



## MEETING MINUTES

# Board of Zoning Appeals

Thursday, October 26, 2017

### AGENDA

- 1. Metcalf Residence – Rear Yard Setback** **9368 Nicholson Way**  
**17-095V** **Non-Use (Area) Variance (Tabled 5 - 0)**
- 2. PCD, Perimeter West, Subarea 1 – Memory Care Facility Use** **6700 Perimeter Drive**  
**17-104AA** **Administrative Appeal (Appeal Reversed 5 – 0)**

The Chair, Rion Myers, called the meeting to order at 6:28 p.m. Other Board members present were: Sarah Herbert, Martha Cooper, Satya Goyal, and Jamie Zitesman. City representatives were: Logan Stang, Claudia Husak, Thaddeus Boggs, Mike Kettler, and Flora Rogers.

### Administrative Business

#### Motion and Vote

Mr. Zitesman moved, Mr. Goyal seconded, to accept the documents into the record. The vote was as follows: Ms. Herbert, yes; Ms. Cooper, yes; Mr. Myers, yes; Mr. Goyal, yes; and Mr. Zitesman, yes. (Approved 5 – 0)

#### Motion and Vote

Ms. Herbert moved, Mr. Goyal seconded, to approve the proposed 2018/2019 meeting dates. The vote was as follows: Mr. Zitesman, yes; Mr. Myers, yes; Ms. Cooper, yes; Mr. Goyal, yes; and Ms. Herbert, yes. (Approved 5 – 0)

#### Motion and Vote

Ms. Cooper moved, Mr. Goyal seconded, to approve the June 29, 2017, meeting minutes. The vote was as follows: Ms. Herbert, yes; Mr. Zitesman, yes; Mr. Myers, yes; Mr. Goyal, yes; and Ms. Cooper, yes. (Approved 5 – 0)

#### Motion and Vote

Ms. Cooper moved, Mr. Goyal seconded, to approve the July 27, 2017, meeting minutes. The vote was as follows: Mr. Myers, yes; Ms. Herbert, yes; Mr. Zitesman, abstain; Mr. Goyal, yes; and Ms. Cooper, yes. (Approved 4 – 0 – 1)

### Communications

Logan Stang asked if everyone received their invitation to the One Drive folder. He said City Staff is in the process of switching between Drop Box and One Drive for meeting materials. He explained materials will be placed in both locations for the next couple of months and plan to use just One Drive next year.



The Chair swore in any witnesses planning to address the Board during this meeting.

**1. Metcalf Residence – Rear Yard Setback  
17-095V**

**9368 Nicholson Way  
Non-Use (Area) Variance**

The Chair, Rion Myers, said the following application is a request to permit the installation of a paver patio to encroach 10 feet into the required rear yard setback for an existing single-family residential lot located within the Tartan Ridge Subdivision. He said the site is zoned PUD, Planned Unit Development (Tartan Ridge PUD, Subarea C). He said the site is located on the east side of Nicholson Way, approximately 150 feet north of the intersection with Enfield Court. He said this is a request for a review and approval of a Non-Use (Area) Variance under the provisions of Code Section 153.231(H).

Logan Stang presented an aerial view of the site, and a close-up of the site showing the single-family home built to the outer extents of the site with a single-family residence adjacent on the north and south sides. He noted that to the rear of the home is an open space reserve that is owned by the City and maintained by the homeowners association that provides separation from the eastern residential properties.

Mr. Stang presented the proposed site plan and explained Tartan Ridge, Subarea C, requires a rear yard setback of 25 feet. He said the home was constructed at 26 feet, within the rear yard setback, which is a 15-foot, No-Build Zone that runs along the entire width of the property. He said the Zoning Code allows for an at-grade patio to encroach five feet into the rear yard setback that would allow the applicant to install a six-foot-deep patio from the edge of the house. He stated the applicant is requesting a variance to install an 11-foot-deep by 17-foot-wide patio up to the no-build zone, which requires a variance of ten feet into the 25-foot rear yard setback.

Mr. Stang restated the site is located adjacent to an open space reserve, which serves as a special condition for this property. He added the applicants are the original homeowners and were a part of the design process resulting in this condition being created by the design and construction of this home. Due to the separation of adjacent single-family lots on the opposite side of the open space reserve, he noted the requested setback would not impact surrounding development. Additionally, he said the conditions of the site are unique but the applicant has alternative methods that enables them to construct a patio space that would be 6 feet deep by however wide they choose. He said the Board would be granting the applicant a special privilege with the approval of this variance. The Variance itself is not recurrent in nature nor would it impact the delivery of governmental services, he said. Therefore, he concluded the applicant has a method available that would meet all of the Code provisions both in the Zoning Code and in the Development Text.

Jaimie Zitesman referred back to the overview of the entire area. He said he visited the development today, he saw another house being built. Mr. Stang said the aerials he provided are a little older. Mr. Zitesman said the area appeared even more closed in.

Sarah Herbert asked if the neighboring property owners built out to the extent this home is. Mr. Stang said he thought they were to the sides and the front but not quite built out to the rear but he would have to examine each and every lot. He noted that what is unique to Tartan Ridge is that front yard setback, which is a build to zone so there is a minimum and maximum that the house can be placed. He said depending on the design of the garage, the home itself, and where the footprint is placed defines how built out it is.

Mr. Zitesman found there were many different designs and ways of doing the garage that affected whether the house was oriented more to the front of the lot whereas this house is back a little further. He asked the age of the house. Mr. Stang answered the permits were approved in 2015 and was finished in 2016. Mr. Zitesman asked who the builder was. Mr. Stang answered P&D Builders.

Mr. Zitesman asked if there have been any other applications in the line for a similar situation. Mr. Stang reported Planning has not received any inquiries as of late but he knows some of the homes are in the middle of construction and ownership has not been transferred to the property owners yet. Mr. Zitesman said this does not appear to be a unique situation; a lot of the homes are built this way. Mr. Stang said within Tartan Ridge there are smaller lots that allow for larger-size homes creating a much more dense development than are found in other parts of the City.

Mr. Myers invited the homeowner or the public to comment.

Linda Metcalf, 9368 Nicholson Way, said she is one of the owners. She reported her and her husband started the design of their home with P&D Builders in April of 2015. She said they did not break ground until November 2015. She said there were issues between the HOA and the builder disagreeing.

Ms. Metcalf said they have lived in Muirfield for 33 years. When they retired in 2012, they moved to Tennessee for a brief time before moving back to Dublin to be close to family and friends. She said they spent one year looking for a ranch and something that would accommodate seniors. She said they put a deposit on one lot to find it was sold so they took the one next to it and that is when all the trouble started. She said three neighbors have also had numerous issues with this builder. She said they take care of the common areas with money out of their pocket because the builder and the HOA will not do anything. She said they built two homes in Muirfield and never had issues; this development had numerous issues but they could not get their deposit back. Due to a family crisis, they were not able to go over the plans from out of state and trusted the builder, which was a big mistake.

Ms. Metcalf said they are not requesting a wall, or an outdoor kitchen, they are simply asking for a patio. She said they have stacks of blueprints marked approved and revised without any signatures. She asked how the Board would not allow a patio for a \$500,000 plus home. She said engineers from the City have been called out to her property multiple times because of excess water from the lot next door. P&D said it would go away once they put sod down. She said three weeks ago they ended up having to put a drain in.

Thaddeus Boggs said he has been informed that staff has not received copies of the documents that the Board was just handed. He said he would object to consideration of the testimony to the extent that it does not address the Variance criteria as to the particular item requested.

Ms. Metcalf asked if the question is why they did not put their patio in earlier. She said with the water issues, they had to add a lot of mulch right up to their house so water would not come from the property into their house. She said they lived with that for eight months and then when the new neighbors moved in, they thought a drain would be put it but that owner wanted to wait. She indicated several neighbors are having problems with the site as the ground is caving in. She said because of the personal crisis they were going through, they did not read the fine print and they were not informed until later that they could not have a patio.

Mr. Boggs suggested to the Chair that no further testimony be admitted unless it is pertinent to the Variance criteria that is listed in the Code.

Mr. Zitesman indicated everyone on the Board appreciates what the applicant is going through but their requirement and their job here is to evaluate the cases on the standards and that is what they need to focus on. He added the Board is sympathetic to her situation.

Ross Metcalf, owner, said they have been married for 55 years. He said he has a stack of prints received through the building process where they had an 11 by 13 foot patio and they changed it to 11 by 15 foot patio and can demonstrate that. He indicated they even paid extra money to have the shape of the patio changed.

Mr. Myers stated the Board is not allowed to review documents that have not been presented to the City. He said the documents the applicant is trying to show the Board need to be submitted to the City.

Mr. Zitesman added the information that would be gleaned from the documents is not relevant. He reiterated that the Board needs to look at criteria and address that. He said the criteria the applicant needs to convince the Board is different is #2 in the sense that the applicant is the original owner, did the construction, were involved in the design. He explained that the Board is tasked with evaluating whether the evaluation by the City, that the Planning Division is consistent with the facts they hear and whether the Board is convinced to change a determination that the City has set forth. He said the problem is the applicant is the original owner, in control of the project from the beginning, and whether it was through the builder or whether the applicant knew what was going on or not, that is the issue we are dealing with and that is what the applicant has to overcome.

Martha Cooper said there is an option that if the applicant has additional information that was not previously presented to City Staff, the applicant could withdraw the application and resubmit it. Mr. Stang said the option for the applicant would be to table the application this evening and provide any additional details going forward to have the Board review this at a later date.

Mr. Boggs said the issue is the documentary evidence that was put forward tonight was not submitted to staff in a manner that it could be included as part of the record for purposes of tonight's Variance hearing. He said it is not incumbent upon staff to make an applicant's case for them as it is incumbent upon the applicant to make the case. He confirmed that the applicant is permitted to request this Variance application be tabled.

Mr. Metcalf said the point he was trying to make was that he has all these plans that show the patio was on the plans and that every time a change was made, it was noted on the plans; that is what they are trying to establish.

Mr. Stang said staff can speak to some of the revisions. He reported they reviewed the building permit that was provided and the initial submittal was made in late September 2015. He added the Review Services Team reviewed the proposal, provided a disapproval for that building permit in early October and on that they noted the patio that was shown was encroaching too far into that setback and would not meet Code so it had to be revised. He said the builder revised the patio to the six-foot depth and submitted that in late October, and that was the permit that was ultimately approved by the City of Dublin's Building Standards division. Mr. Stang said that as the Metcalfs' eluded to earlier, they began these designs in April but the City of Dublin did not get involved until mid to late September, when the building permit was actually filed.

Ms. Herbert said an 11-foot patio was seen on the plans by staff submitted by the builder, to which staff answered affirmatively. Mr. Stang confirmed that plan was rejected. She asked the applicant if he saw that disapproval and confirmed the applicant had no documentation from the builder that shows the disapproval and that the final plans included a six-foot patio.

Mr. Metcalf indicated he had a book that contains everything that was changed on the house.

Mr. Zitesman asked if the builder provided a copy of the approved plans from the City of Dublin to the applicant. Mr. Metcalf answered they were not dated or signed. Mr. Zitesman asked if the applicant received notification of the initial rejection of the initial plans as stated by Mr. Stang. Mr. Metcalf answered they did not. Mr. Zitesman said that is an issue between the applicant and the builder.

Ms. Herbert asked if the applicant has seen any approved anything that had a six-foot patio. Mr. Metcalf said he had a question on the last set of plans that a six-foot patio was on there. He confirmed he only received verbal communication as he was not in town.

Ms. Cooper inquired about the two new houses going into those two lots. She asked about the depth of the open space. Mr. Metcalf answered 50 feet in depth of the common ground.

Sridhar Kesani, 9360 Nicholson Way, said they started the building process and had constant issues with P&D Builders, sharing plans, and specifically communication just like the applicant. He said the neighbors are very nice and he has no issues with them.

Sai Morali, 6774 Enfield Court, said he also had minor issues with P&D Builders. He said he has no objection with what the applicant is requesting.

Ajay Vallakati, 6766 Enfield Court, reported he moved in the neighborhood, June of 2016, and the neighbors have been great. He indicated he did not think the applicant would be encroaching on the neighbor's property. He added they maintain the surrounding area very well. He said if the City is looking at how a Dublin resident should keep up their property and a lawn maintained, the Metcalf's are a prime example. He said he has no problem with the patio requested. He concluded the Metcalf's are great neighbors.

The Chair closed the public portion and opened the discussion up to the Board.

Ms. Herbert restated there are three mandatory criteria that must be met and the second one is where the hang up is with city staff and probably several members of this Board. She indicated there is a lot more information that needs to be submitted for consideration as to whether or not this was the fault of the applicant in terms of their action or inaction. She indicated that was the real issue for her. She concluded she would welcome more information that could illuminate this issue at a future meeting.

Mr. Zitesman said from his perspective, the applicants chose their builder, lot, community, and house. He indicated it is unfortunate if they did not do the appropriate diligence into the requirements of the restrictions. He said they had problems with their builder but that is not the Board's situation. He said he does not know how the City and specifically this Board, can be responsible for correcting them. He indicated there may be other avenues for the applicant to address with their builder. He said it sounds like the builder received the proper documentation from the City as to what was accepted and what was rejected. He said the Board does not have the plans nor should they and people are free to make their choices.

Ms. Herbert said the Board does not have the site plans – the record from the City.

Mr. Zitesman said he did not think the Board needs them as the issue here is what they have seen before and what they will see again, and the question is if the Board is going to be consistent, if this is something the City needs to change. If this is the Code, he said, and the Board is tasked with seeing if the Code should be enforced, whether there is a reason to vary from the Code. He emphasized that was the Board's only position here. To help the Board make that determination, he said, they review objective criteria. He said the applicant has a compelling story and it upsets him to hear what is going on with builders but the Board has heard this before. He said if the Board grants the variance and ignores the objective criteria in this case because of their story but it is not our business to be involved with the communication between the homeowner and the builder. He restated the City rejected the applicant's original plan. Now whether the builder told them it was rejected or not is an issue between the builder and the applicant. According to the testimony by Mr. Stang, he reported the City approved the plan that was in compliance and now the owners are saying that was approved, that is what they built, that is what they bought, but that is not what they want. He suggested that if the Board grants this Variance, there is going to be many more that come in with the same request by the looks of the community. He said if the general Code is changed for that PUD - that is a broader question. He restated, the Board is to determine tonight if the objective criteria has been met or not met.

Ms. Herbert said she understands that there is objective criteria and she is looking at the applicant's original plan, the distances associated with that home and the rear yard setback were well established on the approved site plan, therefore, the condition resulted from the applicant's own actions. She reiterated the Board does not have the site plan and they are talking about the applicant's actions versus the builder's actions.

Mr. Myers asked if the builder is an agent of the owner, an extension of the owner. Ms. Herbert said if the builder is being honest with the applicant or not, the Board was not provided with that information for the record.

Ms. Herbert said they have approved these patios on previous owners and that is pretty much all she has done since she has been on the Board. She said when someone buys a property and they are not the original owners, all of this information is submitted as part of the record and yet they have approved the applicant action/inaction on people that have in their closing documentation all of the same information. Therefore, she restated there is more information that could be submitted.

Mr. Myers asked if there has ever been a circumstance in a situation like this if the applicant had proof that they had no knowledge of final approved plans would that change the perspective on reviewing cases like this.

Mr. Stang said, to his knowledge, the City has not received a circumstance like that. He said the challenging part is the way the Code Section reads "it is the applicant's action or inaction" so the applicants who are filing it, if they were involved in some way, shape, or form, either through the builders or what have you, they are in some way responsible for the outcome that came to be and that is the issue. Although the builders did not provide them with all the information, the City cannot possibly enforce the communication between a builder and a property owner.

Mr. Zitesman said this case is distinguishable from the other cases where it has been approved because it was not an original owner of the property.

Ms. Herbert said we could say it is the applicant's inaction to read the closing documents. Mr. Zitesman said that has not been part of the arguments. Ms. Herbert said in her opinion that would be a comparable situation.

Sat Goyal suggested the applicant reconsider, collect the paper, and resubmit. He reported he has lived in this city the last 30 years and Dublin is positively for the people, from all different cultures, and are willing to help. He indicated that if the applicant resubmits, the City may reconsider their decision.

Ms. Cooper said she was in agreement, like she mentioned earlier, that the applicant request that this be tabled so additional information, including the historic plans, can be provided to the City.

The Chair said the applicant would need to come forward if they wish to table this. Mr. Boggs confirmed the applicant needs to state if they want this tabled or for the Board to vote this evening.

The applicant requested to table this for now and hopefully he can obtain the information both he and the Board need. The Chair said the applicant would need to provide some objective proof that all they received was an approval of the plans they wanted.

### **Motion and Vote**

Ms. Cooper moved, Mr. Goyal seconded, to table this non-use (area) Variance at the request of the applicant. The vote was as follows: Mr. Myers, yes; Mr. Zitesman, yes; Ms. Herbert, yes; Mr. Goyal, yes; and Ms. Cooper, yes. (Tabled 5 – 0)

Under the advisement of the Assistant to the Law Director, The Chair stated the materials submitted to the Board have not been physically submitted to the City of Dublin and the information will be removed from and not included in the record of the minutes.

**2. PCD, Perimeter West, Subarea 1 – Memory Care Facility Use 6700 Perimeter Drive  
17-104AA Administrative Appeal**

The Chair, Rion Myers, said the following application is a request for an appeal of a determination made by the Division of Planning that a memory care facility is not permitted within Subarea 1 of the Perimeter West Planned Commerce District as hospital. He said the site is located north of the intersection of Perimeter Drive and Hospital Drive. He said this is a request for a review and approval of an Administrative Appeal under the provisions of Zoning Code Section 153.231(J).

Claudia Husak explained an Administrative Appeal is one of the processes within the purview of the Board of Zoning Appeals that allows an applicant to come before the Board to determine whether or not the Planning Department staff has made a decision in accordance with the Zoning Code. She clarified, the question is whether or not the Planning Staff has made the right decision that a memory care facility is not a permitted use in the definitions of a hospital, within the City's Zoning Code.

Ms. Husak presented an aerial view of the site in question that is currently vacant, located within the Perimeter West Planned Commerce District. She also pointed out the broader planned district that encompasses the area just mentioned. She explained that this planned district has a list of uses that are permitted within the district and one of the references within the development text that is unique to this particular area is that the uses within the Suburban Office District in Zoning Code is permitted within the district.

Ms. Husak reported that in 2016, there was an informal application that went forward to the Planning and Zoning Commission (PZC) for a facility seemingly similar to what is in question here this evening. At that time, she said, Planning made a determination that the definition of hospital would encompass an elderly care facility but there is not a definition of an elderly care facility in the Zoning Code and therefore, that specific use is not permitted in any of our standard districts outside of the Bridge Street District, which is something that was just added in 2014. Many, if not all, of the facilities within the City are institutional in nature or residential in nature for the elderly and are within planned districts that specifically state elderly care facilities, Alzheimer care facilities, memory care facilities, which are all a permitted use within the district. She gave an example of the facility across Post Road to the north that is within a district that was specifically created for those types of facilities as well as the most recent one that is on Emerald Parkway. Figuring out where these uses fit, she said, most of the time, there is a planned district available that has that use outlined. In this particular instance, she said, the City has looked again as the applicant came to the City with a development proposal for this site and with the understanding of what clientele the use is intended to serve. She reported staff again reviewed the definition of hospital, which she presented:

Hospital: "Any facility in which in-patients are provided diagnostic, medical, surgical, obstetrical, psychiatric, or rehabilitation care for a continuous period longer than 24 hours, or a medical facility operated by a health maintenance organization."

Ms. Husak said ultimately, staff decided that a memory care facility as a residential facility for the elderly is not, in effect, fitting within this definition. She reported staff informed the applicant and stated that while from a planning perspective, staff is not against the use on that site but the appropriate process would be a rezoning application to add the use to the district. With that information, she noted, the applicant has decided to come before this Board and requests that the Board reverses the decision that Planning has made. She noted that in the Planning Report, staff has provided their analysis and records as well as the memorandum sent to the applicants stating staff's decision. She said it is staff's

recommendation to the Board that you would affirm staff's decision/determination that a memory care facility does not fit within the definition of hospital. She concluded she is available for questions as well as the applicant, who is present to also provide further information.

Sarah Herbert said it seems that from the documents provided, when staff was originally approached with a similar facility, it met the definition of hospital and then after conferring with legal counsel, there was a difference. She asked why such a different decision. Ms. Husak answered in 2016, when that application came to staff informally, they made the wrong decision.

Thaddeus Boggs asked if the 2016 application was identical in all respects with the application that is here tonight in terms of any medical, rehabilitative, or psychiatric care that could be provided on the site. Ms. Husak answered there seemingly was more medical at that facility in 2016, but again, it was an informal so staff did not have a lot of information at that time.

Ms. Herbert asked what the specific difference was in staff's analysis from 2016 to now. Ms. Husak answered the difference is the application this evening is a residential facility, an end of life care facility that is residential in nature.

Jamie Zitesman asked if it is distinguished in any of the documents that this latest facility is more residential in nature than medical. Ms. Husak answered affirmatively. Rion Myers said a residential facility is not permitted in this district. Ms. Husak replied not currently but the applicant is free to file a rezoning application and have that use added to the district and from a staff perspective it is something staff could support going forward.

Ms. Herbert questioned that it is an end of life facility, as she did not see that noted in any of the documentation and that indicates hospice care is given. Ms. Husak said that is in regard to discussions with the applicant and yes, potentially, hospice care could be provided. She restated that she would prefer that the applicant answer those specific questions.

The Chair invited the applicant's or public comments.

Aaron Underhill, Underhill and Hodge, LLC, 8000 Waltham Parkway, New Albany, said he is the attorney representing the applicant. He said this Administrative Appeal presents a very interesting legal question embedded within the interpretation question and that is "Were we in the right to rely on the previous staff decision and are they bound by that going forward?" He said he was involved in that application in 2016 with a completely different company. He said the use for all intents and purposes is the same. In 2016, he said, they went forward informally before a big investment was made by that applicant as they wanted to get an idea of where the PZC stood on what they were proposing.

Typically, he indicated, an applicant goes in and figures out whether they want to do an informal before they pursue a zoning and in that instance, discussions were about uses in particular in addition to the vertical elements of the project. He said they were only talking about how the building was cited, the proposed architecture, and the aesthetics of it all. He noted the use became a part of the discussion but it was really already in the Planning Report and staff, rather the PZC is the one per Dublin's Code that makes the determination. He indicated he thinks part of what is happening here is the Commission raised a number of questions about that interpretation which was included in the minutes he provided with his other materials. He said there was some thought that this use has been pretty prevalent in the City and that maybe the PZC had seen enough of it and so it was more to a policy question than anything and if staff's interpretation is upheld, what they are forced to do is go through a legislative process, which is a policy decision. He indicated their fear is that if they go back to the PZC without any real rights in the property to this use, they have to re-litigate the issue. He said that is a staff level decision.

He suggested there is some value in having a zoned site that only requires a secondary review of the vertical elements and that is how this most recent applicant got involved. They entered into the contract partially on that reliance that that decision had been made, he said.

Going backwards, Mr. Underhill said he would pause it that these uses are in fact very similar, if not the same and what happens at this facility is it is a dementia care and memory care. He said individuals come to this institutional setting, where there is medical care available, and in fact, given on a regular basis. He said individuals typically come in and they have a memory impairment or some sort of impairment that make the activities of daily living on their own, impossible. He added the individuals come into the facility and as time marches on, unfortunately, they intend to go downward in terms of their health, not only mentally but physically and both the previous facility and this one were such that those people would stay there until the end of life but they were staying there to get treatment. He said we all know that unfortunately, Alzheimer's and those sorts of conditions do not have a cure so the logical end is death.

Mr. Underhill said the PZC discussion revolved around the fact that we had a suburban office and institutional general listing of that Code section as a permitted use in zoning text and applies to this property, which is probably 20 – 25 years old. He said this particular use, he has been through many times here, is not listed anywhere in the Code so where is it the most logically to fit it. One of the listings under Suburban Office and Institutional District of permitted uses there is a long list that includes hospitals. He suggested we all have in our minds an idea of what we believe a hospital would in and Dublin Methodist Hospital is the first thing you think of or Riverside Methodist Hospital. He said the Code requires that they look at a particular definition that is provided in the Code of the extent there is one, and we meet that definition:

Hospital: "Any facility in which in-patients are provided diagnostic, medical, surgical, obstetrical, psychiatric, or rehabilitation care for a continuous period longer than 24 hours, or a medical facility operated by a health maintenance organization."

Mr. Underhill said one might think of a hospital one way but they have to look at the underlying definition here and see this sort of a use that includes a nursing staff on hand, people being given their medication by others, being treated as their condition progresses negatively. He emphasized it has all of the attributes of an institution, and in particular, a hospital under this definition.

Mr. Underhill reported he made mention in his memo, of some Ohio Supreme Court case law about interpretation of Zoning Codes and how that is to be undertaken. He said a lot of countries in this world have governments that act as if they give their people rights but rather they are taking them away. In this particular case, being a free society, he views this as the government only asked to take away rights that I have from the beginning. Life, liberty, and the pursuit of happiness and property and so to the extent that there is a close question, the Ohio Supreme Court and other courts for that matter in other states, have been very clear that those decisions are to be weighed if there is an ambiguity even in favor of the property owner and in favor of land use rights. He said he thinks the City's initial interpretation of the use being permitted here was correct but have since flipped on that. But that at least demonstrates the existence of an ambiguity and that ambiguity should be resolved in the applicant's favor.

Mr. Underhill said no one has got a reputation of being a hard place to get zonings done and he thinks that is a good thing and good for his business. He said Dublin is a great community and are very diligent in what is allowed to have happen here. He said that process is expensive, arduous, and it takes a lot of patience. He said we are already in a planned district here so the PZC is going to see what the building looks like, they have a text that does not have a lot of teeth in it because it is so old but it would fall back to Code if the extent is not covered. He said the applicant would get their secondary review and get to make sure the architecture is appropriate and they will have their hearings before the Commission. He said that process has within it, rights, and property and so if an applicant can prove to the Commission

that the requirements have been met or exceeded that are included in the zoning, the applicant has the right to get approval.

He said when one goes into a zoning process, it is a policy decision with a lot more discretion given to not only the Commission but to City Council. Based on what they heard at the Commission, he suggested maybe some of those faces have changed since then, but the applicant is not convinced that the Commission will like the use to begin with, not necessarily because of who this is or what the site is going to look like but maybe they have seen too much of it, and do not want to see any more of that happening in the community for a while. He said the applicant does not want to run that risk and in order to get there, they have to spend a lot of money, to get a zoning done in Dublin without knowing the result in the end. He said it is very important that the applicant has this decision overturned so they know they have rights. He said then they can roll up their sleeves and start working with staff on architecture and other design elements that meet the community standard and meet the requirements of the Zoning Code. He thinks the whole case stands for the larger proposition of being able to depend on the decision makers and the local government and rely on those decisions when making important economic decisions. He said the property has been put back on the market and marketed in a large part for this sort of use, which with our aging population, it is very needed and almost cannot be built fast enough. He said a lot of decisions were made based on what happened in 2016, which the applicant thinks was the right result to begin with and were surprised when they submitted an application that there was an about face on that. He concluded that he would be happy to answer any questions.

Mr. Zitesman questioned that documentation states medical facility operated by a health maintenance organization. Mr. Underhill said he is not sure what that term means. He said you meet everything before the "or" or meet everything after the "or".

Greg Simi said he is one of the principal owners and he resides at 353 S. Parkview Avenue, Bexley, OH 43209. He said in reference to this being a residential environment, this is truly a healthcare environment but they create a residential feel. He said there will be partnering doctors, nursing on staff, clinicians, trained caregivers in the healthcare environment that specialize in memory care. He said there is a tele-medicine platform that they constantly monitor residents for health improvements, physically and cognitively. He added there will be a site improvement but ultimately they are going to take residents through end of life. He said they have a Hospice partner that will come in, everything is planned, so there are very few ambulance visits because the way they care for residents, they control the environment so this is a 24/7 environment where the resident very rarely leaves outside of under their control on activities that are planned for early stage Alzheimer's. Ultimately, he said, they will be caring for residents with the disease – Alzheimer's or some level of dementia, and he totally believes this is a healthcare environment. He said it gets confused because they call it a residential setting but that is just because it will feel like a home because they live it the rest of their life. He said their families want them moving from their home to this home but it is very much a healthcare environment.

Mr. Zitesman said he had a question for Mr. Boggs. He said Mr. Underhill quoted at the bottom of page 507 of his brief couplets from court cases, from the Ohio Supreme Court. He asked Mr. Boggs if he had reviewed those at all and what his legal opinion was on those cases cited by the applicant.

Mr. Boggs answered he had not looked at those particular cases with respect to this case. He said they would be controlling precedent in the sense they would direct you to fine one way or the other. It is correct he said that zoning ordinances, ordinances that infringe upon property rights are construed more in favor of recognizing a property right than government regulation. He said Dublin's Code is what we call a non-accumulative zoning code so uses that are not permitted are prohibited and that is a permissive way of zoning in the United States. If a more intensive use is allowed in a district, he explained, then all less intensive uses are permitted in that district; that would be accumulative zoning. He said this comes down to a property owner having the process that we are engaging in now, before any rights are

infringed upon, and when evaluating the text of the Code that is applied more liberally to the facts where a time goes to the property owner.

Mr. Underhill said this is akin a little bit to Codes get outdated pretty quickly, especially the straight districts because planned districts in form-based codes like the Bridge Street District Code are more commonplace today. He said some of these older code provisions seem to be put by the wayside often are not updated with the times. He compared it to retail districts, community commercial district. It would have never contemplated 30 years ago, a cellular telephone retail sales store he said, while we have bakeries listed and sales of clothing or groceries listed specifically. He indicated it is along the lines if you have to have an interpretation or some discretion at the staff level to change with the times on that. He asked to show the slide with the planned district outlined. He pointed out that Dublin Springs is southwest of this site. He said he does not have the benefit of the whole text in front of him, he only has the part that belongs to the applicant's site. He said he did not think that use is specifically called for anywhere in the City Code and it is there.

Ms. Husak said it is considered a hospital that offers psychiatric care. Ms. Herbert clarified that Dublin Springs is considered a hospital. She asked if it was an assisted living facility. Ms. Herbert said this is a lockdown facility for people with dementia related issues but if they have dementia and something else like schizophrenia, she asked if that is treated there as well.

Mr. Simi said the focus is to treat memory impairment but there is a lot of outstanding issues that come along with the disease that we handle constantly. Ms. Herbert asked if that is psychiatric care as well. She asked if physical therapy was offered such as occupational therapy. Mr. Simi said they have "therapists" as they have an entire fitness and occupational therapy program. He said if a resident gets injured, or if they approach staff, they can help them get back on their feet. He emphasized the focus is on memory impairment.

Mr. Zitesman asked if any of these services are covered by health insurance. Mr. Simi answered there are some programs out there for it. He said it depends on the disease and what the health insurance program is. He added there is also elderly care insurance coverage. He concluded most of it is privately paid.

Ms. Herbert said in 2016, Mr. Underhill's other applicant had an informal review and that facility was determined to be a hospital. Then in 2017, Mr. Underhill had a different client, she confirmed, and staff issued this memo. Mr. Underhill indicated staff would not typically issue the memo but he asked them to issue it so he could bring this before the Board of Zoning Appeals. He said previously, he had no reason to because he was permitted and wanted to be clear it was a staff function at that time, in their Planning Report, they reached the same conclusion that he did and his previous client did, that if the Commission had something to say about it, it is not really in their purview. He indicated that is part of what is driving this. He said if he goes to the PZC with a Final Development Plan, some of them will still be there saying, we told you before we did not like the use. He said this is a procedural and technical issue, really.

Mr. Boggs said instead of using the 2016 Informal Review as a precedent, he urged the Board not consider a staff decision in the context of an informal review, which Ms. Husak earlier testified did not provide as much information as a typical application does. He urged that not be considered as a precedent setting decision that staff could not change their mind on or reach a different conclusion on than having a full application. He said tonight he understands what Mr. Underhill is saying in terms of their taking the informal review to the bank but he asked that the Board consider looking at the facts presented in this application as applied to the text rather than relying on a 2016 application as precedent because it was an informal review and here tonight we have an application.

Mr. Underhill said it was an important consideration at the time because if they had the opportunity to know the use was not permitted, that would have been topic A before we even got to getting into what

the building is going to look like and how it is sited, etc. He said if you do not have the use, you do not have anything else. He said it would have been an important part of the informal review if they had decided another way and it would have been the first thing he talked about. He emphasized it was important in whether or not it was given adequate consideration at the time. He said this is a very sophisticated place and should have been if it was not.

Ms. Herbert clarified Mr. Bogg's suggestion is the Appeal for which the Board is to review today is to disregard the Commission minutes as that is previous, and the Appeal that this memo memorializes, which is the Planning staff's decision with which he is appealing based on the information we have on this applicant in terms of if they meet a hospital definition.

Mr. Boggs said he is asking the Board to disregard the argument and minutes that were put forward for 2016 and look at this appeal based on the evidence presented by the applicant and the text before the Board. He said he is concerned that if the Board premises its decision tonight on an informal review that was conducted a year and a half ago, that it may undermine staff's ability to do Informal Reviews at all because they are going to feel bound by it.

Mr. Zitesman said the question the way he sees it is - analyze what the applicant is requesting to, what the Code is, and disregard what has happened in the past with the other applicant in another time. He said the Board is faced right here with a specific question as to whether this use fits into the definition of hospital as stated in the Code. He noted that Planning has said, at this time, no and the applicant is asking us to consider whether that is appropriate and that is the analysis he is looking at.

Mr. Myers said the previous Informal Review has not been coming through his mind, anyways. He said he has been looking at this as "is this a hospital facility or not".

Mr. Underhill said, either way, their position is sound. He said he wants to reserve for the record and future reference that both questions are relevant. He said if we do not consider the first one which is "Is that previous decision binding or not" and the second being on the interpretation, he believes they have a strong position. He said in the later instance, the evidence of staff's previous position is relevant to the question.

Mr. Zitesman said we would not even been talking about the first one had not been that Mr. Underhill was involved in the previous one. Mr. Underhill answered the first thing he would have done was to look at the history of the property and go back ten years, especially with all the great records online.

Mr. Zitesman emphasized, the bottom line is, the request is 'does this facility fall within the definition of hospital' and that is the case they are making and being received.

Ms. Herbert inquired about Exhibit D – Poet's Walk. She asked if that was the previous application for this site. Ms. Herbert asked what congregate care is. Ms. Husak said that was not defined in the Code. Mr. Underhill said congregate care would indicate varying levels of care within the same facility say starting with independent living where people are of sound mind and maybe just need a little common area for cooking to assisted living to nursing care where there is a range of care among a facility. Ms. Herbert clarified it would be independent living to skilled nursing.

Ms. Herbert inquired about the definition as the last part of the "or" is a little vague. The first part she said, they provide medical care and diagnostic care, to which the applicant answered affirmatively. Mr. Simi clarified they diagnose the residents when they come in to what level of Alzheimer/dementia they have and then treat to that.

Ms. Cooper noted in the ORC there is a distinction between a health maintenance organization and a hospital and it basically has to do with patient support, premiums, and payments, etc.

The Chair closed the public portion of the meeting and open this request up to the Board.

Ms. Cooper said she thought she got a little confused when congregate care was defined. She asked where that definition came from. The Chair answered it is submitted under Exhibit D with the application.

Mr. Zitesman said from his perspective, this is a facility, they are in-patients, they have medical issues, and they are there for more than 24 hours at a time. He said there can be people in the hospital until end of life, too, planned or not. He suggested if the Board is going to be in favor of property rights and property owners, and if there is any ambiguity or any issue here, and he does not think there is. He said one cannot claim that dementia, Alzheimer's, or Parkinson's Disease, is not a medical condition.

Ms. Herbert said it meets the definition of hospital in the Code for all the same reasons.

Satya Goyal said hospital is where the doctor's certify their 24-hours service available to qualify people if they are ill. He said he sees the people who are maybe in their last stage and that could be for months. Typically, in a hospital, people can stay a few days, and they send them back to whatever other facilities are. He said he sees this as really not a hospital as such, this is a combination of in-between. He said people cannot go to the hospital to stay but they can come to this facility and stay indefinitely.

Mr. Zitesman said, if we look at the definition, any facility, any is a very broad word, so it is without qualification other than in which in-patients are provided medical, psychiatric, rehabilitation care or a continuous period longer than 24 hours. He said there is nothing about 'but less than three days' or 'not more than two weeks'. He emphasized the definition is very broad. He said when it is drafted broadly, it cannot be read more narrowly. He said we have to take it for what it is, how it is written, and the Board cannot redefine or add more into it to limit the definitions. He said it meets the definition whether it is a classical idea of a hospital or not but then maybe Dublin Springs is not a classical idea of a hospital, either.

Ms. Cooper said it is interesting that in our own definition it states that for a continuous period longer than 24 hours and she would hazard to guess there are some of us who are going for surgery for which we are not allowed to stay for 24 hours in a hospital.

Mr. Goyal said the first record called hospital it defined yourself very clearly what hospital is versus other facilities where people come for treatment. He said there is a very big difference.

Mr. Zitesman said the problem is we are stuck with the language as written. Ms. Cooper agreed that 'any facility' is any facility. In this case, she said it is unfortunate that there was a prior consideration and the new consideration they were limited to interpretation provided to the staff whereas this Board is not privy to that, other than it happened.

### **Motion and Vote**

Mr. Zitesman moved, Ms. Herbert seconded, to reverse this Administrative Appeal of a determination by the Division of Planning that a memory care facility is not included in the Zoning Code definition of "hospital" and therefore not a permitted use in Perimeter West, Subarea 1, finding that the request does not meet the review criteria and the proper standards and procedures were not applied, therefore reversing the decision. The vote was as follows: Mr. Myers, yes; Mr. Goyal, yes; Ms. Cooper, yes; Ms. Herbert, yes; and Mr. Zitesman. (Appeal Reversed 5 – 0)

The Chair stated the next scheduled BZA meeting is November 16, 2017. He adjourned the meeting at 8:18 pm.

As approved by the Board of Zoning Appeals on November 16, 2017.