

The Tuesday, November 16, 2006 meeting of the Delhi Township Board of Zoning Appeals was called to order by Chairman Joseph Scherer at 7:00 p.m. at the Administration Building with the Pledge of Allegiance to the Flag.

Members present:

Robert J. Ashe

Robert G. Hendon

Jerome H. Kearns

Joseph Scherer, Jr.

Charles Brigham III

Also present:

Thomas R. Stahlheber, Director of Development Services

David C. Lane, Law Director

Mr. Stahlheber certified that the requirements of Section 121.22 of the Ohio Revised Code and the rules adopted pursuant thereto had been completely complied with as they concerned the meeting.

The hearing in Case VA2006-11 (4901 Foley) was convened.

Mr. Stahlheber (sworn) advised that on September 22, 2006 the Department of Development Services received an application filed by Steve & Doris Clifford for a commercial alteration of the building at 4901 Foley. He commented that the application was denied on October 3, 2006 with the applicant notified of the denial by certified mail on October 4, 2006. He noted that in the letter were stated the reasons for the denial which included: the premises known as 4901 Foley was located in Delhi Township, Hamilton County, Ohio and in the "C" Residence district as shown on the maps of the Township Zoning Resolution; the subject property is a corner lot; the subject property is a registered nonconforming use; the submitted application and drawings indicated a proposed commercial alteration consisting of converting the building at the subject property for use as auto repair/auto parts storage and office space; zoning certificate #2001-133, approved an office alteration of the building at the subject property for use as offices inasmuch as that use was found to be consistent with the previous use; the proposed commercial alteration is considered a less restrictive use of the nonconforming use than was the existing use; the Township Zoning Resolution prohibits alterations to nonconforming uses resulting in uses less restrictive than existing uses. The denial was also based on the following sections of the Zoning Resolution: Sections 51, 51.1, 81, 82, 61, 62, 62.13, 151, 192, 251, 281, 282 and 291. Pursuant to Article XVIII of the Zoning Resolution the applicant had the right to file an appeal of the denial within twenty days of the action with an appeal being filed in the form of an application received October 10, 2006. Pursuant to the requirements of the Ohio Revised Code the hearing was advertised in a newspaper of general circulation at least ten days before the hearing and those parties of interest were notified by first class mail at least ten days before the hearing.

Exhibit "A" – application

Exhibit "B" – site plan

Exhibit "C" – building floor plan

Exhibit "D" – application materials/permit for existing use of property

Mr. Kearns advised that the alteration requested is to a nonconforming use having an office use classification. He commented that the Board was being asked to grant a variance so to permit a less restrictive use. He questioned whether the Board had the authority to take such action.

Mr. Lane advised that the Board is not empowered to reclassify nonconforming uses to less restrictive uses. He commented that his understanding of the variance request was to challenge a previous determination whereby the use classification of the subject nonconforming use was upgraded from light industrial to retail.

Mr. Stahlheber advised that historically the most intense use of the subject property was that of retail.

Mr. Lane advised that provided the subject property has been used continuously as a nonconforming use, irregardless as to how Township records classify such use, the Board could find that the existing and previous uses were uses similar to use of the property at the time the Township Zoning Resolution was adopted that such might support a determination that the use classification of the subject nonconforming use should be retail. He commented that they could consider a use variance inasmuch as the property has always been zoned residential and used in a nonconforming fashion.

To Mr. Scherer's question as to if the word continuous should be taken to mean a specific use Mr. Lane responded in the negative advising that uses need only be similar and uninterrupted for a period no longer than two years.

Mr. Scherer advised that there appeared to be some confusion as to the use classification of the subject nonconforming use owing to varying use classifications noted in Mr. Stahlheber's staff report.

Mr. Lane advised that the use classification of a nonconforming use can be changed to a more restrictive use but not to a less restrictive use, for example a retail use can be changed to an office use but not to a light industrial use. He commented that applicants maintain, notwithstanding zoning certificate #2001-133, that uses at the subject property have in actuality been retail in nature and continuous and as such support their request for a commercial alteration. He noted that proof of applicants' contention would need to be provided through testimony and that if evidence indicates that an administrative error was made in previously determining the nonconforming use classification that the Board could direct the Department of Development Services to correct their records and issue the requested zoning certificate.

Steve & Doris Clifford (sworn), 4901 Foley, advised that they also own the building at 4907 Foley where they operate an automobile air conditioning repair business.

Mrs. Clifford advised that they contend that the Township erred in determining the use classification of a previous owner's use of the subject premises. She commented that the zoning certificate application submitted in 1990 by the previous owner Mr. Williams (Exhibit "D") specified use of the subject premises as office and warehouse with the zoning certificate specifying office use. She noted that the business supplied equipment to laboratories involved in animal research.

Mr. Clifford advised that business activity at the subject premises included customers coming and going and daily stops by UPS. He commented that sometimes UPS would drop-off packages at his shop if no one was available at the subject premises to sign for the package. He noted that he would like to use the existing building at the subject property in conjunction with his auto repair business rather than add onto his building at 4907 Foley. He commented that with his disability having office space on the ground floor would provide a much needed convenience for him as well as customers.

Mr. Kearns advised that ownership of the subject premises hadn't changed for fifteen years. Mr. Clifford responded that he didn't believe it was operating consistent with the approved use classification.

To Mr. Kearns question as to what affect a retail use classification of the subject premises would have on parking Mr. Stahlheber advised that he would need to look at such, commenting that generally office use parking requirements are more intense than retail uses.

To Mr. Scherer's request that for the record would Mr. Clifford specify his intended use of the subject premises Mr. Clifford stated it would be used for office space, auto repair and a parts warehouse.

Mr. Stahlheber advised that auto repair shops require one parking space for each 400 sq. ft. in floor area while offices require 3 parking spaces for the 1<sup>st</sup> 1,000 sq. ft. in floor area plus 1 space for each additional 400 sq. ft. in floor area. He commented that the number of parking spaces indicated on Exhibit "B" would be sufficient for the proposed use.

In response to Mr. Scherer's contention that a light industrial use classification would be necessary to support the warehouse portion of the proposed use Mr. Stahlheber advised that auto repair is classified as a retail use and that most auto repair shops maintain an inventory of parts.

Mr. Kearns advised that his concern was with future uses of the subject premises by either the same or some new property owner commenting that by granting the requested variance that limitations on future uses would be less stringent.

Mr. Stahlheber advised that it was he, not the Board, who approved the previous use of the subject premises based on the application materials submitted and that the applicant did not challenge his determination. He commented that there was no record of that use having been inspected and that no complaints concerning its use were received. He noted that if the previous owner was using the subject premises in ways other than approved that his department wasn't aware of such use.

To Mr. Kearns' question as to who was responsible for confirming the use of nonconforming uses Mr. Stahlheber advised that his department is. Mr. Stahlheber commented that a certificate of occupancy inspection is made to confirm that the use and any improvements made are code compliant. He noted that once the certificate of occupancy is approved that his department doesn't hear from the applicant/property owner unless they are proposing some additional improvements. He advised that his department does not make periodic inspections of nonconforming uses so to monitor their operations.

To Mr. Brigham's question as to since 2001 what kind of activity has been going on at the subject premises Mr. Clifford advised that it was being used as an office, record storage and part storage in conjunction with the business use of 4907 Foley.

To Mr. Brigham's question as to if the requested use classification was approved how many customers would be served at the subject premises Mr. Clifford advised approximately ten. Mr. Clifford commented that his hours of operation are 9 a.m. to 5:00 p.m. during the spring, summer and fall and that they shut down the business during the winter months.

To Mr. Brigham's request for more specific information as to the types of activity Mr. Clifford advised that he would see customers in the office and work on automobiles in the garage.

To Mr. Brigham's question as to if the auto repair business at 4907 Foley would continue Mr. Clifford responded in the affirmative.

Mr. Scherer expressed his concern for if the Board determines that use of the subject premises by the previous owner should have been considered retail that the office use of it since 2001 would then be an issue. Mr. Lane advised that testimony given stated that it was used for office, record & parts storage and occasional service work. He stated that, based on testimony given, that the current owners have continuously used the subject premises in such ways that could be construed as retail.

To Mr. Hendon's question as to if the car parked in the parking lot at the subject premises was a customers' car Mr. Clifford responded in the affirmative. To Mr. Hendon's question as to if auto parts are stored in the building Mr. Clifford responded in the affirmative.

Mr. Clifford advised that adding on to his building at 4709 Foley could not be done in such a way as to provide a first floor office.

Mr. Kearns advised that he felt that the request amounted to little more than the expansion of a nonconforming use. He commented on not agreeing with the request. He stated that the concept of nonconforming uses is for them to eventually go away.

Mr. Brigham advised that he felt that substantial justice would be done by granting the requested variance in that such would not be contrary to the public interest owing to the subject premises being a long established business location, the building having a layout conducive to many uses, the proposed use being consistent with the use of the neighboring building west and actual use of the subject premises as observed by Mr. Clifford. He commented that based upon Mr. Stahlheber's summary uses of the subject premises have varied from office to retail resulting in there always being a question as to the proper use classification. He noted that Mr. Clifford's physical impairments constitute an unnecessary hardship allowing special conditions to come into play. He advised that the alternate to the proposed use would probably be another vacant business building in Delhi.

Mr. Lane advised that granting the variance as suggested by Mr. Brigham is an option. He reiterated that the Board, based upon facts presented at the hearing, would find that the subject premises has been continuously used in a retail capacity that they could find that an administrative error was made in determining the use classification as office and direct the Township records to be corrected to reflect such finding, which would facilitate the proposed use. He commented that he wanted to make sure the Board knew they had both options to consider and that their decision needed to be supported by evidence presented.

To Mr. Kearns's question as to if the Board refused to make an administrative decision so to facilitate the proposed retail use would Mr. Clifford's use of the subject premises be required to cease Mr. Stahlheber responded in the negative noting that he has a permit to utilize the premises as offices and that use of the property would be limited to such a use.

Mr. Lane advised that currently the subject premises has a nonconforming use certificate that legally considers and limits the use as office. He commented that any use of the subject premises as a use less restrictive than office would constitute a zoning violation.

To Mr. Kearns' question as to if his not being able to use the subject premises in a retail business fashion would put Mr. Clifford out of business, Mr. Clifford responded in the affirmative.

Mr. Hendon advised that it was his opinion, based upon testimony given, that previously there was an error made in determining the use of the subject premises as office.

To Mr. Kearns' question as to if the use classification of the subject premises was determined by the Board to be retail what types of uses could it be used for Mr. Stahlheber advised any use permitted in a retail zone district, provided sufficient parking for the use could be provided.

Mr. Clifford advised that there was abundant parking at the subject premises.

Mr. Stahlheber advised that the proposed improvements do not include any additions to the existing building. He reiterated that for auto repair uses the Zoning Resolution requires a minimal number of parking spaces where as other retail uses may require more or less. He stated that the compact nature of the subject premises coupled with the parking regulations, could serve to inhibit intense retail use of the property.

Mr. Lane advised that there have been a variety of retail uses at the subject premises. He commented that the Board, by Resolution, could note such in support of changing the nonconforming use classification of the property. He noted that testimony has been given speaking to the continuity of the nonconforming use of the property.

Mr. Ashe advised that based on testimony given the nonconforming use classification of the subject property should have been retail.

### **Resolution 2006-13**

Mr. Ashe moved and Mr. Hendon seconded to find a past administrative error by the Township Zoning Inspector in determining the nonconforming use classification of the property at 4901 Foley Road (NC Case #75-56) as office where, owing to testimony given, use of the subject premises had continuously been retail in nature, to order that the records of the Department of Development Services be changed to reflect such determination, and to order the approval of zoning certificate #2006-201 inasmuch as the proposed use of the subject premises thereby is determined to be permissible by way of this nonconforming use classification. Messrs. Brigham, Kearns, Ashe, Hendon and Scherer voted aye. Motion carried.

### Old Business:

- Mr. Stahlheber advised that the applicant in case VA2006-9 (5196 Rapid Run) has asked if they could convert the building into a two-family. He commented that they have inquired as to the legality of demolishing the old shop portion of the existing building and replacing it with an addition of the same size and configuration. Mr. Lane advised that he would research the matter and advise Mr. Stahlheber of his determination.
- Mr. Stahlheber advised that the minutes from the Boards' previous meeting would be finalized by the Boards' next meeting.
- Mr. Stahlheber advised that his budget request includes the hiring of a consultant to assist with the backlog of needed amendments to the text of the Zoning Resolution.

New Business:

- Mr. Stahlheber advised there were no cases pending and so there should not be a reason to meet in December 2006.
- Mr. Stahlheber requested that the Board members continue to set aside the first three Tuesdays of each month to facilitate future meetings.
- Mr. Stahlheber advised that the chairmanship of the Board would rotate to Jerry Kearns in 2007.

There being no further business on motion of Mr. Ashe and seconded by Mr. Hendon the meeting was adjourned at 8:12 pm. Messrs. Ashe, Hendon, Scherer, Kearns and Brigham voted aye.

Board of Zoning Appeals:

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Thomas R. Stahlheber, Secretary