

**BERLIN TOWNSHIP TRUSTEES**

**6:00 p.m.**

**Special Meeting**

**October 29,**

**20**

**HELD AT:** This meeting was held virtually by Zoom, Delaware, OH

**CALL TO ORDER:** Ron Bullard, Trustee

**PLEDGE OF ALLEGIANCE:** Ron Bullard led the Pledge of Allegiance

**ROLL CALL:** Ken O’Brien, Tom D’Amico (Recused), Ron Bullard, Theresa Taylor, Assistant Fiscal Officer

**ATTENDANCE:** Angela Brown, Rob Platte, Holly Mattei, Christina Littleton, Meghan Raehll, Dave Goettel, Rick Gemienhardt, Erik Reed, Chris Ballard, Jim Reed and Joe Miller

**BZC 19-005 AS THE BERLIN BUSINESS PARK COMMERCIAL OVERLAY**

Rob Platte began with updates that the county had made on the working document for the BCO. In the permitted uses section, is the cleaned-up language stating the R10 allows for apartment style buildings in the peninsula area to have a greater number of units per dwelling unit but not to exceed 10 dwelling units per acre. In this section, it also states that if there is to be a roof-top used in the mixed-use area, language was added saying there is to be an additional 100-feet added for a set-back for the minimum of 550-feet for noise concerns.

In regards to the mechanical units, there was language added that states upon the recommendation of the zoning commission, the board of trustees may approve a height and location of a mechanical unit that may differ from the requirements of the language. It does state that in no case shall it exceed 53-feet high.

Platte stated there were concerns for the residents living in the Ravines at Alum Creek subdivision with how the buildings would be facing them. Language was added that buildings will be designed in a way that the fronts/sides of the buildings will face the existing residents of the Ravines at Alum Creek. In addition, there will be no trash receptacles, no decks or patios nor balconies will be placed between the elevation and the Ravines at Alum Creek lot line.

There is also language stating that upon the recommendation of the zoning commission, the board of trustees may approve flat roofs when it’s determined said roofs will blend with the overall architectural style. Bullard stated that his concern is that the maximum height be a 3-story building if a flat roof is going to be used. Platte stated there is language that clearly states that.

Platte stated that within the next couple of meetings there will be a resolution presented to the trustees for consideration stating what trees will be allowed in the area.

As far as the mounding issues, any new parcel, created after the adoption of this overlay from a parcel subject to the mounding requirements at the time of adoption of this overlay, shall be required to construct a mound that complies with said requirements. The mound shall run parallel to the existing parcel utilized for residential purposes as defined herein. Upon the recommendation of the zoning commission, the board of trustees may waive or modify this mound requirement for newly created parcels, if it is determined that the intent of the mound requirements have been met. After a lengthy discussion, both O’Brien and Bullard agree with this language.

There was a parcel list with addresses that are adjacent to the 250-foot buffer created to show who the existing parcels are before the proposal is approved.

Bullard asked Platte to comment on the Orange Road Overlay discussing them using incentives with developers. Platte stated that he does not feel this is a good idea as it leaves room for too much interpretation and prefers it to be more of a black and white proposal.

**Public Comment-** Bullard opened the meeting to public comment.

Joseph R. Miller from the Vorys law firm, on behalf of: The Hondros Family, Thistlegate Farms, and its related entities, including Thistlegate 2 LLC and Thistlegate 12 LLC stated the following:

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Our clients own more than 276 acres of the land that would be rezoned by BZC 19-004 and BZC 19-005. These measures, which have been before this board for a year now are completely arbitrary and unreasonable. If these measures are approved, and if they survive a referendum, which is doubtful at best, neither measure will withstand scrutiny in the courts and will expose this Township to significant financial liability.

This whole project was marketed in June 2019 as a "2,000-Acre Berlin Business Park" that "will contain commercial and light industrial businesses, along with some retail and medical offices." When Mr. Lamb solicited support for this project, our clients were promised that their land could be used to address the area's need for future commercial and light industrial development. Therefore, the project would enable them to continue their farming operation and would zone their land for future commercial and light industrial use.

The Hondros family supported this concept. It enables them to continue their farming operations with an eye toward this community's growth for the decades to come. Our clients therefore agreed to help pay for the research efforts to further the project. Yet, our clients were outraged to learn that after they contributed their own money, the project is not actually for a business park at all. In reality, the two measures before you constitute illegal spot zoning of the Hondros Family's land and our clients oppose both measures.

Just looking at Land Use Exhibit Maps, both overlay districts look more like a gerrymandered congressional district than a functional business park. The Business Overlay's boundary weaves around our client's property line while excluding certain individual neighboring properties. This of course frees those hand-picked neighbors from the onerous development restrictions imposed on our client's private property. What's more -- it does not make any sense whatsoever to plop residential townhomes in the middle of an industrial overlay district on one side and a commercial district on the other.

Additionally, there are numerous unfounded and arbitrary restrictions riddled throughout these proposed development restrictions. R.C. 519.02 limits the Township's ability to restrict private property owners' right to use their land. Restrictions on the use of private property are limited to matters that advance the community's health, safety, and welfare. Yet these onerous development restrictions go well beyond this fundamental limitation.

For example, on the one hand, Section 15.05 says that along the busiest road, State Route 37, any commercial, office, or mixed-use building must be built no more than 60' from the right-of-way. Yet, when it comes to our client's properties, that are along much smaller roads, our client will be forever barred from building anything within 250' from the lot line and will have to erect an 8' earthen mound along its property line bordering any residential property – even if it is across the street. There is no basis whatsoever in requiring our client to give up nearly a football field of land, in the name of "buffering," when no more than 60' is deemed safe and in the community's best interest along State Route 37. This restriction will render a significant portion of our client's land utterly worthless and is a confiscation of their private property. Moreover, it is inherently contradictory and arbitrary. If such extensive buffering is truly within the community's health, safety, and welfare, all properties throughout the township should be required to have that amount of buffering not just the few properties singled out here.

Likewise, if the Township is going to start prescribing every detail one must follow to build a home or building (see Section 15.05) – from requiring certain building materials to using specific paint colors – it cannot arbitrarily single out our client's properties while not also imposing the same restrictions on its neighbors.

These measures will detrimentally impact our client's land, reduce its value, and blunt this community's future. Our clients and this community were promised a business park – but that is not what this is. It is a confiscatory regulation riddled with arbitrary restrictions that will only expose this Township to significant liability if passed. Both BZC 19-004 and BZC 19-005 should be denied.

Furthermore, the Zoning Commission and the Board of Trustees have failed to adhere to the procedures in R.C. 519.12. The procedures set forth in R.C. 519.12 are mandatory. *Trans Rail Am., Inc. v. Hubbard Twp.*, 172 Ohio App. 3d 499 (Ohio Ct. App., Trumbull County 2007). Any zoning changes adopted outside of the procedures are void as a matter of law. *Id.*

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The Zoning Commission first moved to start this process in May 2019. The Delaware County Regional Planning Commission had concerns and added conditions for further consideration in June 2019. The Zoning Commission then passed two separate resolutions on October 29, 2019.

R.C. 519.12 (E) required the Zoning Commission to forward its recommendation to the Trustees within 30 days of the Commission's hearing. This Board of Trustees was then required to hold the public hearing on the Zoning Commission's recommendation in no more than 30 days. This Board was then required to either adopt, deny, or adopt some modification of the recommendation within 20 days. All told, the Statute requires a public hearing and decision by the Board within 80 days from the Zoning Commission's hearing. In this case – no later than January 17, 2020. Yet, here we are at the end of October 2020 – a full year after the Zoning Commission issued its two resolutions – and the resolutions are being constantly revised and re-written through numerous meetings. It is completely unreasonable for landowners who would be subject to this to attend random hearings for over a year while the restrictions on their private property are constantly being re-written.

Nor has the board followed the notice requirements either. The notice requirements are mandatory. *Brown v. Sperry*, 23 Ohio App. 2d 163 (Ohio Ct. App., Van Wert County 1970). To our knowledge, the public notice requirements were not followed for this evening's meeting. We only learned of this meeting on Tuesday because a reference was made in the October 15 meeting minutes (which were just recently posted). No mention was made of this meeting on the Township's website until after 10 am today. This is contrary to the clear notice requirements set forth in the Ohio Revised Code.

To our knowledge, the last Public Notice regarding these hearings was posted on July 16, 2020.

Finally, the Trustees are not permitted to re-write the measures as is occurring here. *SuperValu Holdings, Inc. v. Jackson Ctr. Assocs., LP*, 2004-Ohio-4314, 2004 Ohio App. LEXIS 3914 (Ohio Ct. App., Clermont County 2004). Any zoning amendments passed by the Trustees at this point will be improper due to the failure to adhere to the applicable law.

Miller also stated that in addition to the above, there was not a proper notice of tonight's meeting as it was just posted today, the day of the meeting. They had only learned of tonight's meeting through the Township's minutes. They believe the trustees cannot act on these proposals and furthermore, they shouldn't.

Bullard explained that all this is in addition to the zoning text. Miller stated "that spot-zoning in Ohio is treating a small, limited number of properties differently than other surrounding properties and inconsistent with your comprehensive plan. With regard to the Hondros Family properties at Thistlegate Farms, that is exactly what you're doing. All you're doing is opening up your township for needless litigation and liability by rushing ahead along through this process. That's what is actually happening tonight and I urge you to stop it and put it aside, consult with Mr. Ballard, I will consult with Mr. Ballard and keep this township out of hot water in state and federal court".

Bullard stated "we went into this process by doing exactly what we've been doing for the last 1 1/2-2 years, thus making a change to the zoning text not to the zoning of any piece of property". Miller again urges to put this aside entirely until he and Ballard have a chance to have a discussion. O'Brien asked Ballard to comment if he feels inclined too. Ballard stated that the board complied with the noticing of the special meeting, saying it was continued to a time and date certain so there is no notice issue of tonight's meeting. Ballard stated he would be happy to discuss Miller's concerns later.

Bullard stated if there is something that is being done wrong in the process, they could address that at a later point but as far as this working document becoming changes to the text it will not happen tonight because there are still more reviews to go through.

Rick Gemienhardt stated that he has two types of comments for tonight. The first being process comments, he stated he feels the trustees have been doing a good job with the process efforts and in giving ample time for citizen input and doesn't believe they have rushed this zoning text into adoption.

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As far as product comments, he cannot accept this product as it lays tonight as he is totally against its future adoption. Gemienhardt stated he feels this product has created incompatible land-uses amongst the most rural part of our township and is totally unexpected. He feels this is an economic plan to help justify and pay for future county infrastructure needs. The pre-zoning and changes of land-use without future citizen voting rights runs counter to what most citizens would expect from our elected officials. Finally, he hopes for this to be a future trustee election issue.

Christina Littleton asked if the R10 that is on the north side of 36/37 receives the vanishing line height requirement. O'Brien stated that he believes so but feels we need to get that confirmed. Platte stated that is the intent for the mixed-use area. O'Brien stated that is what his intent was. Platte stated they will make that change. Littleton stated that she feels if the incentive points are not included that members of the ARB and BZC know that they can be more demanding on the design standards.

**RESOLUTION 20-10-42                    MOTION TO ACCEPT AND APPROVE THE CHANGES PER THE RED-LINED DOCUMENT DATED OCTOBER 23<sup>rd</sup> , 2020 INCLUDING THE BOLDED SECTIONS, AND MAKE IT THE WORKING DOCUMENT**

Motion:            Bullard  
Second:           O'Brien  
Vote:                O'Brien yes and Bullard yes

**RESOLUTION 20-10-43                    MOTION TO MAKE WORKING DOCUMENT EXHIBIT #26 AND ANY CHANGES HERE AFTER WILL BE CONSIDERED WHEN GIVEN TO REGIONAL PLANNING AND THE PROSECUTORS OFFICE**

Motion:            O'Brien  
Second:            Bullard  
Vote:                O'Brien yes and Bullard yes

O'Brien stated he would send the document to both the prosecutors' office and to regional planning.

**RESOLUTION 20-10-44                    MOTION TO RECESS AND CONTINUE BZC #19-005 HEARING TO NOVEMBER 23<sup>rd</sup>, 2020 AT 7:00 P.M. VIRTUALLY BY ZOOM**

Motion:            Bullard  
Second:            O'Brien  
Vote:                Bullard yes and O'Brien yes

Meeting continued by Trustee Bullard at 7:13 P.M.

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RECUSED  
Tom D'Amico, Trustee

ATTEST:

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Ron Bullard, Trustee

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Theresa Taylor, Assistant Fiscal Officer

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Ken O'Brien, Trustee