

**TOWN OF ELKTON
BOARD OF ZONING APPEALS
DECEMBER 22, 2016
MINUTES**

Present: Robert Olewine; Shirley Hicks; Dave Mehelas; Heather Mahaffey; Richard Czernik; Lisa M. Hamilton Blackson, Esq., Legal Counsel; Charles A. Bromwell, Director, Building & Zoning

Absent: Dawn Schwartz

Mr. Olewine called the meeting to order at 7:00 p.m.

ACTION: Motion was made by Ms. Hicks to approve the minutes from the November 17, 2016 meeting as written. The motion was seconded by Mr. Czernik and unanimously approved.

REQUEST OF JAY C. EMREY, III, ESQUIRE REPRESENTING RT. 40 VENTURE, LLC FOR AN APPEAL OF THE ZONING ADMINISTRATOR'S DECISION REGARDING A BUILDING CODE VIOLATION AT 1183 EAST PULASKI HIGHWAY, ELKTON, MARYLAND, TAX MAP 316, PARCEL 2333, ZONED C-2

Jay C. Emrey, III, Esquire was in attendance to address this request for appeal. He provided a memorandum to the Board (see attached). All those expected to speak during the appeal were sworn in. Mr. Emrey stated the appeal was regarding a decision made by Mr. Charles Bromwell, Director of Building & Zoning for the Town of Elkton. The property in question is located at 1183 East Pulaski Highway and is owned by Rt. 40 Venture, LLC. The decision made by Mr. Bromwell is in regard to the property tenant, Tim's Used Tires. They have applied for a special exception for placement of up to four (4) storage trailers for this use. He noted their appeal is of his interpretation of Section 9.03.2.9.2 requiring a sprinkler system for bulk storage of tires.

Mr. Emrey stated he believes the International Code tries to make their statues unambiguous and incapable of more than one interpretation, however it doesn't always work that way. They differ with Mr. Bromwell on the particular issue of the requirement that the building must have a sprinkler system. He stated he would be bringing witnesses to speak to this issue. His point was that they are not using 20,000 cubic feet of space to store the tires. He noted that most of the tires will be stored in the storage trailers for which they are requested the special exception. He stated two (2) of the trailers would be for storage of used tires while the other two (2) trailers would be for storage of scrap tires. The scrap tires are not road worthy but will be recycled and repurposed.

Mr. Emrey asked if the Board had any questions. Mr. Mehelas asked for the total square footage of the building. Mr. Emrey stated the building is 3,500 sf. Mr. Don Horton, having been sworn, addressed the size issues with regard to cubic footage. He provided the Board with handouts. Mr. Horton confirmed that he is the managing member of Rt. 40 Venture, LLC, that he has leased the property in question to Tim's Used Tires and that he received Mr. Bromwell's letter. He stated that he has a difference of opinion with regard to Mr. Bromwell's interpretation of the regulations. Mr. Downs objected because Mr. Horton is a lay witness and therefore cannot offer an opinion or testimony.

Mr. Mehelas again asked for the cubic footage of the building. Mr. Bromwell noted that the building is 29,952 cubic feet and there is not a demising wall within the area. Mr. Mehelas asked if there was a wall

currently dividing the spaces which appears to be shown on the exhibit provided by Mr. Horton. Mr. Bromwell stated he used an 8' ceiling height with the building being approximately 78' x 48' for his calculations. Mr. Horton stated he disagreed with Mr. Bromwell's determination of the cubic footage. He stated that the entire building is 7,000 sf and therefore would be approximately 35,000 cubic feet. Mr. Olewine asked if Mr. Horton is saying that the entire building has more cubic feet than what Mr. Bromwell stated. Mr. Horton agreed. Mr. Downs objected to Mr. Horton's opinion about the cubic footage for the building with respect to the Code. Mr. Downs read the section of the Code which stated "the area for the storage of tires exceeds 20,000 cubic feet. Mr. Downs asked if Mr. Horton felt there was a different interpretation for this particular section. Mr. Horton stated he believed there could be a different interpretation of that section. He stated his expert witness would address this interpretation. Mr. Horton was asked if he intended to use the entire building for tire storage. He said he would not be using the entire building but only the area shown on the exhibit. Mr. Emrey asked if the building will be in compliance with all other regulations of the Town, County and State. Mr. Horton stated that it would be in compliance. Mr. Emrey asked if Mr. Horton was willing to comply with all regulations. He stated he was willing to comply. Mr. Emrey asked him if this was the reason for his appeal. Mr. Horton answered in the affirmative. He confirmed that he will have the wall placed if the decision is made that he needs to do that. His intention is to comply with all requirements and that is why he is here to get this issue resolved. Discussion ensued regarding keeping focused on the issue in question. Mr. Horton stated his expert would be able to give his opinion on the building codes and how they relate to this specific issue.

Mr. Emrey asked Mr. Horton to go over the exhibits he provided to the Board. Ms. Hicks questioned which letter he was referring to in exhibit 1 of his submission. Mr. Bromwell interjected that he provided the Board with only his letter from October 19th since the October 21st letter simply stated that they had the right to appeal his decision.

Mr. Horton began to describe his photographs and Mr. Downs objected. Ms. Hamilton-Blackson asked why he felt these pictures were relevant to his case. He stated that they are similar businesses which are greater than 20,000 cubic feet that were recently given occupancy and have tire storage. Ms. Hamilton-Blackson asked if he had photos of his building and stated he needed to address his building. Mr. Horton pointed out in one photo the area where the tires would be stored as well as the shop area. He went on to present pictures of other businesses in the area who store tires in their buildings. Mr. Downs objected to these photographs. Ms. Hamilton-Blackson stated that Mr. Horton needed to address only issues that were relevant to his building and the appeal which was made. Mr. Emrey disagreed because he stated the photographs are businesses in the area within a quarter of a mile which store tires and this relates to the storage of tires in Mr. Horton's building. Ms. Hamilton-Blackson asked if they had anyone available to confirm the size of each of the buildings and whether they have a sprinkler system. Discussion ensued regarding whether the information should be admissible. Mr. Olewine commented that the Board has no way of knowing whether the other buildings in the area, which store tires, are in violation.

Mr. Ellis Blomquist, having been sworn, was questioned as to his experience which would allow him to answer questions concerning this appeal. He stated he has been a Code Enforcement Officer for twenty three years. His duties include enforcing the City's building, zoning, health and sanitation codes which includes both commercial and residential structures. He confirmed the City of Wilmington has adopted the International Building Code and he noted that he has worked to enforce the 2012 Code since it was adopted by the City. He stated he has testified in court with regard to cases such as this. He stated that he interprets the 2012 International Code for his job on a regular basis. Mr. Downs questioned whether Mr. Blomquist had ever had occasion to make interpretations of the Code for towns or municipalities outside the city of Wilmington. Mr. Blomquist stated that he had not. He was asked if the City of Wilmington had written its own code. Mr. Blomquist stated that they adopted the International Building Code with insertions, deletions and modifications listed in chapter 4 of the city of Wilmington code. Mr. Downs asked if the IBC Commentary was adopted as well. He answered in the affirmative. Mr. Downs asked if

Mr. Blomquist knew when the Town of Elkton adopted the 2015 International Building Code (IBC). He stated that he believed it was in May of 2015. Mr. Downs asked if he was aware that the Town did not adopt the Commentary for the IBC. He stated that the Commentary is not a Code, it is a description or clarification of the Code's intent. He was asked if he had ever testified in a court outside of the City of Wilmington. He stated that he had not. He asked if Mr. Blomquist had ever been a code enforcement officer anywhere other than the City of Wilmington and he stated that he had not. Discussion ensued regarding Mr. Blomquist's use of the Code and Commentary and his expertise in this area.

Mr. Emrey asked Mr. Blomquist what type of education is required to be a Code Enforcement Official. He replied that in Delaware it requires that you be certified as a Building Inspector which requires a test given by the International Code Council. The tests are available to any municipality which chooses to adopt the Code. He stated that additionally he must take specific educational credit classes in order to remain certified as a Building Inspector. Mr. Emrey asked if the codes used in other municipalities, if adopted, are similar. Mr. Blomquist stated this was true but that each municipality is free to make adjustments and modifications to it. Mr. Downs again voiced his objection because he believes Mr. Blomquist is not familiar with any adjustments and modification made by the Town of Elkton. Mr. Emrey disagreed with Mr. Down's objection due to the fact that the International Code is the same in all states.

Mr. Olewine questioned how the Code in Delaware, without the Commentary differs from the Code in Maryland. Mr. Blomquist stated that it does not differ.

Mr. Olewine asked Mr. Blomquist whether his determination of the cubic footage of this building is bigger than 20,000 cubic feet. He answered in the affirmative. He went on to read the section of the Code which references bulk tire storage and pointed out that, according to the exhibit, the areas where tires would be stored does not exceed 20,000 cubic feet. Mr. Olewine replied that the building is capable of storing more tires. He stated that at any time the business could expand the area where the tires are being stored. Discussion ensued as to the enforcement capabilities of the Town should the expansion of tire storage move into other areas of building.

Mr. Mehelas questioned the reasoning behind the limitation of cubic footage. Mr. Blomquist stated that it is due to the fire hazard and safety issues. Mr. Mehelas wished the business well in their endeavor but stated that his main concern is the safety issues. Mr. Emrey questioned Mr. Blomquist on his interpretation of the 'area' which he feels, according to the Code, should be included as storage for tires. He stated that only the 'area' where the tires are actually being stored and does not take into consideration the remainder of the building. Mr. Mehelas questioned Mr. Blomquist's interpretation of 'area' within an open area with no walls to partition off the office from the tire storage area. Mr. Blomquist stated the reason he interprets it that way is because he believes the Commentary says exactly that. He does not believe it includes the area between the tires, around the tires or in any other part of the building. Discussion ensued with regard to how cubic footage of tires is determined. Ms. Hicks asked what would prevent the business from expanding their storage of tires without a wall designating the area to be used for tire storage. Mr. Emrey stated that Mr. Bromwell has the ability to check the property whenever he chooses. He also stated that it is not their intention to violate the Code. Mr. Mehelas pointed out that without a certificate of occupancy and with a safety issue a tenant was placed in that building. He said that they have violated a number of issues so far. Mr. Horton asked if he could address these issues. He stated it was never their intention to violate the Code. He explained that when the tenant moved from the other location during the annexation of that property he was being told he had to move by January 1, 2017. He stated he leased the building with the intention of complying with the electrical and plumbing codes which he stated was what was required by the Town. The tenant was going to take care of the permits for plumbing and electric. Mr. Horton stated that the issues regarding the storage area did not come up until after the initial meeting with Mr. Bromwell. He stated that Mr. Bromwell gave them

occupancy and that it was not their intent to violate any codes. Mr. Olewine asked Mr. Horton if he had received a certificate of occupancy to operate a business in the building. Mr. Horton stated that he had not received a certificate of occupancy for this building. Mr. Olewine stated that the business owner is operating a business at this location. Mr. Horton stated that he agreed.

Mr. Downs stated that he is at the meeting as the Town's attorney and is willing to bring testimony if Mr. Olewine feels it is necessary. Mr. Olewine asked Mr. Emrey if he had anything additional to bring before the Board regarding this appeal. He stated that he believes Mr. Blomquist has shown his expertise and feels he should be considered an expert witness.

Mr. Downs brought testimony regarding the Town's position of this appeal. He stated that the Town encourages this business but that it must be done lawfully. Mr. Downs noted that Mr. Emrey asserted earlier in his testimony that the issue before the Board was a complicated one and he disagrees with his assessment. He stated he believes the issue is very clear cut. The issue is whether this area needs to be sprinkled. He stated that the defendants agree that the building is over 20,000 cubic feet. Mr. Downs stated that it is the Code, not Mr. Bromwell, which will assure that the business is in compliance. Because Mr. Bromwell is not available every day to check for compliance there needs to be some assurance that the business remains in compliance with the Code.

Mr. Downs asked Mr. Bromwell to address the other businesses which currently have tire storage. Mr. Bromwell stated that these businesses fall under a different code, NFPA, for miscellaneous tire storage which allows them to store a certain amount of tires on racks such as Quick Lane at Ramsey Ford. Mr. Downs asked if the distinction is due to whether the sale of tires is primary or secondary to the existing business. Mr. Emrey stated that they are capable of storing more tires than what they are allowed. Mr. Bromwell stated that he saw the number of tires they were storing from the beginning. He also pointed out that Premier Tire is not within the Town limits so the Town has no jurisdiction over that business.

Mr. Downs asked Mr. Bromwell if the specific code section with regard to bulk tires is vague in any way. Mr. Bromwell stated that it was not. Mr. Downs asked if his interpretation of the code is used to make determinations for other similar businesses. Mr. Bromwell stated that it is the same. Mr. Downs asked about historical codes and Mr. Emrey objected to him leading the witness. Mr. Bromwell stated that this area of the code is based on legacy codes for passenger tires from back in the 60's and was simplified and replaced with 20,000 cubic feet.

Mr. Downs asked if Mr. Bromwell had offered any option. Mr. Bromwell stated they could build a wall in order to limit the area where tires would be stored.

Mr. Emrey posed questions to Mr. Bromwell. He asked if it made any difference whether the 20,000 cubic feet of tires were tricycle, bicycle, or tractor tires. Mr. Bromwell responded that the code is talking about the cubic feet of area of the building not the tires themselves. Discussion ensued regarding different scenarios for storage of tires.

Mr. Olewine asked for clarification when the code talks about an area of more than 20,000 cubic feet for the storage of tires doesn't it denote that tires are being stores as opposed to any other type of product. Mr. Bromwell stated he was correct. Mr. Olewine stated it simply stated what is being stored there not the volume of what is being stored there. Mr. Bromwell agreed. Mr. Emrey questioned whether according to the Code it mattered what type of tires were being stored. Mr. Bromwell replied that the 20,000 cubic feet is referencing the area of the building not the tires being stores in it.

Mr. Emrey asked a hypothetical question concerning a 50,000 cubic foot building with only twelve tires in it and whether Mr. Bromwell would consider the volume to be 50,000 cubic feet. Mr. Bromwell asked

what the primary use of the building would be. He asked if it was a repair garage and if so then it would fall under 'miscellaneous tire storage' and those uses are allowed to store a specific number of tires. The 20,000 cubic foot would not come into play in that situation.

Mr. Emrey pointed out the photograph showing a separate area for the shop and stated that Mr. Bromwell feels this doesn't matter that it is the area of the entire building. Mr. Emrey stated that their position is that they are not going to store tires in the shop area. He asked what would stop any business from storing more tires than what is allowed by code. Mr. Bromwell responded that the code does not deal with the volume of tires only the volume of the area available for the storage of tires. Mr. Emrey asked if that was Mr. Bromwell's interpretation. Mr. Bromwell stated that it was his interpretation of the Code.

Mr. Olewine pointed out that, in the pictures provided by Mr. Emrey and his client, tires are being stored in the shop area. Mr. Horton confirmed that tires were currently being stored in the shop area. Mr. Horton pointed out that their biggest objection is the 20,000 cubic feet of material. He stated that the wall is not the issue. They agreed to build the wall. He referred to the fact that the Fire Marshal had been called but has never inspected their building. He stated he does not believe the Fire Marshal has ever inspected the businesses that sell tires. He stated he would make sure that it is done in the future. Mr. Olewine stated that the issue of the Fire Marshal inspecting other businesses does not pertain to the case at hand.

Mr. Olewine asked if there was any other testimony that needed to be presented. Mr. Emrey stated that he wished to make a rebuttal from Mr. Blomquist. Mr. Olewine stated that unless there was something new that needed to be added that the Board needed to move on with the appeal. Mr. Emrey stated he had nothing further to present.

MOTION: Motion was made by Mr. Mehelas to deny the appeal of the Zoning Administrator's decision regarding a building code violation at 1183 East Pulaski Highway. The motion was seconded by Ms. Hicks and unanimously approved.

CASE # 1500 – REQUEST OF JAY C. EMREY, III REPRESENTING RT. 40 VENTURE, LLC FOR A SPECIAL EXCEPTION FOR PLACEMENT OF UP TO FOUR (4) STORAGE TRAILERS. THIS ACTION CONCERNS PROPERTY LOCATED AT 1183 EAST PULASKI HIGHWAY, ELKTON, MARYLAND, TAX MAP 316, PARCEL 2333, ZONED C-2

Mr. Emrey also addressed the request for the special exception for this property. Mr. Emrey provided the Board with additional information regarding this request. He stated the special exception is regarding the storage trailers which are currently on the property at 1183 East Pulaski Highway. A special exception is permitted by right provided they meet the qualifications called out under the regulations for special exceptions in the Town Zoning Ordinance.

Mr. Emrey called Mr. Joe Zang to testify with regard to this case. Mr. Zang, having been sworn, stated he has been licensed as a realtor for 10 years. Mr. Emrey asked the number of residential and commercial sales he has had over the course of that time. He stated that he has had approximately 400 sales with a small percentage of those being commercial. He stated that he has provided a 'broker price opinion' for properties in order to determine a property value as compared to similar properties.

Mr. Emrey asked if Mr. Zang could be considered an expert with regard to real estate. Ms. Blackson stated she would allow it with respect to real estate in the area but not with respect to value of properties. Mr. Emrey agreed. He asked Mr. Zang if he was familiar with the property in question and the surrounding properties. Mr. Zang confirmed that he was familiar with the property and described the

surrounding properties as commercial in nature. Mr. Emrey asked if he felt the special exception request would affect the value of neighboring properties. Mr. Zang stated he did not feel the special exception would detract from the value of neighboring properties if the storage trailers are placed properly so that they are mostly hidden from view. Mr. Zang stated he believed the special exception would be compatible with other uses in the area and that it would not affect the peace of neighboring properties. He pointed out that there are a number of other businesses in the general area which currently have storage trailers.

Mr. Emrey asked if he felt the special exception would have any effect on public services in the area. He responded that he did not believe it would. Ms. Blackson asked Mr. Zang for his definition of 'detractor' as used in his previous statement. He gave an example of a residential property with a pool. He said that sometimes a pool is an asset but sometimes it is a detractor and will cause certain people to decline to purchase the property that has the pool.

Mr. Mehelas asked what was currently in the storage trailers on this property. Mr. Emrey stated he believed there are tires in them. Mr. Mehelas asked if the current trailers have a special exception. Mr. Emrey stated they are the trailers relating to the current special exception request. Mr. Mehelas pointed out these are being used by a business with no certificate of occupancy. Mr. Emrey answered in the affirmative.

Mr. Mehelas asked if there was any code which addressed specifics of the type of trailers such as sea containers which sit on the ground. Mr. Bromwell stated sea containers or trailers are allowed by special exception. Mr. Olewine asked if the Code calls out any restrictions on what is allowed to be stored in these types of trailers. Mr. Bromwell stated there are no restrictions in the Code. Ms. Hicks asked if there is a limit to the number of times an extension can be made if the special exception is approved. Ms. Blackson stated the extension request must be made prior to the time allowed by the Ordinance. Mr. Olewine asked what the time limit would be. She stated there is a time limit of six months. Mr. Olewine informed the applicant that they would need to come before the Board each time there is an extension requested.

Mr. Emrey pointed out that the reason for the restriction timeframe is if the special exception use becomes harmful or any of the other regulations of the special exception are not being met then it would give the Board the opportunity to deny any future special exceptions.

Mr. Olewine entertained additional questions from the Board. Ms. Mahaffey asked for clarification of parts of the original submittal which shows the building and the trailers. Mr. Horton addressed her questions. She also asked if the Board needed to be concerned with what the makeup of the trailers. Mr. Bromwell said the Board did not need to worry about that aspect of the request.

Mr. Olewine asked if the location of the trailers on the original submission was the only area where the trailers would be stored. Mr. Emrey agreed. Mr. Horton stated there is a lot of area at the rear of the property behind the fence which might be more appropriate for placement of the trailers. He addressed the locations with the members of the Board. Mr. Horton felt the location for trailers containing the scrap tires would make it easier for the company picking them up.

Mr. Emrey asked Mr. Horton if the special exception was granted would he see that the tenant complies with the regulations. Mr. Horton stated that it would be his goal to do that.

Mr. Emrey noted that the special exception is presumed compatible if there is no greater harm in the location being requested than at any other location in the same zone. He stated that because of the need to move the business from the original location the trailers were moved and the business was set up before

they realized they needed a special exception. There will be no storage of tires outside the trailers. He said two of the trailers will be for used tires and the other two trailers will be used for scrap tires.

Ms. Hicks inquired if the owner of the tire store was in attendance. Mr. Zapata was recognized and he was asked how many years he has had this business. He stated he has had the business for seven (7) years.

Mr. Olewine read the Planning Commission recommendation from their December 12, 2016 meeting concerning this request for a special exception. (See copy attached)

Mr. Downs conveyed to the Board that he believed the conditions the Planning Commission has recommended are common sense. Specifically he mentioned the fact that during the meeting Mr. Horton suggested placement of the trailers in a different location than on the original submittal showed and they are not placed on either concrete or asphalt. He stated that having businesses come into Town should be encouraged and he did not believe the issue of the appeal was caused by the owner of the tire business.

He also suggested they consider the requirement of a certificate of occupancy as an additional requirement of the motion. Ms. Hicks stated that this was one of her concerns as well in approving a business which is in a building with no occupancy.

Mr. Olewine asked if there was anyone in attendance to speak for or against this application. There were no questions or comment.

Mr. Mehelas made an initial motion to deny the special exception. There was no second. Ms. Hamilton Blackson interjected and clarified the issue of the certificate of occupancy. She told the Board that although this was an unusual instance that they could make the issuance of the certificate of occupancy as a contingencies of the motion. Mr. Mehelas chose to amend his recommendation.

MOTION: Motion was made by Mr. Mehelas to approve the special exception for Tim's Used Tires at 1183 E. Pulaski Highway contingent upon the building receiving a certificate of occupancy and contingent upon placement of the trailers is not for more than six (6) months, the trailers are positioned consistent with the plan presented to the Board, the trailers are placed on a concrete or macadam surface and the trailers are neutral in color with no advertising and/or consistent with the color of the building. The motion was seconded by Ms. Hicks and unanimously approved.

OLD BUSINESS: Mr. Bromwell stated they are looking at revisiting the amount of time that storage trailers can be allowed.

NEW BUSINESS: Mr. Bromwell stated there were no submissions for the January meeting.

There being no further business to address Mr. Olewine adjourned the meeting at 8:52 p.m.

Respectfully submitted,

Brie Humphreys