

**VILLAGE OF HINSDALE
ZONING BOARD OF APPEALS
Minutes of the Meeting of
November 19, 2008**

1. Call to Order

Chairman Anglin called the regularly scheduled meeting of the Zoning Board of Appeals to order on Wednesday, November 19, 2008 at 7:35 p.m. in Memorial Hall of the Memorial Building, 19 E. Chicago Avenue, Hinsdale, Illinois. He explained that the Board will follow the agenda and will hear V-13-08, deliberate and reach a decision and then will hear APP-03-08. Chairman Anglin further explained that in the matter of APP-03-08, the only comments taken from the audience would be in reference to the Village Manager's decision that the garden center was abandoned. We will not be talking about neighborhood zoning, that issue is not on the table, only the issue of Mr. Cook's decision is before the Board at this time.

2. Roll Call

Present: Chairman Paul V. Anglin, Members John Callahan, Kim Angelo, John Richter, Marc Connelly and Bob Saigh

Absent: Member William Haarlow

Also Present: Village Manager Dave Cook, Village Attorneys Steve Ruffalo and Ken Florey, Michelle Feola, Building Commissioner Robb McGinnis, Staff Secretary Christine Bruton and Amy Deis, representing The Doings

3. Approval of Minutes – Regular Meeting of October 15, 2008

Item taken out of order.

4. Receipt of Appearances

Chairman Anglin confirmed that proper appearances were on file.

5. Receipt of Requests, Motions, Pleadings, or Requests to make Public Comment of a General Nature - None

6. Pre-Hearing and Agenda Setting - None

7. Public Hearings

a) **522 Hickory Street, V-10-08 – continued to December 17, 2008**

b) **245 E. Chicago Avenue, V-13-08** (Transcript of these proceedings is on file)

Mr. Mark Irpino, property owner, addressed the Board. He outlined the specifics and purpose of his request; he proposes to change the method of ingress and egress to his garage. In the current configuration, he has to pull out and pull forward onto Chicago Avenue, which is a busy street. Further, the house is located at the crest of a hill between County Line Road and Garfield, where there are no stop signs. It is very difficult to back out onto Chicago Ave. He would like to turn the garage or move it and add a curved driveway that would eliminate the safety issue. He described the requested relief and referenced the Morris engineering report wherein average setback was calculated. Discussion followed regarding the driveway as pictured in submitted drawings. Mr. Irpino says that the drawings are a general idea of the driveway location and materials. There was no one present wanting to speak on the matter. Chairman Anglin closed the hearing.

ZONING BOARD DELIBERATIONS – V-13-08

There being no discussion forthcoming, Chairman Anglin asked for a motion. Member Richter moved to **approve the request for variation for 245 E. Chicago Avenue, V-13-08**. Member Connelly seconded the motion.

AYES: Members Callahan, Angelo, Richter, Connelly, Saigh, Chairman Anglin

NAYS: None

ABSENT: Member Haarlow

Motion carried.

c) **540 W. Ogden Avenue, APP-03-08** (A transcript of these proceedings is on file)

Chairman Anglin recapped the matter before the Board and noted that the application is in the form of a legal petition, not the standard Village application. He stated that the petition addresses many items that are not the subject of tonight's hearing. The Board will only consider the letter of Mr. Cook. The Board cannot discuss the validity of current zoning, planned development or the economic impact of retail space at this location. The Board will address the abandonment of the garden center use only. The Board will use the current zoning code only and discuss only Item A of the petition. This item deals with Mr. Cook's August 5th letter, which states that Amlings Garden Center is a discontinued use.

Chairman Anglin stated that presentations would be limited to one hour. If there are legal issues that need to be addressed, he requested these be developed in a brief and submitted within two weeks, which will necessitate continuation of the public hearing. Secretary Bruton will monitor the time and advise participants of their time.

Attorney Ruffalo began by stating there is a requirement for an escrow deposit and Chairman Anglin confirmed that \$1,100.00 was received. It was noted that according to Village Code the Village Manager can set the escrow amount and can collect fees from the applicant of an appeal. Mr. Daniel has not issued an \$8,000 check requested by the Village; he described the \$17,235.00 bill that consists of \$6,000.00 from Mr. Florey's firm and \$11,200.00 from Mr. Ruffalo's firm. He believes they are unauthorized fees and a Constitutional violation. Attorney Florey advised that the hearing not proceed until the \$8,000.00 payment is made. Mr. Daniel requested a decision by the Chair on this matter. Chairman Anglin stated there is no point in proceeding without payment and read the section of the Code that permits the Village to request more money. Mr. Daniel wanted to poll the ZBA to overrule the decision of the Chair. Mr. Florey said they would need a motion. Mr. Angelo asked for clarification of why \$8,000.00 was the amount requested. Mr. Florey stated that was the initial estimate of legal fees. Since that time, there have been numerous communications by Mr. Daniel that have made the fees soar. There was no motion from the Board to overrule the decision of the Chair. Mr. Daniel stated he will pay under protest.

Mr. Daniel addressed the Board on behalf of the applicant MIH, LLC. and began by stating that he does not believe that the garden center use was ever a non-conforming use nor that there was abandonment of the use. The definition of the word 'use' is fundamental to his argument. The purpose for which the structure is built has not changed since at least 1967 and there has been a commercial use on this property since the 1930s; his client merely wants to continue to use this property as it has been used for 70 years. He recited changes to the Zoning Code over the years and stated that the original ordinance approved by Ordinance 89-20, cannot be found in the current zoning code. This property has always been used commercially.

Mr. Daniel called his first witness, Mr. Michael Horne, President of MIH, LLC. and president of HSS Management Company. Mr. Horne stated he/his company has been involved with the property in question since 2002 and that Cassim's has been an ongoing commercial use since that time. He described the lease agreement with Amlings, stating that they had been in financial straits and left the property a mess. They owed

money to Flagg Creek and to him. Mr. Daniel reviewed exhibits and submitted Exhibits A-D for the record. Mr. Ruffalo asserted an objection of relevance, but accepted the submission.

Mr. Horne, upon questioning, indicated that the title insurance he acquired for the property indicates that single family is not allowed on Parcels 1, 2,3 and 4. Mr. Horne described what happened after Amlings left and ongoing efforts to lease the property were examined. He stated that the property has never been wholly unoccupied as a commercial enterprise since MIH, LLC has owned the property. Upon cross examination, Mr. Horne stated that the leasing materials admitted as exhibits have no dates on them.

Mr. Ruffalo questioned the witness in an effort to demonstrate that MIH, LLC was trying to redevelop the property and did let go of the garden center use; they marketed the property as a redevelopment opportunity, not a garden center. The attorneys argued as to whether a condominium development plan submitted to the village in September of 2006 is relevant to these proceedings.

Mr. Daniel called Village Manager Dave Cook to testify. Mr. Daniel questioned him about Plan Commission minutes dated 1997. Mr. Ruffalo objected on the grounds of relevancy and Chairman Anglin sustained the objection. Mr. Daniel asked Mr. Cook to verify that Exhibit S, from the Downer's Grove assessor's office dated 1990, designates the zoning district for which the fire alarm permit was issued as an R-4 special use. He noted other documents with the same notation. Mr. Cook confirmed that he did not consider these documents before issuing his August 5th letter.

Mr. Ruffalo cross examined Mr. Cook and determined that these documents would make no difference in his final determination of abandonment. Discussion followed between the attorneys regarding the relevant code used to make Mr. Cook's decision and the termination of special use versus the termination of non-conforming use. Mr. Florey suggested this be put in briefs and dealt with at that time. Mr. Daniel stated that there is no proof that the 1989 zoning ordinance was properly adopted and therefore all decisions should revert back to the 1981 code. Chairman Anglin stated that issue is not the subject of tonight's hearing.

Mr. Daniel called Mr. Joe Abel and he was sworn in by the court reporter. Mr. Abel stated that he is a member of the American Institute of Certified Planners with over 40 years of planning experience. Mr. Daniel asked him if a nonconforming use can be abandoned one segment of a strip center at a time. Mr. Ruffalo objected to the question and discussion

followed regarding whether the Amlings location is a strip center. Mr. Abel referenced the definition of 'use'. He said the building has always been used for a garden center; it is a multi tenant facility. In his opinion it takes at least six months to a year to find an occupant when the uses are limited; when there is a permitted use list plus a conditional use list. He stated the principal structure was designed and used and maintained and marketed for the same uses over the last 40-50 years.

Mr. Daniel's time expired for the presentation of his case. He moved admission of all exhibits that are attached to the petition for appeal, particularly exhibits discussed during this hearing. He asked that the ZBA take judicial notice of the group Exhibits CC, which are the zoning codes in effect from 1966 forward. Discussion followed regarding the admission of the exhibits and their relevance. Chairman Anglin asked Mr. Daniel to put this in a brief.

Mr. Ruffalo called Mr. Cook back to the stand. Mr. Cook stated that he relied on §12-206u of the current zoning code when making his decision, which is the subject of this hearing. Regarding the current occupants of the property, Mr. Cook confirmed that the only sales tax revenue generated has come from Cassim's Rug Gallery, to which Mr. Daniel objected on the grounds of relevancy. Discussion followed on this point, Chairman Anglin instructed Mr. Ruffalo to move on. Mr. Cook indicated that he also relied on §10-101 regarding non-conformities and continued existence of uses when making his decision. He also explained that there is continuity between non-conforming uses and special uses when terminated in that both have a six month consecutive date for abandonment.

Mr. Ruffalo asked Mr. Cook about public welfare concerns. Mr. Cook explained that one of the intents of the code is to make sure the property does not go into disrepair. Questioning followed indicating that there are risks associated with abandoned property some of which have been brought to Mr. Cook's attention by staff and residents. Upon Mr. Daniels questioning, Mr. Cook stated that under the current Village code a special use is different than a non-conforming use. Mr. Ruffalo and Mr. Daniel debated whether or not Mr. Cook could comment on referenced sections of code. No further questions were addressed to Mr. Cook at this time.

Mr. Ruffalo called Building Commissioner Robb McGinnis to the stand. Mr. McGinnis stated that he has been the Building Commissioner since April 2006 and that concerns about this property have been on his desk since that time on a very regular basis. He is charged to enforce Title 9, which states that if there is a change in occupancy an application must be completed; upon receipt of such application, the Building Department

reviews the use and building and fire inspections are scheduled. He stated that he has seen no such application since January 2007. Further questioning brought to light that a lack of property maintenance has been demonstrated at this address, which results in public safety concerns. Violations consist of improperly terminated conductors, broken windows, open electric, greenhouse panels ready to come down, fence panels falling down, fly dumping and vermin.

Mr. Mike Nelson of 424 N. Monroe was called by Mr. Ruffalo. Mr. Nelson stated that he lives four houses away from the Amlings property and has lived there for about 11 years. He testified that he has observed parked cars in the lot, no activity of the nature of a garden center and the continued deterioration of the site. He stated that several months after Amlings vacated the property a sign went up for leasing information. He explained that he had attended a gathering at the Drake Wyndham last Monday evening hosted by Mr. Horne and was told by Mr. Daniel that if he spoke at this meeting he could expose himself to further litigation. Mr. Daniel clarified his statement to Mr. Nelson saying that he said if Mr. Nelson appeared as a party in this proceeding, he was placing himself in a position where if we lost, we would have to sue Mr. Nelson and if Mr. Cook lost he would sue Mr. Nelson. Mr. Nelson confirmed that that was the statement. Mr. Nelson indicated that he has been active in the Amlings proceedings since the beginning in an effort to see that the property reverts back to residential.

Mr. Daniel asked Chairman Anglin for a five minute recess; recess was taken.

When the meeting resumed, Chairman Anglin instructed Mr. Ruffalo and Mr. Daniel to limit their briefs to ten pages and turn them in within two weeks and that rebuttals be limited to five minutes.

Mr. Daniel redirected questions to Mr. Horne, who stated that six months to a year is a typical time to try to lease a property the size of this one, but it is more challenging in this case because of its limited uses. He also stated that all code violations were addressed at a cost of thousands of dollars. With respect to the neighbors, only Mr. Cauley has spoken to him on these matters. No other neighbor has contacted him with complaints. The parking arrangements with Hinsdale Orthopedics were not facilitated by any Village staff.

Mr. Ruffalo's cross examination of Mr. Horne indicated that no one has operated a garden center since Amlings left and only Cassim's and Christmas tree sales have occurred there since that time. No circulars, advertisements, materials or any other print items were produced to

indicate that this property has been marketed for use as a garden center.

Counsel were permitted five minutes each for closing arguments.

Mr. Daniel spoke to the long relationship MIH, LLC has had with Hinsdale. His client did not forfeit the benefits accruing under Ordinance O87-26. The law says where there might be ambiguity in the zoning code you defer to the free use of property. They are trying to survive based on 70 years of history. This property has always been referred to as R4 special use. Mr. Cook should have looked back to 1966 or checked the building file before making his determination. He stated that notice and hearing are required to revoke a special use permit by law. There has always been a commercial use there; this is a continuity of use. He asked the Board to reverse Mr. Cook's decision.

Mr. Ruffalo asked that Exhibits 1-14 be moved into evidence. Mr. Daniel expressed objections to the relevance of the exhibits and his notification of them. Discussion continued with no resolution, Chairman Anglin recommended Mr. Daniel include this in a brief.

Mr. Ruffalo referred back to the August 5, 2008 letter of Mr. Cook. The letter states that the former Amlings building has been possibly leased to another company. He stated that Mr. Cook relied on §10-103(i)2 because it applies to a nonconforming use and that if the use is discontinued or abandoned for six months you lose the right. The current zoning code's stated purpose is to preserve the residential nature of the town. A non-conforming use is not listed as a special use. They were terminated because six months went by. The code was properly relied upon by Mr. Cook and the property should be R-4

Chairman Anglin closed the hearing and stated the matter will be continued pending receipt of briefs.

Approval of Minutes – Regular Meeting of October 15, 2008

Mr. Saigh moved **Approval of the Minutes from the Regular Meeting of October 15, 2008**. Member Richter seconded the motion. Voice vote taken, all in favor, motion carried.

8. New Business - None

9. Unfinished Business - None

10. Adjournment

With no further business coming before the Zoning Board of Appeals, Member Angelo made a motion to adjourn. Member Callahan seconded the motion. Voice vote taken, all in favor, motion carried.

Chairman Anglin declared the meeting adjourned at 11:08 p.m.

Christine M. Bruton
ZBA Staff Secretary

Approved: _____