr. McElroy stated that the code does not say someone cannot have 2 garages on their property. Mr. McElroy asked if the board could combine the remaining area of the garage that Mr. Conte is allowed with the 1% allowed for an accessory building, so that Mr. Conte would be allowed an extra 700-some square feet. Mr. Cvitkovich said it would depend on the board's interpretation and that Mr. Cvitkovich does not interpret it that way.

Mr. Conte stated that having his stuff outside is also a theft issue. Mr. Cvitkovich asked if there was any other discussion. Mr. Foulkes stated that one interpretation made by the Building Department is that the attached garage is considered part of the residential building and that the square footage was not counted. Mr. Foulkes stated that in Section 210.02 (c) "Use Regulations" in the Zoning Code, it does provide for accessory uses being private garages. Mr. Foulkes said that a garage is not traditionally included in the principal building. Mr. Cvitkovich said that the definition for a private garage is, "A detached accessory building or portion of the principal building designed to store motor vehicles and other normal household accessories of the residents of the principal building." Mr. Cvitkovich said that Mr. Foulkes determines the footprint of the dwelling including the garage to see if the house will fit on the lot. Mr. Foulkes said

that an attached garage is included in the overall square footage, it is calculated as non-living space. Mr. Foulkes stated that it is at the discretion of the board, but that is Mr. Foulkes' historical interpretation.

Mr. Cvitkovich asked if there were any other comments or questions. Mr. McElroy stated that he believes Mr. Conte is entitled to 475 square feet for a garage and 273 square feet for an accessory building. Mr. Conte said that that he would like to go as large as the board would let him. Sandra Davis was sworn in. Ms. Davis stated that Mr. Conte is making an interest to improve the value of his property and that it won't be an eyesore and the board should let Mr. Conte build it. Mr. Cvitkovich said that there are other options, the conditions the board is looking for are not being met. Mr. McElroy stated that there are specific conditions in Section 540.06 (b) 1-9 of the Zoning Code that help the board determine whether or not there is a hardship.

Ms. Kilo asked what the definition of a hardship is. Mr. McElroy read Section 540.06 (b). Mr. Conte stated that the Building Department told him he could build up to an 875 square foot garage. Mr. McElroy said that the Building Commissioner has power that is independent of the Board of Appeals. Mr. McElroy stated that Mr. Conte has the right to withdraw the appeal and go to the Building Department and get a permit to build an 875 square foot garage. Mr. Conte asked the board if he would have a better chance at the Building Department. Mr. Foulkes stated that if it pleases the board, Mr. Foulkes would like to get a legal opinion rendered. Mr. Foulkes said that after hearing the discussion of the board, there might be questions. Jim Bolander was sworn in. Mr. Bolander is a former member of the Board of Zoning Appeals. Mr. Bolander stated that historically, the board has included the attached garage and the detached garage.

Mr. Maser moved to table Application #20060300 for legal opinion. Seconded by Mr. McElroy. Roll call, all approved.

### **Ryan Homes Variance**

The secretary read the public notice for Application #20060353.

Brian Dixon from Ryan Homes was sworn in. Mr. Dixon stated that the house at 8705 Westfield Park Dr. was surveyed at one foot higher than it was supposed to be, which changed the grade considerably. Mr. Dixon said that Ryan Homes lowered the grade to make it even with the other properties. Mr. Dixon stated that the other building inspector told him the retaining wall was okay to have in the rear yard. Mr. Cvitkovich asked Mr. Dixon if there is any intent to put anything beyond the wall. Tony DiPaolo was sworn in. Mr. DiPaolo is the owner of 8705 Westfield Park Dr. Mr. DiPaolo said that the only thing going beyond the wall would be grass. Mr. DiPaolo also said that he believes it is a landscape wall, not a retaining wall.

Mr. Cvitkovich asked how far the patio goes back. Mr. DiPaolo said the patio will be 18' x 15'. Mr. McElroy asked Mr. Dixon the distance from the patio to the retaining wall. Mr. Dixon said approximately 4 feet. Mr. Cvitkovich asked how high the wall is. Mr. Dixon said about 20' high. Mr. Cvitkovich asked Mr. Foulkes if he considers that a retaining wall. Mr. Foulkes stated that a retaining wall is something built to retain soil and erosion. Mr. Foulkes said that this retaining wall encroaches the rear and side yard setbacks. Mr. Foulkes stated that a landscape wall would be a border or decorating accessories. Mr. Foulkes said that this wall is abutting a dwelling and holding back soil. Mr. Cvitkovich asked Mr. Dixon how far past the side of the house the wall goes. Mr. Dixon said 4' to the rear and 4' to the side.

Mr. Cvitkovich said that his interpretation is that a 20" wall is not a retaining wall. Mr. Foulkes stated that it is referenced as a retaining wall on the engineered drawing. Mr. Cvitkovich said that he does not get the same interpretation from the code. Mr. Cvitkovich asked Mr. Foulkes if the Building Department would make anyone, who puts two blocks in their backyard, get a permit. Mr. Cvitkovich also asked what

the Building Department would inspect. Mr. Foulkes stated that the entire grade has been changed and has compromised drainage to other properties. Mr. Foulkes said that the Building Department wouldn't address it, an engineer would have to get involved. Mr. Cvitkovich said that he believes it is a landscape wall and in Section 230.08 of the Zoning Code, a landscape wall can be right on the property line.

Mr. McElroy said that a true retaining wall is usually 4' to 5' high. Mr. Cvitkovich asked what the concern is then. Mr. McElroy said that his issued is with the patio, if it is considered a structure. Mr. Cvitkovich said that 230.08 of the Zoning Code says walls can be 0' to the property line and the patio is not the concern. Mr. Cvitkovich asked Mr. DiPaolo the dimensions of the patio again. Mr. DiPaolo said 15'x 18'. Mr. Cvitkovich said he believes the rear of the house is 38' from the back property line. Mr. McElroy stated that Mr. Dixon should amend the application to the section for setbacks. Mr. Cvitkovich asked Mr. Foulkes if the setbacks were established in the development plan approval process. Mr. Foulkes said yes, the development was approved through the court with 22' and 25' setbacks. Mr. Foulkes stated that nothing is to encroach the setback lines. Mr. Cvitkovich stated that he doesn't see any problems. Mr. Dixon amended the application to include the code section for setbacks.

Mr. Maser moved to approve Application #20060353 as amended. Seconded by Mr. McElroy. Roll call, all approved.

### **Bricely Variance**

The secretary read the public notice for Application #20060342.

Kyle Bricely was sworn in representing this variance. Mr. Bricely said that he would like to build a patio off of his house that goes out 12'. Mr. Cvitkovich asked Mr. Bricely how much of encroachment there would be. Mr. Bricely said he believes about 4' past the setback line. Mr. Cvitkovich asked Mr. Foulkes if he reviewed the application first. Mr. Foulkes said yes. Mr. Cvitkovich asked Mr. Bricely who told him about the encroachment. Mr. Bricely said Miss Rosiu and Mr. Foulkes both told him. Mr. Cvitkovich said he does not see an encroachment. Miss Rosiu explained that Mr. Bricely has to maintain a 50-foot rear yard.

Mr. Cvitkovich said that the letter from the Homeowner's Association states that the patio has to remain within all setbacks. Mr. Cvitkovich said that the board couldn't grant a variance if the Homeowner's Association does not approve going beyond the setback. Mr. Bricely stated that the letter is a standard letter that is given to every applicant. Mr. Cvitkovich said that the board couldn't grant the variance if the Homeowner's Association says to stay within the setbacks. Mr. Bricely stated that his neighbor had the same letter when he came to the BZA and he was approved to build beyond the setback. Jodi Bricely was sworn in. Mrs. Bricely stated that her neighbor was approved for a variance and he had the same letter. Mrs. Bricely asked if they could be approved and then take it up with the Homeowner's Association. Mr. Cvitkovich said just because a variance was granted before does not mean it will be granted now.

Mr. Bricely said that he couldn't wait another month. Mr. Cvitkovich stated that the board could vote on this and have a contingency that Mr. Bricely provides the Building Department with a letter from Barnett. Mr. Bricely said that sounds fair.

Mr. McElroy moved to approve Application #20060342 for a 12'x 30' patio contingent on the written approval from Barnett Management, Inc. Seconded by Mr. Maser. Roll call, all approved.

### **Kurtz Bros., Inc. Conditional Use**

Jeff Andrey was sworn in. Mr. Andrey stated that he would like to continue the conditional use as a landscaping business. Mr. Andrey said that he sat down with the Trustees and they granted him approval. Mr. Andrey introduced Greg Malone, who was then sworn in, and stated that they have both been the

property owners since the 1980s and they have both worked there since 1972. Mr. Cvitkovich asked Mr. Andrey when the last conditional use permit was issued for that property. Mr. Andrey said a couple years ago. Mr. Cvitkovich stated that he did some research and found that there were no applications submitted after 1993. Mr. Cvitkovich said that Dugan's sought a re-zoning on several occasions and the Cuyahoga County Planning Commission opposed it. Mr. Cvitkovich said that the reason it was opposed is because a re-zoning stays with the parcel and it would allow for other businesses to go there.

Mr. Cvitkovich asked if Kurtz Bros. is the same use as Dugan's. Mr. Malone said yes, mulch and stone. Mr. Cvitkovich asked if there has been an increase in inventory since 1993. Mr. Andrey said the increase is mostly inside the building. Mr. Andrey said that the business peaked in 2001 and now they are only doing about half the business since then. Mr. Andrey stated that he does not have exact figures. Mr. Malone said that the ratio is pretty close with bulk over green goods. Mr. Andrey said that the differences outside include pavers, which are bulky so they take up more space. Mr. Andrey stated that the mulches are in concrete bins and more spread out than previously. Mr. Andrey said that behind the property is a CEI easement and a Shore West easement. Mr. Andrey stated that Shore West put up a mound between Dugan's and Villages of Lakeside and the mound has shrunk over the years. Mr. Andrey said that he would put trees or a fence up on the mound, but it is not his property and he does not have the authority to maintain it.

Mr. Andrey said that more material was brought in and they needed more parking spaces. Mr. Andrey stated that the dust was pretty bad because the irrigation pump was down, but it is working now. Mr. McElroy asked if the property was originally non-conforming. Mr. Andrey said that it was considered a roadside stand when there was only a Zoning Department in Olmsted Township. Mr. Cvitkovich asked if there was any calendar year Dugan's has not been opened. Mr. Andrey said no. Mr. McElroy asked how many different names there has been for the business. Mr. Andrey said Dugan's Partners owns it, Western Reserve was a DBA name and Kurtz Bros. is leasing the property. Mr. McElroy stated that he is concerned that someone will get hurt if a front-end loader touches a power line. Mr. Cvitkovich said that he is not sure if it is a conditional use or a non-conforming use.

Terri Wynne Soukup, 27052 Pondsides Point Dr., was sworn in. Ms. Soukup stated that in the past 6 months, there have been many changes going on, there has been a lot of growth in the outside. Ms. Soukup said that it used to be a quaint garden center. Ms. Soukup stated that when she bought her dream home, she knew there was a garden center there and she was okay with it. Ms. Soukup said that occasionally there was noise or a smell, but she had good neighbors. Ms. Soukup stated that she thinks the community has been disrespected by not being told that the business was going to quadruple in size.

Sandra Davis, 27044 Pondsides Point Dr., was sworn in. Ms. Davis stated that her house backs up to the business. Ms. Davis said that since the new ownership, the dust is horrible and her kids have now developed asthma from breathing in the dust. Ms. Davis said that it is not a roadside stand and there is a very large backhoe and several semis going in and out. Ms. Davis stated that there is so much noise from the semis and so much dust that her neighbors run to their garages to get away from it. Ms. Davis stated that the business is not the same as it was in 1993 and she bought a quarter-million dollar house that has lost value because of the business. Ms. Davis said that her children's health has been affected and there are chemicals that blow over and onto their windows.

Mr. Malone stated that the reason there are so many semis right now is because they are stocking for the season. Mr. Andrey said that there are about 5 semis coming in and out every day on the weekend during the peak season.

Brian Hofmann, 27048 Pondside Point Dr., was sworn in. Mr. Hofmann stated that Kurtz Bros., Inc. supplies to municipalities and now that there is an office closer to some of the municipalities that they supply, the traffic will be picking up and materials will be increased. Mr. Hofmann said that the tractors they use are huge and Mr. Hofmann asked why increase the size of the tractors if the business has not increased. Mr. Hofmann said the smell is unbelievable and he has to wear a mask outside while he is cutting the grass. Mr. Hofmann stated that the tractor is causing a lot of dust and it has never been that bad previously. Mr. Hofmann said the business has expanded and the bunkers with the materials have been pushed back further. Mr. Hofmann stated that there is always banging of the front-end loaders and tailgates early in the morning.

David Wanner, 27028 Pondside Point Dr., was sworn in. Mr. Wanner said that the neighborhood is having no benefit from the business being there. Mr. Wanner stated that the owners of the business offered the residents of Villages of Lakeside passwords for bulk material, but the neighborhood cannot be bought. Mr. Wanner said that it is a residentially zoned area and the neighborhood shouldn't have to be woken up at 7:00 a.m. on a Saturday. Mr. Wanner said that he and his family could not eat dinner with the door open because of the dust, noise, vibrations and diesel exhaust. Mr. Wanner stated that the back-up beeper for the front-end loader has been shut off, which violates OSHA. Mr. Wanner said that the barricades are marked with "retail" signs and customers can't walk around back there without a beeper on the front-end loader. Mr. Wanner said that flies have accumulated on his back doors from the smell. Mr. Wanner wondered how Dugan's files their sales taxes in a residentially zoned district. Mr. Wanner stated that a fence would not help the situation.

Ms. Soukup said that there were no problems in the last five years. Mr. Hofmann showed a video of the noise and dust from the Kurtz Bros. site. Mr. Wanner stated that he would beg to the board to maintain the quality of life and deny their application. Mr. Wanner said that in the video, the board can see the dust and hear the banging and the only solution is to close them down.

Mr. Foulkes stated that the Building Department has received many complaints. Mr. Foulkes said that there has been a noticeable increase in traffic, which brings mud onto the road. Mr. Foulkes stated that when the Building Department brings anything to Kurtz Bros. attention, they do take corrective action. Mr. Cvitkovich asked if there were any complaints in the past. Mr. Foulkes said that he only knows that recently the Building Department has received a large amount of complaints. Ms. Rosiu stated that there were complaints in the past, but not near as many as now.

Mr. McElroy asked Mr. Andrey why the front-end loader is larger now. Mr. Andrey said it lifts higher and it is taller. Mr. Cvitkovich asked what the purpose is of having it taller. Mr. Andrey stated that it can get over the dumpster and also the old loader they used is dead. Mr. Cvitkovich asked if the delivery trucks are a different size than before. Mr. Andrey said they are bigger because the company is now hauling more. Mr. Cvitkovich stated that in comparing the old pictures to the new site plan, he couldn't tell if the business has expanded. Mr. Cvitkovich said that if there was a discontinuance of use for 2 years or more, the board could not allow them to go forward. Mr. Cvitkovich stated that the business might continue if it is not made a public nuisance, which includes residential complaints.

Mr. McElroy asked about the sales from then and now. Mr. Andrey said that he could provide that. Mr. McElroy stated that he does not believe the board has enough information to make a decision. Mr. Andrey asked when the board would like the figures from. Mr. Cvitkovich said since 1993. Mr. Andrey asked how long a conditional use is good for. Mr. Cvitkovich stated that a conditional use is good for one year and a non-conforming use is good forever until a change in ownership. Mr. Cvitkovich said that he would like a list of materials they carry now and what they carried then.

Ms. Soukup stated that she knew she was moving behind a quaint garden center and that her and her neighbors have purchased a lot of merchandise from them. Ms. Soukup said that there were no problems before Kurtz Bros. moved in. Ms. Davis said that people walk in the neighborhood all the time, but nobody has been walking lately because the dust is so bad. Mr. Wanner said that the neighbors are very considerate of each other and nobody mows their grass before 10:00 a.m., but the trucks from the business wakes everyone up at 7:00 a.m. on Saturday.

Mr. McElroy asked what would happen if the application is tabled. Mr. Foulkes said the matter would be pending and the business would be able to stay open. Mr. Malone suggested that Kurtz Bros. would not make deliveries before 9:00 a.m., the business would shut down at 9:00 p.m. and they would make every effort to reduce the amount of dust. Mr. Cvitkovich said that he would take that into consideration. Mr. McElroy suggested getting a legal opinion to see if this business is a conditional use or a non-conforming use. Mr. Cvitkovich said the zoning could have changed and it could have been conditional then and non-conforming now. Mr. Cvitkovich stated that if the use has not been changed, the business became non-conforming and it should stay non-conforming. Mr. Wanner stated that if the business is non-conforming, and the owners were changed, the business would not be permitted. Ms. Soukup asked if the homeowners could have representation at the next meeting. Mr. Cvitkovich said it is a public meeting and anyone can attend.

Mr. McElroy moved to table Application #20060343 pursuant to the stipulations provided by Mr. Malone, including no deliveries before 9:00 a.m., closing of the business at 9:00 p.m., make every effort to reduce the amount of dust and submit documents for Section 340.03 and 340.10 of the Olmsted Township Zoning Resolution. Mr. McElroy asked for Application #20060343 to be the first item on the agenda for the May 17, 2006 meeting. Seconded by Mr. Maser. Roll call, Mr. McElroy-yes, Mr. Maser-yes, Mr. Cvitkovich-no.

**Kurtz Bros., Inc. conditional use – Sign**

Mr. Cvitkovich moved to keep Application #20060245 on the table. Seconded by Mr. Maser. Roll call, all approved.

**Floor Discussion**

Angel Fox from the Westfield Park development stated that a few homeowners in Westfield Park would like to put up decks that encroach the rear yard setback and they did not build them before the expiration of the previous variance. Ms. Fox asked if a homeowner could apply for the variance and include all the homes that would like to build decks or if it had to be done by the Homeowner's Association. Mr. Cvitkovich said that a homeowner could apply as long as the applicant has signatures from all of the people wanting to be involved.

Mr. McElroy moved to adjourn at 10:41 p.m. Seconded by Mr. Cvitkovich. Roll call, all approved.

Respectfully submitted,

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Nicole L. Rosiu, secretary

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Charles Cvitkovich, Chairman

Date