

**City of Aurora, Ohio
Council Subcommittee for the
Review of BZA Membership
Meeting Minutes
January 22, 2018**

The Council Subcommittee for the Review BZA Membership of the City of Aurora, Ohio met in Council Chambers at City Hall on Monday, January 22, 2018 for the purpose of holding a meeting. Committee Chairman John Kudley, Jr. called the meeting to order at 5:30 p.m.

ROLL CALL

Present: Kathi Grandillo
George Horvat
John Kudley, Jr.
Scott Wolf

Also Present: Dean DePiero, Law Director
Denise Januska, Director of Planning, Zoning and Building
Donna Hawks, Clerk of Council

Review the Charge of the Committee

Mr. Kudley stated the charge of the ad hoc committee is to study the composition, requirements and selection process for membership on the Board of Zoning Appeals (BZA). He said if the committee goes beyond that, they would have to ask Council to expand the depth of what is being considered.

Director of Planning, Zoning and Building

Mr. Kudley said he asked Ms. Januska to put together a memo and come to the meeting so the committee could hear firsthand from her what the BZA does and how it functions.

Ms. Januska said the BZA consists of 5 members and an alternate that are appointed by the Mayor. She said they are an administrative body, but they are quasi-judicial in nature. Ms. Januska explained that all projects that come into her department are reviewed to make sure they meet the zoning code. She said the BZA only deals with area variances. She said if they do not meet the requirements a letter is sent telling them they can appeal to the BZA or they can change it. She said they have 15 days from then to appeal. She said if it goes to BZA it is a public meeting; residential neighbors within 750ft. of the subject property are notified. She said there are 7 factors that the Board goes through, called the Duncan factors; not all of them have to be met but those factors were created from an Ohio Supreme Court case in 1986. She said the Board has a chart and they go through those factors, give their opinions and once they go through this, they can add other characteristics to the property as there could be hardships that might have been created prior to zoning and it could be hard to meet those setbacks and they can consider them. She said the Board then votes and they need at least 3 for it to pass; if it does not, the applicant can appeal to the Common Pleas Court under ORC 2506. She said if the variance is granted an adjacent neighbor can also appeal to the Common Pleas Court.

Mr. Wolf said with respect to the Duncan Factors; they are not rated and he asked if they are equally weighted. Ms. Januska replied they are not; and that was in the Supreme Court case. Mr. Wolf asked if the members fill out a chart indicating how they feel and that is submitted and becomes part of the record. Ms. Januska said no, the minutes are part of the record. Mr. Wolf stated the board is not

required to take notes and submit them as part of the record, they only speak to it. Ms. Januska said that is correct.

Mr. Kudley commented it says if the factors weigh against the variance and there is no set numbers they have to account for. Ms. Januska said no, if a board member feels very strongly that one is not being met they can deny on that one factor.

Mr. Horvat asked if the BZA provide a reason as to why they are not approving something. Ms. Januska said yes, there is a process in place that if they deny a variance they must state their reasons why. She said that is put into the record and then at the next meeting a findings of fact is done that states what those reasons are and that is put into the record.

Mr. Horvat asked how long the Planning, Zoning & Building Department have to consider a request. She said once it is submitted and it is reviewed; if it does not meet the code a letter is sent and they have 15 days to reply; if they do not within those 15 days they either have to meet it or revise the application in some way that it is different.

Mr. Wolf said even if the applicant is approved the members should indicate in writing with respect to the Duncan factors why they feel they were met or not met. He said there is an aggrieved party adjacent to the property that wants to appeal the board's decision they do not have any information in writing.

Ms. Januska said as they deliberate they do read some of them and say whether they are in favor of them. She said it is not restated after the vote if it is denied. She said the entire discussion goes through reading the factors and that is included in the minutes.

Mr. Wolf said he has been to BZA meetings where they have not done that. He said part of his conflict with the whole process is that it seems to follow only one path; if there is a denial there is factual record being kept. He said if there is an approval and someone wants to challenge that; they are not in the same position as they would be if it were denied.

Mr. DePiero said generally the courts give great weight to the administrative bodies when making a decision. He said so long as there is not an abuse of discretion; the board goes way off track and they do not follow the factors; they give substantial weight and deference to the administrative body. He said so long as there is evidence in the record and proper hearings, it is hard to overturn the decision of the administrative body. He said there is 30 days after the decision is made to appeal to the Common Pleas Court. He said the Duncan Factors are all equally weighted, they do not have to meet them all and nor do you have to meet half of them. He said all of the factors have to be considered in the deliberation and put evidence in the record to justify them. He said how that works and how the courts look at them is different depending on the issues. He said regarding members filling out forms; he has never seen that done in any of the cities he has defended or worked with. He said the information ought to be in the minutes when a denial or approval is made. He said there should be enough evidence in the record from the staff, or the board members as to what the facts are and what was relied upon in making the decision. He said another practical issue in dealing with a form to fill out would be if someone did not do that, it would it be a reason to overturn an appeal. He said and argument could be made it could make things cleaner but he thinks it could muddy a record. He said it is a better practice to put the reasons in the record verbally so that they can be transcribed. Mr. DePiero said he does not know if he would advise to start having board members fill out their charts. He said he does not know if that is a best practice.

Ms. Grandillo said at Planning there is discussion; everyone has their comments; questions are asked of the applicant or others in attendance and then a decision is made. She said it is all put into the record. She said anything that would be contentious when they do the Findings of Fact they get that at Planning and it is read and they have to agree that is their Findings of Fact and vote on it again.

Mr. Wolf stated the difference is the decisions that come from Planning with respect to CZC's can be appealed to Council. Mr. Wolf said what bothers him is the court gives great weight to the administrative body that makes the decision and it is very hard to overturn. He said this means the deck is stacked against anyone that makes an appeal. He said his big issue is that there is an administrative body that is entirely appointed and that has no representation from an elected standpoint on it whatsoever that is making a decision that is not appealable to anybody but the court system and the courts give great weight to the decision of that administrative body. He said it is a significant portion of his concern is the board makes a decision; the courts rely on it heavily; and it is very difficult to overturn. He said it would take significant sums of money to appeal. He said some that have means will not appeal to the courts and the people that do not have means are not willing to take it on.

Mr. DePiero said Mr. Wolf has raised a practical issue. He said most municipalities do not have an appeal process to council, there are some that do. He said the board members are appointed by the mayor and then confirmed by council, an argument can be made that it is through that process of putting folks on the board, council gets to weigh in by confirming a member or reject a member they feel is not suitable to apply the Duncan Factor correctly. He said it does involve the legislative body as they have to confirm the members.

Mr. Wolf replied council receives a piece of legislation that has the member's name on it. He said there is nothing included about their background, or a resume. He said council knows nothing about the individual's qualifications. He said council does not have the ability to say this is a concern or not a concern. He said council can ask questions and make suggestions but it does not mean the administration has to accept them. He said there are some cities that have members of council on the board; there are some that have appeals processes. He said the way the city is currently doing it does not make it right or perfect; the question is; is there room to improve it. He said he thinks there is.

Ms. Grandillo said we see who the applicants are. She said there is still time do our due diligence. She said she feels those that are appointed take it seriously. She said her Planning members take their appointments very seriously. She said they come well prepared and have good questions. She said she would imagine BZA does the same.

Mr. Horvat asked how many applicants have been turned down over the past two years. Ms. Januska said maybe five. Mr. Horvat asked out of the five how many have gone to court. Ms. Januska said one. Mr. DePiero said since he has been here he does not think the city has been sued on a 2506 appeal in the last four years. Ms. Januska said there was one, down in the Geauga Lake area who wanted a lot frontage. Mr. DePiero said it was before him.

Mr. Horvat referred to the list and asked how many of them have Council as an appeal board.

Mr. Kudley said he will conduct the research and have it for the next meeting. Mr. Kudley said the vast majority follow the Ohio Revised Code where it goes before the Common Pleas Court. Mr. Kudley said there was one city that did not have a Mayor, they had a City Manager and Council had more authority.

Mr. Wolf indicated there were missing municipalities from the area and that he would like them to be included.

Mr. Kudley said the memo and legislation indicates that the BZA is a group designated by the legislative authority, there is nothing in the Charter regarding the BZA. He said it is a body created by ordinance, by city council and therefore, the makeup of that and how it operates is under the authority of council. Mr. Kudley stated anything council recommends can be enacted by ordinance and they are not bound to go back to the citizens to have them vote on it. He said the Mayor could veto it. Mr. Kudley said he wanted everyone to understand that the board is a quasi-judicial board that was created by city council.

Mr. Kudley reviewed the chart of information he compiled from research that he and Ms. Hawks had done. He briefly went through and indicated what some cities do that is different from Aurora. He said there were only two cities that specifically require certain qualifications. Mr. Kudley said he will gather information from the additional cities Mr. Wolf mentioned.

Mr. Horvat asked what it costs to appeal.

Mr. DePiero said many times to file a case you must post a bond. He said sometimes the bond can be waived by the court. He said the big cost is the attorney's fee which can be several thousand dollars. He said when the stakes are high obviously the cost is much higher.

Ms. Grandillo asked if there is a way to find out how many appeals have gone to court.

Mr. DePiero said he could find out. He said it is a handful, not many. He said a lot of times they will change the plan rather than go through the court system.

Mr. Kudley said one of the problems the city has had in the past on some boards is they had individuals that allowed personal opinions to enter into things. He asked if there some type of direction from city administrators participating or from the law director to keep these people on track. Ms. Januska said a staff report is put together with background and maps and in the report they try to answer the seven factors. Ms. Januska said they do not give a recommendation to BZA.

Mr. DePiero said he has a more expansive and liberal view when it comes to the application of factors. He said he believes each board member needs to bring their own experiences and can give an opinion as long as they are basing it on what the factors are.

Mr. Kudley stated he went to the last BZA meeting and explained what the subcommittee was about and invited them to the next meeting. He said he was asked by one of the members if the subcommittee of council would be agreeable to having a member of the BZA on the subcommittee. Mr. Kudley explained it was not possible as the committee is a subcommittee of council. He said though citizens are not allowed to participate at a subcommittee meeting he would allow the BZA members to participate and share with the subcommittee what it is like to be a member of the BZA. Mr. Kudley stated he feels that will help the subcommittee to come to some kind of recommendation to city council.

Mr. Wolf said he appreciates what Mr. Kudley doing as this is not a witch hunt it is strictly procedural in makeup and has nothing to do with personalities. He said this is something he has thought about for a long time.

ADJOURNMENT

MOTION: To adjourn

Mr. Horvat moved; Mr. Wolf seconded. The motion carried on unanimous voice vote.

The meeting was adjourned at 6:08 p.m.

John Kudley, Jr., Chairman

Donna Hawks, Clerk of Council