

**VILLAGE OF CHAGRIN FALLS
BOARD OF ZONING APPEALS
July 24, 2018**

Members present: Fricke, Freshman-Johnson, Holdren, Maersch
Also present: Markowitz, Rogoff, Edwards, Jamieson

The meeting was called to order at 8:00 p.m. by Chairman Wade Fricke.

APPROVAL OF MINUTES

Moved by Mr. Maersch, seconded by Mr. Holdren that the minutes of the meeting held March 21, 2018 be approved. Carried. Ayes: Fricke, Freshman-Johnson, Holdren, Maersch. Nays: None.

SWEARING OF WITNESSES

All were sworn in.

D.O. SUMMERS DRY CLEANERS, 129 MAPLE STREET - REQUEST FOR A VARIANCE TO SECTION 1145.02(b), NONCONFORMING BUILDINGS, PERMANENT PARCEL NO. 932-04-001.

Mr. Jamieson said this building is located in the R1-50 residential district. It is considered a preexisting nonconforming structure. Its use, of less than a year ago, was a tire store/vehicle service center. When we were approached with the plans to turn it into a dry cleaning drop off/pick up type facility we looked under Section 1145, which is nonconforming buildings and uses. Under 1145.03(a), change of use, the nonconforming use of a building may only be changed to a conforming use. Thereafter, it shall not be changed back to the former nonconforming use. The term "change of use" shall not include changes within a single use category. In a list of permitted uses, each use category is identified by a number (1), (2), (3), etc. So then I went to within the use category, which is listed under Section 1137.02(a)(3). Under retail services that has the automotive service stations under (e), which was its original use up until last year and the new proposed use falls within that same category, which is a personal service establishment including dry cleaner/laundromat under subsection (b).

Mr. Fricke said my understanding is that before it was a tire shop it was a gas station going back as far into the 60's. Mr. Jamieson said vehicle service and auto repair. Mrs. Freshman-Johnson said so in other words, it falls under the same subcategory so it is not changing it to a different category so it doesn't have that issue, it just has the nonconforming use.

Mr. Fricke said so what you are saying is that none of that requires a variance? Mr. Jamieson said the use is allowed, yes. Mr. Fricke said it is not a use variance.

Mrs. Freshman-Johnson said what is important to note here is that if they didn't do anything to the exterior of the building they wouldn't be here.

Mr. Fricke said okay Rob, so then why are we here? Mr. Jamieson said we are here due to the fact that under Section 1145.02(b), additions to a nonconforming building, it states that a nonconforming building shall not be altered, added to, or enlarged unless the additions and the original building are made to conform to the yard, coverage, and height regulations of the district in which it is located, except a nonconforming dwelling may be altered, modernized, or enlarged provided the alterations and enlargement conform to all the yard regulations. The plans that we had submitted to us show the addition of a 4' wide awning on the north and west sides of the structure as well as replacing the two overhead garage doors with an aluminum & glass door and window system type of entry. So they have an alterations as well as an expansion of the structure and that changes the setbacks.

Mr. Maersch said, so why is this different than the funeral home? Mr. Markowitz said it is significantly different. The funeral home had a nonconforming use. They were not changing the use, they were expanding the building and the parking and they were creating a more intense use of a nonconforming lot. They needed to come in under 1145.03(b), which they were not able to meet the code there because the plans that we saw they were expanding the building. Mr. Fricke said they weren't adding awnings and replacing doors; they were building a whole new building and doubling the size of the building and taking out parking. Mr. Markowitz said they needed to get a variance because they weren't doing it within the confines of what existed. Mr. Maersch said a variance to what? This absolutely makes no sense to me that this is different than the funeral home. Mrs. Freshman-Johnson said I agree. Mr. Maersch said unless somebody can show me in the code where an awning is different than expanding a building it is the same thing. Mr. Markowitz said it is not, it is the same thing. Mr. Fricke said we are here tonight to talk about whether a 4' awning meets the Duncan Factors as opposed to the funeral home which is whether a 47' addition meets the Duncan Factors. Mr. Maersch said no, because we told the funeral home that they needed a use variance. Mr. Markowitz said no we didn't. Mrs. Freshman-Johnson said yes we did. We said you guys are not prepared for this, it is not a Duncan Factor review, you need to go back to the drawing board, and it was a whole thing and that is why they did not come to us. Mr. Markowitz said I know why. We said that they were expanding onto a portion of the property that had not been used before for the funeral home and that was why they were expanding the use into an area that had not been grandfathered under the nonconformance. Mr. Maersch said my understanding of that was that they wanted to expand a nonconforming use in a residential district and we have factors in 1107 that show what you need to do to expand the use and that is what we told them. They made a presentation and that was it. Mrs. Freshman-Johnson said I absolutely agree that the way we interpreted the code was whether they were building one inch or 3,000 miles bigger than they were to adjust a nonconforming building they needed another use variance in order to change that nonconforming building in a residential zone. Just like all the other variances we have when you have an existing nonconforming you need to reapply a variance even if they are not changing that part. Mr. Markowitz said they were doing two things. In this case they are not expanding the use, they are altering the building by adding the awning. In the case of the funeral home, they were expanding the use onto parts of the property that had not previously been used for a funeral home.

Mr. Maersch said okay, so the parts of the property had not formerly been used for an awning. Mr. Markowitz said well it had been used for a service business. Mr. Maersch said an awning is a part of the lot. I am going to have a really hard time. And, by the way so that everybody knows, in the plan view you can see my house. I don't have any objections to the use here. My objections are not to what they are trying to do with the property and I don't have any objections to the awning. My comments here are directed more towards we need to make sure we're applying our code consistently and until somebody can convince me that this is different than the funeral home and we should be granting a variance to 1145(b), which we never do, I am going to have a hard time voting on this tonight.

Mrs. Freshman-Johnson said I am in the same place that I was assuming this was a variance about use and we have never granted a variance on use in this town and setting precedence regardless if it is for a 4' awning is a huge deal. And, unfortunately, your timing is awkward at best. Mr. Maersch said or maybe no deal at all. If somebody can convince me that there is some reason that an awning is different. There might be a way that an awning is different than a funeral home but the funeral home came in here and wanted to expand a nonconforming use. They wanted to alter a building for a commercial use in a residential district. What they want to do is alter a building for a commercial use in a residential district. That is a use variance and I don't see how we get around this. Mrs. Freshman-Johnson said that is at least how it was explained when that woman came in and so now that we are changing the basis of that I don't know. I am also very hesitant here because I was assuming this was a use variance.

Mr. Fricke said I don't remember the use discussion. What I remember was they wanted to make that building a lot bigger and they were going to take out a lot of parking and you had a lot of people who lived around there and said we are going to object to the scope of that project. So to me the analogy is if you came in and said we are going to add 12' on each side of the building, we are going to have two parking spots, I need a variance for the parking, I need a variance because I am not conforming to any of the setbacks to me that is the analogy. Mrs. Freshman-Johnson said we printed out a whole different piece of paper that had different factors they had to prove for us to approve it because it was a use variance. We literally went upstairs and printed this out. Yes, it was extensive and people were not happy that they wanted to make it big but that was not the issue.

Mr. Markowitz said I know this sounds like I am creating a non-distinguishing difference but in the situation here where they are adding an awning, the area where the awning is being added has been used continuously as part of a service business, whether it was the drive up or whether it was fixing cars outside or pumping gas where the awning is going there was a use there that was continuous for the service business. In the case of a funeral home I am saying that they are expanding the use to portions of the lot that were not previously used. Mr. Maersch said that is hogwash Dale because then they would come in and they would just put a building over their whole parking lot. Mr. Markowitz said if they could do that without requiring more parking they could come in and say okay, well they would still need a variance.

Mr. Maersch said this was Mr. Markowitz's idea because we didn't have the ability to have a use

variance and Dale explained to us at the Council level that not having it in the code is going to box us in if and when it comes up because then the court is going to essentially hold it against us that we don't have the ability to get a use variance in there.

Mrs. Freshman-Johnson said it is important for us to set on record the difference between the two scenarios so that we can't let the funeral home come back and argue that we gave them incorrect information. That is why this is important to go through otherwise it sets precedence for something else. Mr. Holdren said I actually think it is find to do that because every single lot is different.

Mark Cohen, North Coast Architects 23215 Commerce Park Road, Suite 316 Beachwood, Ohio, said I think one of the things to take into consideration when you are looking at this, and I think the gentleman just said it correctly, you can't set precedent when every situation is unique to itself and you have to look at the criteria that fits into it. In this case, the roof element that are adding is not adding any footprint to the building structure or any usable area within the building. It is an architectural element that is being used for aesthetics only where as opposed to what it sounds like you are saying and the funeral home the addition is creating a larger amount of usable area. This is not a change of use because it is the existing use that is there now. It is permitted as a nonconforming use. What we are doing is just an exterior renovation and changing the aesthetics to make it more pleasing and to make it blend in more with the residential character, materials, details, and scale type of items. It sounds like if this roof element wasn't there and we were just changing the materials, the exposed block was gone and we are adding shingle siding and some other things this wouldn't be an issue because there is nothing projecting out from the building. In this case the roof element is for aesthetic purposes and doesn't increase the building area in any way so it really is different, it sounds like, from what you went through with the other project.

Mr. Maersch said I agree with all that but then show me in the code where we are drawing a distinction between a roof element, which is an enlargement, and the funeral home, which is an enlargement. Mrs. Freshman-Johnson it is a little bit different. We were under the impression that no matter what changes you make to a nonconforming use building in a residential zoning had to be conforming or you need a variance for use whether it is a 4' awning or a gigantic, the size is irrelevant and that is what we are debating to say why did this not need a use variance to bring it because it is a nonconforming use in a residential neighborhood. Mr. Markowitz said it never said in the letter from Rob that this is an area variance and not a use variance. It is a hybrid between the two because they are not meeting the setback for an area variance but they are also expanding a nonconforming building so this does need a use variance. Mrs. Freshman-Johnson said they need a use variance and an area variance.

Mr. Maersch said I don't know what the procedural aspect of it is. The good thing here is that D.O. Summers Dry Cleaners is open for business and so I don't know that this is going to disrupt their lives at all. From my perspective I would be looking for a memo from Mr. Markowitz explaining how we are applying the code to this variance and reconciling it with how we are applying the code to the funeral home variance because in my view these are the same variance requests and they need to be applied consistently or, and Mrs. Freshman-Johnson said, we are going to set a precedent that

we are going to have to deal with.

Mr. Fricke said I don't see how you can reconcile 1111.07 with 1145.03; they seem to be at odds with one another. Mr. Maersch said I can reconcile that okay because it says the change of use shall not include changes within a single use category. Mr. Fricke said but 1111.07 simply says that variances shall not be granted for uses not permitted in the zoning district applicable to property. Mr. Maersch said I would say that Section 1145.03(a) is defining the uses that are permitted and then you flip to the section that you read, which is 1137 when it goes through the categories. Under category 3 the uses that are permitted are numerated and so that is how I think you get out of that inconsistency because then I would say a service station and a personal service thing are both permitted in that district.

Mrs. Freshman-Johnson said I am still back to even above this before you get in this part of the code that it is a nonconforming use and in order to alter that building you need a variance for it to be a nonconforming use in a residential zone. That is the issue before we get into what it is for and if you can expand and all that. Mr. Maersch said and if the code parsed out that it was building expansion. Mrs. Freshman-Johnson said yes, and then they would need to have those factors just like we told the funeral home even if it is for a 4' awning.

Mr. Fricke said it seems to me that if we've erred, the error was in telling the funeral home that they had to apply the 1111.07 factors that if we said we're mistaken you need to apply the Duncan Factors for whatever. Mr. Maersch said potentially that is an outcome or potentially Mr. Markowitz comes back and says here is what we did with the funeral home, here is why they needed a use variance, and this is the same or this is different. If I look at 1145.02(b) and it made a distinction between additions to a building and awnings that would be something but that doesn't exist. I looked at this issue before this and I was trying to find a way that I could figure out how this is different and I just can't do it.

Mr. Markowitz said what you really have is a gap in the code. You are not changing the use, so to speak, you are just expanding a building so the structure is being expanded. You are not changing the way the property is used. But the distinguishing factors at the funeral home they were proposing to use land that had never been used for the funeral home. Mr. Maersch said so if that is how we reconcile these two then we should have an opinion on that but that is not what we told the funeral home at all. We gave them the impression that any alteration of a nonconforming use in a residential district needed to meet the preamble to 1111.07 and that is the impression we left them. We handed them a paper to that effect. Mr. Fricke said I don't think anybody discussed or considered 1145.03 at the time. Mr. Maersch said no, because they weren't changing the use. Mr. Fricke said we said to them you need a use variance because that is what 1111.07 says but no one said hey, wait a minute 1145.03 says as long as you are going funeral home to funeral home you don't need a use variance. Mr. Maersch said because that wasn't the issue, the issue isn't 1145.03 they weren't changing the use. Mr. Fricke said 1145.03 is what we said is the reason why they don't even need a use variance to D.O. Summers. Mr. Markowitz said yes. Mr. Fricke said we weren't aware of 1145.03 with respect to the funeral home; we didn't discuss it. Mrs. Freshman-Johnson said no, we did not say

D.O. Summers needed this. Mr. Fricke said no, they don't because they fit. They are in a single use category. I am saying the funeral home, this is what saved the funeral home at least what Karl suggested I believe we were about to proceed with the funeral home saying hey, don't worry about 1111.07 because 1145.03 says as long as you are within a single use category you are nonconforming you are not changing the use. That was going to simplify that and what I thought you are saying what we did differently with the funeral home is we said no, no you have to go 1111.07 and what I am saying is I believe the funeral home would have also fallen into 1145.03. They don't need a change of use because they are still in the single use category; they are still a funeral home.

Mr. Markowitz said D.O. Summers is here under 1145.02(b), which is the addition to the building. In the case of the funeral home they are continuing their use but they can't expand it under 1145.03(b). In the case of the funeral home we are saying that they are expanding the use because they are going onto part of the property that was not used before. They are expanding the use of the lot. They were also expanding the building. In this case for D.O. Summers they are altering the building or are making an addition to it by putting on an awning. So they only come in under 1145.02(b).

Mrs. Freshman-Johnson said if they were just to do the siding and the windows and no awning like roof shingles would they need a variance? They need a permit for that, right? So they would pull a permit, we would review the plans that is still altering an existing nonconforming building. I don't think the awning is the issue. Mr. Markowitz said if they are fixing the roof that is not an alteration, it is a repair. Mr. Maersch said I just want to make sure that what we did with the funeral home is consistent with what we are doing here because the last thing I want to do is grant a variance here when we should have done the same thing with the funeral home. Mr. Fricke said we told the funeral home is hey, under 1111.07 new section you guys are in a residential area, you are a business, you need to apply 1111.07. When it comes to D.O. Summers, as you pointed out, a business in a residential area we said oh, you don't need a use variance because of 1145.03. Mr. Maersch said no, they don't need a variance. There are two issues that D.O. Summers has that the funeral home doesn't have. D.O. Summers has a preliminary issue, which is they are changing it from a tire shop to a dry cleaning drop off thing. The first question is can they do that in a nonconforming use. In 1145.03(a) says they can so that is off the table; they don't need a variance for that because they fit squarely within the code. They are also adding on to a nonconforming building and that is sort of a different kettle of fish. Mr. Holdren said they already did that; they are operating as a dry cleaners. Mrs. Freshman-Johnson said I am saying D.O. Summers needs a variance to 1111.07. Mr. Markowitz said 1111.07 is just a standard of review. You don't get a variance from that section. That is the code section you look at to decide how you grant the variance. Mr. Maersch said she was using loose language.

Mrs. Freshman-Johnson said that is where we think the error in the letter went out. We feel like that is the question at hand. I think this does apply to D.O. Summers. Mr. Markowitz said we need to add a provision to deal with expansion of use where you have a building on the lot already because 1145.04 covers vacant lots where there is a use without a building. When you go back and look at 1145.03 it is talking about the nonconforming use of the buildings it doesn't talk about what you do

when you want to expand that use on the lot. It talks about not expanding the building but it needs to be more comprehensive. You do have the authority to interpret the code and say we find that this specific use doesn't need any variance. Mr. Maersch said I am not comfortable doing that until I am clear on what we told the funeral home and why we told the funeral home because telling somebody they need a use variance with the standard that we have set out is a pretty high hill to climb. D.O. Summers is operating, I personally don't care about the awning. I am sure that if we get to the Duncan Factors I am sure it is what it is but I just want to make sure we are applying our code consistently. I am not willing to snake my way through the code and make some exception that didn't appear in the notice. Look, we gave a public notice on this and we told the public that they need a variance to 1145.02(b) so like me sitting here, us sitting here and crafting away that they don't need a variance to 1145.02(b) just seems like a silly way to do business.

Mrs. Freshman-Johnson said our legal opinion is they reviewed this and told us this is the variance we need and our job is just to opine on the variance before us. It is not always our responsibility to decide how to interpret the code, that is why we have our legal counsel. Mr. Markowitz said no, but you have the ability to say we are not sure we agree with this can you provide an opinion before we finish hearing this matter? You can take evidence and then say okay, give us an opinion on why we are here just on this section. I agree with Karl's point about are you occupying any land outside the building but I didn't consider the awning as occupying the land. Mr. Maersch said and if that is the position we are taking then they don't need a variance at all.

Mrs. Freshman-Johnson said if they took the awning off they wouldn't have to be here. That is why we are saying if the awning is considered not occupying the land then they don't need the variance at all or we do and we need to vote on it and this is what is stated and that is why the funeral home is different.

Moved by Mr. Maersch, seconded by Mrs. Freshman-Johnson to continue the application for 129 Maple Street.

Fricke: Aye.

Holdren: Aye.

Holdren: Aye.

Freshman-Johnson: Aye.

The meeting adjourned at 9:03 p.m.

Wade Fricke, Chairman
lgb