

**CAUCUS PRIOR TO STRONGSVILLE BOARD OF ZONING &
BUILDING CODE APPEALS**

**Meeting of
November 7, 2018
7:30 p.m.**

Board of Appeals Members Present: Kenneth Evans, Richard Baldin, John Rusnov, David Houlié, Tom Smeader

Administration: Assistant Law Director Daniel J. Kolick

Building Department Representative: Brian Roenigk

Recording Secretary: Kathy Zamrzla

The Board members discussed the following:

NEW APPLICATIONS

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative

- a) Determination of Jurisdiction to grant a use variance to permit a Motorist Service Use; namely, a convenience store and service station for the sale of fuel in a Local Business Zoning District;
- b) Requesting a use variance from Zoning Code Section 1258.02, which prohibits the proposed use as a convenience store and service station for the sale of fuel in a Local Business Zoning District, to permit such use; property located at the southwest corner of Royalton Road and West 130th Street, PPN 399-01-005.

The Board does not believe this is within their jurisdiction, and so they thought that they should not be making a vote on this request. They also noted that Council has denied it, and this Board can't supersede City Council. The Board mentioned having Mr. Kolick to speak during the meeting to shed more light on this matter as well as listening to the applicant

PUBLIC HEARINGS

2) FRED AND BARBARA LEYBA, OWNERS

Requesting a 1' Height variance from Zoning Code Section 1252.05 (g), which permits a 12' Height and where a 13' Height exists in order to approve an existing Accessory Structure; property located at 19064 Clinton Circle, PPN 399-26-046, zoned R1-75.

The Board indicated no difficulties with this variance request. They mentioned that they received a letter from the HOA. They agreed that it was not the homeowner's fault that this happened. The Board noted that the footprint hadn't increased, and it's tucked back far enough that it won't be visible.

STRONGSVILLE BOARD OF ZONING & BUILDING CODE APPEALS
MINUTES OF MEETING
November 7, 2018

The meeting was called to order at 8:00 PM by the Chairman, Mr. Evans.

Present: Mr. Baldin
Mr. Evans
Mr. Rusnov
Mr. Smeader
Mr. Houlé

Also Present: Mr. Kolick, Assistant Law Director
Mr. Roenigk, Building Department Representative
Ms. Zamrzla, Recording Secretary

Mr. Evans – Good evening ladies and gentlemen. I would like to call this November 7, 2018 meeting of the Strongsville Board of Zoning and Building Code Appeals to order. May we have a roll call please?

ROLL CALL: ALL PRESENT

Mr. Evans – I hereby certify that this meeting has been posted in accordance with Chapter 208 of the Codified Ordinances of the City of Strongsville. We have before us this evening minutes from October 24th, 2018 meeting. If there are no corrections, then we will submit these minutes for the record. If there is anyone in our audience this evening that wishes to speak whether it is to present to the Board or to speak at a public hearing, I ask that you stand now and be sworn in by our Assistant Law Director, along with our Recording Secretary, and our Representative from the Building Department.

Mr. Kolick then stated the oath to those standing and anyone who wished to participate.

NEW APPLICATIONS

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative

- a) Determination of Jurisdiction to grant a use variance to permit a Motorist Service Use; namely, a convenience store and service station for the sale of fuel in a Local Business Zoning District;

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

- b) Requesting a use variance from Zoning Code Section 1258.02, which prohibits the proposed use as a convenience store and service station for the sale of fuel in a Local Business Zoning District, to permit such use; property located at the southwest corner of Royalton Road and West 130th Street, PPN 399-01-005.

Mr. Evans – Our new applications come first and we have one from Petros Family Limited Partnership with Greg Modic as their representative. Please come up to the microphone and give us your name and address for the record.

Mr. Slagter – Good evening, my name is John Slagter, and I'm Council for the applicant. My address is 1375 E. 9th Street, Cleveland, Ohio 44114. I also have with me this evening Greg Modic, a representative also of the applicant.

Mr. Evans – Okay. Thank you Mr. Slagter. Do you want to tell us why you are appearing before us this evening?

Mr. Slagter – Yes, we have submitted to the City of Strongsville an application for a use variance to permit an addition to a convenient store which is actually a permitted use on our property that is zoned Local Business to add fuel pumps which are prohibited under the zoning. We had requested a rezoning to Motorist Services, which was denied. Now we are proceeding to the BZA under the authority in your Charter and under your Code for a use variance.

Mr. Evans – Okay, thank you Mr. Slagter. We talked very briefly in caucus about this. I had read your Exhibit A, and looked at the reasons that we are required to find before granting variances, and in my estimation a use variance is really not something that I felt this Board was empowered to do. In caucus we referred to the fact that we would probably defer to Mr. Kolick, our Assistant Law Director for his insight into this. Mr. Kolick, I will entertain your comments.

Mr. Kolick – Thank you, Mr. Chairman, as you are aware this Board determines its own jurisdiction based on the laws that are both given in the Constitution, our Charter, and our Codified Ordinances. As this Board is aware, you sit as an Administrative body not as a Legislative body. City Council as part of its legislative duties and responsibilities is the body in the City that determines what use district and every parcel in the City is put in to, and also determines what the regulations are applicable to that particular use district. The courts in Ohio have dispositively established that the particular use district into which a parcel is placed, and the establishment of the regulations for that use district is strictly a legislative, and not administrative, decision. I can refer you to a string of cases, but I'll just mention some of the key cases. Donley vs. The City of Fairview Park, Tuber vs. Perkins, Berg vs. The City of Struthers, Flair Corp. vs. The City of Brecksville, Bluestone vs. Mantua Twp., and Shopshire vs. Englewood. In those cases the Courts have established that determining the particular use that is proper on a property and the regulations are strictly legislative decisions. Under The City of Strongsville Charter, namely Article 3, Section

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Kolick continues - 1, all legislative authority is vested in City Council. This Board has no legislative authority whatsoever. Since you have no legislative authority, and since the determination of what properties are put into which particular Zoning district is a legislative decision, you don't have authority or jurisdiction to determine what uses you are going to permit within a Local Business zoning district as requested here. Council is the Body that has the sole authority to make that determination. You can't overrule, and you don't have authority to change City Council's legislative decisions on this or any other property in this City under the guise of a use variance. Frankly this is consistent with how this Board and the City has handled this for the more than 40 years that I've been with the City. This Board has never, ever, granted a use variance. You have never taken jurisdiction over a request for a use variance. In fact, the applicant here itself has recognized that this is in fact a legislative decision. They asked City Council to change the zoning on this property by way of a legislative decision to the very use they are requesting here. So they recognize it's a legislative decision by asking Council to make that change. Council, in its legislative judgment, determined that it was not going to make that change to permit a gas station and convenience store on this particular parcel. In effect, the applicant is asking this Board to sit as an Appellate Board and reverse the legislative decision of this City's Council. You do not have authority to do that in my opinion as a Board so therefore I do not believe you have jurisdiction to consider what they are asking you here to do. My advice to the Board is to determine that you don't have jurisdiction here this evening, thank you.

Mr. Evans – Thank you Mr. Kolick. Mr. Slagter I'll let you respond and I'll ask you to remember that we are not here for the next three days or anything so if you could keep it in that framework.

Mr. Slagter – Thank you very much, and I appreciate your time this evening. I have a lot of respect for Mr. Kolick, but he's wrong on this issue. If the City believes that they don't have authority or jurisdiction here for a use variance under your Charter and your Code, it's incorrect. Let me explain why. First of all, I recognize that we are not here for a legislative decision, just so you know that, and I acknowledge that. The Board of Zoning Appeals is not granted legislative power to adopt Zoning for particular pieces of property, specifically Zoning Amendments that are under Section 1244 of your Code. I understand that, and we recognize that. The request for a Zoning Amendment or a change to your Zoning is a legislative act that goes through Planning Commission, and ultimately goes to Council for review and approval. Council has, as a legislative Body, wide discretion in determining whether or not to adopt changes to Zoning. It could be for a single parcel or for groups of parcels or otherwise. That's simply what they have the right to do. We're not here for that. The fact that we asked for rezoning does not in any way preclude the right of a property owner to ask for a use variance. In fact, under Supreme Court precedent in Ohio those two concepts: rezoning and variances are clearly recognized as different concepts and principles that I'm sure your counsel would agree with me on that point. We specifically asked for under Section 1248 of your Code which is authorized also under Section 6 of your Charter for a variance. So now what's happening is that there is an interpretation that you have not been granted authority or somehow there's a prohibition against this Body granting use variances. By

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Slagter continues - the way, Ohio law allows municipalities to limit the power. They can actually say, we won't grant any variances, or they could select whether they want to grant use variances or area variances. Area variances are probably what you'd commonly work with here like changing setbacks, sizes of fences or otherwise. The typical standard for granting area variances comes under the case Duncan vs. Middlefield. It's called practical difficulties as a standard. Your Charter talks about practical difficulties, but in Section 1248 it talks about what is known as unnecessary hardships. That is the typical standard used for area variances under the law. I've gone a little a field on this, but I just wanted to explain that the law says that the municipalities and especially like Strongsville have home rule authority if they have adopted a Charter to potentially restrict or not grant use variances. They don't have to grant any variances, but the fact of the matter is that nowhere in Strongsville's Charter or Code is there a prohibition or restriction against the types of variances that are permitted to be granted. I would agree with Mr. Kolick that if your Charter or your Code said that use variances are not permitted to be granted, but it doesn't. It simply talks about the ability to grant variances. Now your ability to grant variances is not unrestricted. Mr. Kolick's opinion that you are going to change the use would be correct if there were no standards in your Code to grant the variance. Mr. Evans as you talked about earlier, you have four specific standards that are applicable when a variance is to be granted. Contrary to what was stated in caucus by you, we specifically identified and walked through those standards and indicted that this variance is proper because of the unique characteristics of this property. In addition to the other four standards that are required, we walked through them. Consistently with your comprehensive plan, not a substantial detriment to the property or adjacent properties; the listing that was there those are not unusual standards that there is economic infeasibility or otherwise as it relates to it. So if your Code did not provide those standards and you were allowed to grant without any restriction, variances in use or otherwise, and I would agree that there has been an improper delegation of legislative authority to you. That's not the case here. In this case you can grant variances and again there's no restriction on use or area, if we meet those four standards. We have a right and the ability to at least come before you to try and prove our case. What's different from a variance hearing than a legislative hearing? One is the individuals that appear are under Oath. It's a quasi-judicial proceeding. People are sworn in. The evidence is presented. There is a right to cross-examine, which there is no right to do that during a legislative hearing, we couldn't even respond to some of the objections that some of the residents had. That's why even though they appear to be the same, the fact of the matter is that they are different vehicles that can accomplish a similar end, but it doesn't mean they are the same. This is not just me coming here and giving you my opinion of the law. I have a copy here, and this is such a basic proposition, and I was actually surprised that the City took this position, but I do have copies of it for you if you want it. I don't know if you are familiar with it, it's the Ohio Planning Land Use Cite. I have the cases that are stated in here that talk about this exact proposition. Specifically they talk about use variances, and the standards that are applicable. If I could just have a moment to run through this for you, and then I'm going to walk through your Code, just so you can see exactly what I mean, and through the case law on this issue. Specifically there is a discussion about what they call the special case of use variances. It says that there is some language that

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Slagter continues - could be interpreted in an ambiguous fashion. The Ohio Supreme Court decisions can only be read as upholding the constitutionality of use variances so there was some discussion about whether use variances are even legal because they allow something to be used that is inconsistent with the Zoning. Then it goes on to read that the Ohio Supreme Court held that there is authorization and Revised Code Section 713.11 for municipal BZAs to grant variances encompassing both area and use variances. In discussing the grant of power to municipalities pursuant to Revised Code 713.11, the Court stated that this broad authorization in 713.11 to grant variances encompasses both use or area and use variances. Examples of a use variance is a commercial use in a residential district, the Court also explicitly confirmed that the grant of use variances is not an impermissible use of legislative power. Just what your counsel indicated that if you were granting a use variance, it would be an impermissible grant of legislative power. The reason it is not is that you have the four standards that you follow. That's the key case. The case that talks about that is the Shoemaker case which I'll provide you. Second of all, there's a discussion about even when, and I have the case that has it, where Council holds onto the power to finally approve the use variance like they can here; they have the option to. When they are doing that they are no longer wearing their legislative hat. They are now acting in a quasi-judicial administrative capacity just like you are. Why is that different? Why is that an issue? One, decisions, administrative, are not subject to referendum. So just like certain actions by Council can be subject to referendum because they are legislative. There's broad discretion, and they can do what the voters want them to do. Once you get into an administrative action, Council is not free at their whim to vote a certain way because they feel bad for the neighbor or because three or four people objected or in our case, 12 of the family members did. They cannot do that. In fact, there's case law on that point. They have to follow the standards and then ultimately after either they decide, we have the right to appeal to a Court of Common Pleas under 2506 of the Revised Code. The Court looks at whether the decision was supported by substantial, reliable, and probative evidence. Evidence, not opinions of neighbors or objections or I don't want it. That's what legislators do, and that's why they are voted into office to represent a form of government, however here we are dealing with property rights. Variances, which again don't have to be authorized by Communities, but when they are, you have a right to them. Why do we have variances? Specifically they are a relief valve for Constitutional challenges of your Zoning. Zoning has to be comprehensive and it has to cover the entire community, you have to treat similar properties similarly, and there's different methods. The problem with Zoning is that since you do it in a blanket fashion, it doesn't make sense everywhere, not on every particular parcel. If you start treating every parcel differently, every single one, then you get into a situation where it's called Spot Zoning or otherwise if they are treated in an arbitrary or inappropriate manner. So what happens here is that even though we believed that this was a proper situation, what we thought we had the support of the legislature, Council had the wisdom to do what they thought was a good decision. They decided not to. Well we also have a right because of the unique characteristics of this property to pursue before you a request for a variance. Specifically what is the authorizing provisions in your Code that would allow it? I'll just walk through them quickly here. You would start the analysis with, and I'll mark this as Exhibit A.

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Evans – We already have an Exhibit A that you furnished during the application process.

Mr. Slagter – No, this is for this hearing.

Mr. Evans – Okay.

Mr. Slagter – I have copies here.

Mr. Evans – Okay.

Mr. Slagter – I'll hand those to you.

Mr. Evans – To our Secretary, yes. Thank you.

Mr. Slagter – You can mark those Exhibit A.

Mr. Evans – Okay.

Mr. Slagter – All Section 6 is, is the copy of your Charter form of government. It provides authority and power in granting variances. It says under powers, it shall be the duty of the Board of Zoning Appeals to hear and decide appeals made for exceptions to and variations in Zoning Ordinances of the Municipality in conformity with the purpose and intent thereof, and to hear and decide all appeals made for exceptions to and variations in the application of the Zoning Ordinance, and it goes on. Nowhere does it say that your restricted in the types of variances, it doesn't talk about area. It doesn't talk about use. Specifically, when, and I actually called Mr. Kolick to find out where our application was. I asked that specific question of him, and Mr. Kolick you can confirm, does your Charter say that you don't have authority? Does it specifically say you don't have the authority to grant use variances? It doesn't speak to it. It just says variances. As I cited before, the same language that is in your Charter is in your Section 713.11 of the Revised Code which the Supreme Court of Ohio has interpreted in the Shoemaker vs. First National Bank of Ottawa case, that the authority to grant variances covers both use and area variances. So I would agree with Mr. Kolick if anywhere in here it said you can't grant use variances or if it just said only area variances or otherwise, but nowhere does it say it. Okay, so that's the first thing, that your Charter doesn't say there are any restriction on it. That's Exhibit A. Secondly, is you'd look to definitions. What's a variance? Sometimes your Code may define that. I'll mark this as Exhibit B. So I looked for definitions of variances which there are none in your Code. Actually there is one. It's under Section 19. Here you go. This is in Section 1240.08. Under that it says interpretation and there are a bunch of definitions. The only one that was relevant was the variance definition which is 19. It says that variance means a modification of the Zoning regulation, permitted in instances where a literal application of the provision of Zoning Code would result in an unnecessary hardship as a result of some peculiar or unique condition or circumstance

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Slagter continues - pertaining only to the Zoning lot in question in accordance with procedures and standards set forth in 1248 of your Code. So again, it says you can grant variances if there is an unnecessary hardship and it has to be particular to your property. I completely agree with that. It does not limit and say that variances are only area variances or variances are not use variances. It does not say that. So you have to kind of walk through this process as you're going through it legally, as you're determining your jurisdiction. I do agree that you have the authority to determine your jurisdiction, but it's based on the jurisdiction and authority that has been granted to you under the Charter and also under your Code. Next is Section 1244. I'll mark this as Exhibit C. I'm just providing this for the record, and it's just to show, and I'm sure you're aware of it, but the process for a Zoning Amendment and again the fact that it goes to a different bodies; it goes to Planning Commission for recommendation, it goes to Council for ultimate determination, and it could be subject but I'm not sure whether there's some referendum here or not. In some communities there are, but again legislative action is different. It doesn't have standards set forth for review like you do with granting variances or otherwise. So again we're not here under 1244. Our application is under 1248. So then we get to the relevant Section 1248; which we'll mark as Exhibit D. I also have Exhibit E. I'm just going to mark this as D, I'm not going to go to E just because I noticed we're covered here. This is D, which I know you're familiar with. It comes with your application. What's relevant is that first of all there is a cross-reference to Section 713.11, that Municipal Code section of the Revised Code that talks about the authority for Municipalities to grant variances including both use and area variances. That same Section 713.11 is cited in your Code as a cross-reference.

Mr. Kolick – That's not cited in the Code Mr. Slagter. As you well know, that's a publisher's note that goes with the Code. So don't tell the Commission it's sited in the Code because it's not.

Mr. Slagter – Well this cross-reference comes from...

Mr. Kolick – The publisher's notes from Justinian when they do it, this is not part of the Chapter, it was never part of the Ordinance that was adopted. You're familiar with these Codes the same as I am. You understand that's a publisher's note. That has nothing to do with the law that was enacted by City Council so please don't misrepresent it to the Board here.

Mr. Slagter – Mr. Kolick, I take issue with the fact that I'd be misrepresenting anything to this Board.

Mr. Kolick – Well you are.

Mr. Slagter – I'll stand corrected if that is the case, but I was not aware of that. Just so you know, I was not aware of that.

Mr. Kolick – Well, you're aware of it now.

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Slagter – I think what is relevant, I did pull Section 713.11, and I have a copy of that too. You'll see that all 713.11 is the grant, and we'll call this Exhibit E, this is the statutory grant of powers so Municipalities to grant variances. As I indicated, Ohio Supreme Court case law, the Shoemaker case, has said that this language covers both use and area variances. All it says in 713.11 of the Revised Code, is that the legislative authority of a Municipal corporation may create an Administrative Board to administer the details of the application of regulations under 713.06 to 713.12 of such Revised Code, and may delegate to such a Board in accordance with general rules to be set forth in the Districting Ordinances and Regulations the power to hear and determine appeals from refusals of building permits by Building Commissioners or Officers, which is a power that you do have. That's an appeal. To permit exceptions to and variations from district regulations in the classes of cases or situations specified in the regulations. That's all it says as it relates to variances. It's that simple. It doesn't talk about use, it doesn't talk about area, but the Court has interpreted that to mean the ability to grant both use and area variances. That's the Shoemaker case I was just talking about. This is a very basic and fundamental principal that is understood in land use law. I've been practicing in this area for 25 years. I have seen communities that specifically prohibit use variances. I've seen communities that don't allow any variances. Under your Code, and based on my experience in the case law, you are permitted to grant use variances; not because you feel like it, but if we comply with the standards that are set forth in your Code, which have been defined as unnecessary hardship and modified by you. So specifically our application was under Section 1248 and we are asking for the ability to present to you our case, and establish that under Section 1248, I may be missing a page here, no sorry about that. Section 1248.08 says to come in and present a request for a variance and prove that we are entitled to one. Specifically, if you look at power of the Board again now under Section 1248.03, nowhere does it say that you have no authority to grant a use variance. Nowhere does it talk or separate out a variance. It just generally talks about it. It talks about your ability to hear and decide upon applications for variations from the terms provided in the Code, subject to the standards set forth in 1248. The terms of the Code include the Zoning that our property has on it, which is the Local Business Zoning and the restrictions. So nowhere does it say only area restrictions in your Code or otherwise. It says in your Code, you clearly have the authority to do what we're asking for here. Again, not unlimited, we would have to prove that we meet the requirements that are set forth in Sections 1248.08, (a), (b), (c), and (d). We believe that we do. We set forth in our narrative the reasons for that, I won't repeat it here because it is part of the record. I do want to present to this Board though the case law that I had cited. There was a string cite that Mr. Kolick cited, basically saying that you're not allowed to take legislative action, no objection here, I completely agree. I'm not asking you for that. I'm asking for a variance under Section 1248.08 of your Code. Specifically the Shoemaker case I'll submit to you. You can look specifically at the language, and everything I've indicated. It's consistent with the fact that you do have the authority to grant use variances under the language in your Code. That's a Supreme Court case. There's also a case Hodge vs. The City of Columbus. I'll just read a section of it for you. It says that the test for determining whether an action of a legislative body is legislative or administrative is whether the action taken is when enacting a Law, Ordinance, or Regulation or executing or administering a

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Slagter continues - Law, Ordinance or Regulation, thus the power to zone or rezone via the passage of an Amendment or a zoning Ordinance is clearly a legislative function. You discussed in caucus, didn't Council do this? They actually were legislating and determining whether to grant an Amendment or not. That's a completely different issue. The fact that we ask for a rezoning doesn't prohibit us from asking for a use variance, and nowhere in your Code does it say that. The case goes on to say conversely the grants were denial of variances based on unnecessary hardship, which is your standard at least cited in the Charter, or practically difficulties, or administrative in nature even when the decision is made by City Council. So your Charter has this additional step that a lot of communities don't have where if we get a variance from you we have to go to City Council. Of course, I know that based on their decision on the rezoning, I have concerns about it. But again, now we have a right to cross-examine, present testimony under oath, and also focus on the relevant issues of whether we meet the criteria; those four standards in your Code to grant a use variance. So I'll provide this Hodge case to you also. Based on the case law, clearly, and hopefully now at least a clarification of what we're asking for, we know what we want, we believe that you do have authority and should grant us at least the right to come before you and present our case. I think that it's only fair and proper. The Ohio Supreme Court recently came out with a case that talked about, it was a Cleveland Clinic Board of Zoning Appeals case. It's cited as 141 Ohio State 3d 318. I thought what was relevant in it, and this was where the City of Fairview Park didn't want the Cleveland Clinic to have a helicopter pad, and the Cleveland Clinic was trying to claim that it was an accessory use. It made its way all to the Supreme Court, and what is relevant is that it talks about the fact that when you are dealing with Zoning Ordinances, restrictions on property, that they are a derogation of common law, and they deprive the property owner of uses, and therefore they should be construed in favor of the property owner, and that we have long held that restrictions imposed on the use of private property via Ordinance, Resolution, and Statute must be strictly construed and the scope of the restrictions cannot be extended to include limitations not clearly prescribed. The point is that here, with all due respect to Mr. Kolick, he's reading in language that either variances are permitted, but only area variances, that's the interpretation; or somehow use variances are prohibited. Nowhere, and we walked through your Charter. I know it was painful in your Code, but nowhere in there does it say that this is not permitted. Therefore you cannot read a restriction in that doesn't exist. All we're asking for is our right to due process. Our right to be heard. I think a property owner that has owned this property for 20 years has a right to do that. We ask that you recognize that you have jurisdiction to review this and give us an opportunity. Thank you.

Mr. Kolick – Mr. Chairman, if I may, I need to respond to a couple of these items. One, I appreciate that Mr. Slagter may be practicing for 25 years in this area. I've been practicing for 43 before many, many communities. So I'm also well aware of the law in the area. This whole issue under Revised Code 713.11 and the Shoemaker case decided under this isn't even applicable. Those are applicable to statutory cities. We are a Charter Municipality. We're not bound by Revised Code 713.11. So that whole line of argument isn't even proper. Next I'd point that Council also gives an opportunity and a due process opportunity during the amendment process as they did to the

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Kolick continues - applicant here. They are required to set public hearings, they are required to refer it to the Planning Commission, the property owner had the opportunity to present their case before the Planning Commission, and they had the opportunity to present their case before the City Council, I don't disagree they didn't have the right to cross-examine witnesses, but they certainly had the right to present their case. Likewise, Council is also bound by standards in determining whether or not to change a zoning regulation. We have constitutional standards, namely their decision has to be related to the health, safety, and welfare of the community. They cannot require a use that isn't economically viable for that property. So it isn't like Council doesn't have standards that they use when looking at the legislation. I think one of the key things where you can really see what they are asking you is legislative and not administrative is this, it is not only the use, but also the regulations? They want to put up a canopy. How far does that have to be from the right-of-way, where do the driveways have to be located? Local Business district is a whole lot different than a Motorist Service District. That's why Council has the authority to do these things because they legislate. They say that the driveways have to be a certain distance apart and located at certain areas. They say that the pumps have to be so far from the right-of-way. They say the number of parking spaces that have to be there. You can't just pull this out of the air and say that we're going to permit this use and now we're going to make up all our own regulations to what they have to be. That's why you have a difference between the legislative end of it and the end of it where you can grant a variance. Again, nothing here has changed my opinion on anything. These items involving 713.11 aren't even applicable, those are for statutory cities. I think it's clear under our Charter. I think it's clear as to how this Board and the City has interpreted the Charter and the Ordinances which the courts will take into effect that historically we do not permit use variances or the granting of use variances or we wouldn't even need a City Council. They could come in here and say under residential district we're going to plop an industrial building down here. If you had the grant a use variance, allegedly you'd have the right to grant that. It isn't the way the Zoning Ordinance is set up, it isn't the way the Charter is set up, and it isn't the way the authority is granted between the legislative body and the administrative bodies in this City. Whatever is said in 713.11, that's not even applicable. We're under Article 18 Section 3 of the constitution, we have our power under Home Rule. Again, I think it's very clear you don't have jurisdiction to grant this, and my suggestion is that you need to make your determination based on what you hear, and if you determine under (a) you don't have jurisdiction to grant it, then you don't even proceed to (b). Thank you.

Mr. Slagter – May I respond?

Mr. Evans – Yes.

Mr. Slagter – First of all, the reference to 713.11 which Mr. Kolick is harping on, let me explain. The language I cited in 713.11 is statutory language for statutory municipalities. You as a home rule entity have the right to create your own rules and regulations. The reason I cited to you 713.11, is that the courts have interpreted the language in 713; it says that a legislative authority has the

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Slagter continues - ability to create administrative boards and give them the power to permit exceptions to, and variations from district regulations. That's all it says. Okay? The Supreme Court has interpreted that statutory grant of authority to a board to permit exceptions to and variations from district regulations, is a grant of the ability to do use variances and area variances. So why is that relevant here? Mr. Kolick says it's not relevant at all, we're not a statutory City board. Don't even listen to Mr. Slagter. It's relevant because when you look at your Charter, which the statutory grant of authority is by the Revised Code, right? As a home-rule entity you get to create your own rules. They are right here. It says, it shall be the duty, not an option, but a duty of the Board of Zoning Appeals to hear and decide appeals made from exceptions to and variations in the Zoning Ordinance. What does that mean? Let's look at the Supreme Court case law that interprets what that language means. It means both use and area variances. If you don't believe me, then I'd say to look at the Supreme Court case law that I handed you. So what I'm saying is that your Charter has the same language as the Revised Code that's been interpreted to mean both use and area variances. I think that deals with issue one. Issue two, Mr. Kolick, who was not present during our Council hearings, said that they didn't have a right to cross-examine the residents, but they had a right to present their case or otherwise. Mr. Modic you can confirm if I'm wrong, when you tried to respond to the residents, respond not cross-examine, but respond to the objections of the residents and were told, what Mr. Modic? You're under oath, by the way.

Mr. Modic – Greg Modic, 17198 Goldrush Drive, Strongsville, Ohio. I think what Mr. Slagter is referring to is, Bill Ponstingle specifically asked me what the screening would be should Council approve it. He sat right here in that chair right there, Mr. Jamison said I cannot respond.

Mr. Slagter – So we weren't permitted to respond to that, we also actually wanted to get up to respond to some of the complaints or objections that were heard, and they said no. You say your case, and that's it. That's different than a quasi-judicial administrative proceeding. Next Mr. Kolick says well why even have a Council? We could just stick industrial uses right in the middle of a residential area. I'm not saying that. I'm saying that your Code can be modified and exceptions can be granted if and only if we meet the standards that are in 1148.08 of your Code. We've got to prove that. If we prove that, and it's proper to put a different use in an area, then yes. We should be permitted to do that, but not because it was a whim or a legislative action, but because your Code allows for a modification under those circumstances. Then finally, the comment of Mr. Kolick that it's Council is not unrestricted in their ability in modifying or changing zoning. That's true. They have to follow the law; the Constitution. If you read the article in Mr. Modic's response, our opinion is that your Council failed to. That their action was illegal and improper, and our redress for that is to follow a lawsuit against the City, and we have to follow it with a Declaratory Judgement Action under 2721 of the Revised Code; which is a different action than an appeal under a use variance because that's 2506 of the Code. We believe what Council did was wrong. We believe it was wrong for a multitude of reasons, which aren't necessarily relevant here because that's a whole different issue. So the fact that they did what they did doesn't mean it was right. They did what they did, I don't know why, they never explained it. There were

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Slagter continues - no findings no decision. There was nothing. There was no feedback. There wasn't Conclusions of Law and Findings of Fact which I assume you present once you make your decision. So again, don't be misled here as to your power or your authority. I think it's crystal clear. I think the case has been made, and I think we have the right to do it. Don't force us to follow a lawsuit on something so basic, the right to be heard by this body. I mean if you disagree with it, then we have a right to seek redress. The other thing is that as an applicant, if I don't come in here and request a use variance, then there could be a claim when we do bring an action against the City for turning down the zoning or the zoning to be illegal. The defense, and Mr. Kolick knows this is what, failure to exhaust your administrative remedies. If you look at the reasons for variances under your Code, one of them is to avoid Constitutional challenges to your zoning. That's why we're here. This is a relief valve to allow us to either get relief or we go to the Court. I want to make sure that we have exhausted our remedies. Thank you.

Mr. Evans – Thank you Mr. Slagter. I'm not sure that the Constitutionality is an issue that we deal with at this Board, you may feel that it is, and that's fine. Our objective here is to work within the four reason that we have and the power that is given to us to hear and make determinations about variances. I think there are probably a couple things that we could do. Mr. Kolick, is our expert on this side of the bench so at least due consideration has to be given to the opinions that he's made. I recognize that you as well have the opportunity to make the case and be heard by this Board, we don't deny that. Whether or not it fits in our jurisdiction, my concern as a Chair of this Commission is that if we were to grant a use variance, which we've never done before, but if we did that we would be empowering you to do things in the Zoning Code that have no restrictions because you would no longer be held by the standards that the Zoning Code for Local Business would require certain things to be in conformance with that. We'd have no power to enforce that, require that, or anything else. By granting a use variance we go outside of what that is, and as a Chairperson for this Board, I would see that as a gross injustice to the reason that this Board is empowered. That may be that Courts will have to determine that as we go down the road or whatever else. Hearing your case tonight, I have no objection to doing that, but I'm going to have to defer to the fact that we would have to have Council consider the information that you have presented tonight as to whether or not it is legitimate. For my purposes, it means that I can't see that we could grant a use variance that in this situation would allow you to do something that would be outside of what the Code requires. By use, you could therefore change things and go around the Code for that Motorist Service use in a different zoning district, and I don't think that we could allow that in good conscience for public health and safety and everything else. Whether or not that is the case or not, again I'd have to defer to Mr. Kolick to take a look at that. So I think that there are two options, we could either post this for public hearing at the next meeting or we could defer this now and have counsel for the City, take a look at it, and determine what you've presented and whether or not it is within our purview to grant a use variance. I personally don't think it is because we've never done that. The reason is like I say that we can't allow things to take place that go around the Code for safety and the welfare of the people. So we can post it for public hearing, and then you'd have the opportunity to have the presentation by Mr. Kolick at public

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Evans continues - hearing as well. You may want to defer and wait until we hear that from the Law Department telling us whether or not we really do, and whether or not the information you have presented tonight is germane. Which some of it, at least, I'm sure is, but I don't know if in totality it changes things. So those are the two options I see, Mr. Kolick, I would assume those were what we can do.

Mr. Kolick – I don't think I need any additional time to look at this. I'm well familiar with the law that was cited here by the applicant's attorney, as he well knows, because we've dealt before. Nothing here has changed my mind as to what this Board's authority and jurisdiction is under the Charter for the reasons I enunciated already. So I think it would be appropriate for the Board to determine whether or not it has jurisdiction based on what is heard here this evening to even make the determination because we don't even get into the standards or anything on the merits if this Board determines that it does not have jurisdiction to hear it. So before when Mr. Slagter called, I said that you don't need to come prepared to address the standards or anything here this evening because the Board first has to determine their jurisdiction. If they did determine for some reason that they had jurisdiction, then they would move it to another meeting to hear it on the merits, but again it's clear to me in my opinion as a Board you don't have jurisdiction to hear this. I don't need any more time to look over what he has presented because he hasn't presented anything that I'm not already familiar with in the Law. Thank you.

Mr. Rusnov – Mr. Kolick, in other words, in plain English, we could make a motion to vote yes or no that we have or have no jurisdiction here.

Mr. Kolick – That is correct. The motion would be, if you voted yes to item (a), you're determining you do have jurisdiction. If you vote no on item (a), you are determining you do not have jurisdiction.

Mr. Rusnov – Can I make that motion?

Mr. Kolick – You can.

Mr. Baldin – Do we need any further discussion on this or have we heard enough?

Mr. Rusnov – Heard enough.

Mr. Evans – If anybody wants to say anything...

Mr. Kolick – You need a second.

Mr. Evans – ...you certainly can.

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Kolick – You need a second, then you can open it to discussion.

Mr. Evans – Yes, Okay.

Mr. Rusnov – They also have to second it.

Mr. Smeader – Second.

Mr. Evans – Thank you Mr. Smeader for the second, then we can discuss. Does anybody have anything they need to ask?

Mr. Baldin – Can I ask one thing? The gentleman said that at the meeting in front of Council they were not allowed to respond? That sort of leaves a big question mark in my mind.

Mr. Kolick – They were given an opportunity at the public hearing to make any statement that they wanted to make. I think what he is talking about is they were not given an opportunity to cross-examine or respond to specific questions that came from people in the audience as opposed to people on the Council. They had an opportunity to present it before the Planning Commission, I was in attendance at those meetings as well as the Planning Commission. So I don't disagree that they were not given an opportunity to cross-examine at the public hearing, but they certainly would have been given an opportunity to address City Council. There are three readings. They could have spoken at any of those readings. They can always address City Council, not just at the public hearing. They did have the right to address City Council, City Council has a public audience participation section at every single meeting they have. They had an opportunity to address City Council at any of those meetings in addition to the public hearing. It's just that at the public hearing there are notices that go out to people to be able to comment on it as well. So no, they would have been given an opportunity to present their case.

Mr. Slagter – May I respond?

Mr. Evans – I'll make an exception.

Mr. Slagter – Because the comment was directed to us.

Mr. Baldin – Yes.

Mr. Slagter – Correct, if I may.

Mr. Evans – I'm allowing you to.

1) PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd

Mr. Slagter – Okay. This is how it works at Council. You speak, the people in favor speak, then once you're done you're done. People against speak, and once you're done you're done. People that are against may make claims like this is going to cause all kinds of environmental issues for me, it's going to cause flooding, it's going to do this, it's going to do that. All that, you're going to hear it. We have no right to respond to that, and present evidence contrary to it or otherwise, as we would before this body. I think that answers your question. The due process is different and that's because that's a legislative action. This is administrative, it's quasi-judicial; you have certain rights. Not only the right to cross-examine, but the right to present evidence on these issues. Again, it's a different proceeding.

Mr. Evans – Mr. Slagter, even though you identified it as a different procedure, in my mind, the ability for us to grant a service station to operate with pumping gas and that type of thing in a Local Business zoning district is not something I think we're empowered to do. We will go ahead and move forward with the vote and see where we get to with that. That item (a) will determine whether or not this Board feels it has the jurisdiction to address this.

Mr. Slagter – If it's a concern by this body about it, because there is case law on the issue of, and when you grant a use variance like you're concerned about, does that mean you can do anything under the sun and all that? They are permitted to, and there are conditions many times that are put on it. We actually submitted a specific plan that we were going to build here.

Mr. Evans – Understood.

Mr. Slagter – So that would be...

Mr. Evans – Our second agenda item tonight is somebody who submitted a plan and then did something different and we all lose sleep over that because we've all been in the position of granting variances where something hasn't gone the way that we thought. We've learned the hard way to examine things a little bit tougher and make sure that again we're looking at all perspectives when we're making our decisions.

Mr. Slagter – So again, if this was granted it would be, I assume, based on our plans submitted if there are variations or otherwise. I mean that's how they are typically done. I've probably handled 500-1000 variance hearings. That's how they are typically done including use variance hearings.

Mr. Evans – Okay. So we have a motion and a second. Are there any other questions that we need to address?

Mr. Rusnov – Let's clarify again, a no vote means that we do not have jurisdiction, and a yes vote would indicate that we do have the jurisdiction.

1) **PETROS FAMILY LIMITED PARTNERSHIP/Greg Modic, Representative, Cont'd**

Mr. Kolick – That's correct.

Mr. Evans – We are only doing (a) on the first item right now. Just proceed from there.

Mr. Rusnov – Okay.

Mr. Evans – And then may we have a roll call please?

ROLL CALL:

ALL NAYES

MOTION DENIED

Mr. Evans – So at that point, again it's based on our interpretation, and as a Board I believe that we are empowered to make that. I appreciate the fact that you've gone to great pains to educate us, and if we are wrong, I'm assuming that would be brought to our attention eventually. At this point, this Board then has voted that we do not accept that it is within our jurisdiction to make any further judgements on the application that you have made. So that application will not move forward. Alright? Okay, thank you.

PUBLIC HEARINGS

2) **FRED AND BARBARA LEYBA, OWNERS**

Requesting a 1' Height variance from Zoning Code Section 1252.05 (g), which permits a 12' Height and where a 13' Height exists in order to approve an existing Accessory Structure; property located at 19064 Clinton Circle, PPN 399-26-046, zoned R1-75.

Mr. Evans – Item number two on the agenda in public hearings is Fred and Barbara Leyba. Mr. Hall if you would come forward. We'll need your name and address for the record please.

Mr. Hall – My name is Gary Hall. My address is 16130 Lake Forest Drive, Strongsville, Ohio.

Mr. Evans – Thank you, Mr. Hall. You're here requesting on behalf of the owner, the one foot height variance. We indicated at the last meeting the reason that this took place is because the roof was switched on the building. The HOA has deferred their authority to us in approving. That if we say it's okay, then it is. It was sent out for public hearing, I do not see anyone here in the audience, but we will go through the public hearing process. Is there anything else that you need to tell us in advance to that?

Mr. Hall – No, other than that this was not a deliberate act to get away with something. I made a terrible mistake, it's a learning experience. You'd think I'd be old enough, and would have learned enough by now, but it was in an effort to please the homeowner. I have to learn to be more of an online person, and I heard someone say in there earlier that not old people are. I am an old people.

2) **FRED AND BARBARA LEYBA, OWNERS, Cont'd**

Mr. Hall continues - I do need to learn to be online. When I went into the Building Department I asked if they had anything like this, and I held up the permit I had for the deck. I said, do you have anything like this for a shed, and I was told no. When I got the permit, I looked at the description of what was allowed and what wasn't and that's not in there, but I did make a mistake by not going online. I should have asked more questions. This was not deliberate. It was a mistake.

Mr. Evans – Are there any questions for Mr. Hall or any observations that anyone needs to make? Okay. This is a public hearing. I'll ask if there is anyone here this evening who would like to speak for the granting of this variance? Is there anyone here who would like to speak against the granting of the variance? Hearing none and seeing none, I will declare the public hearing closed and will now entertain a motion.

Mr. Baldin – I make a motion to approve a request for a 1' Height variance from Zoning Code Section 1252.05 (g), which permits a 12' Height and where a 13' Height exists in order to approve an existing Accessory Structure; property located at 19064 Clinton Circle, PPN 399-26-046, zoned R1-75.

Mr. Houlé – Second.

Mr. Evans – We have a motion and a second, may I have a roll call please?

ROLL CALL: ALL AYES MOTION PASSED

Mr. Evans – I'm assuming that when you were in caucus you heard the suggestion that you be banned from the City for perpetuity...that was an effort at comedy from one of our members, but I think you get the general gist of that.

Mr. Rusnov – Esteemed member.

Mr. Kolick – For the applicant, please be aware that almost anything you build, if it requires a permit, it's going to have restrictions. Height, setback, distance, size, number of square feet, etc., so understand that going forward. So if you come in with anything, make sure you give them everything on that plan including the size, the height, the setbacks, and all that because almost everything does have restrictions, okay?

Mr. Evans – When you make changes to please the consumer, you need to be aware that you have to come back in to make sure that it doesn't change things.

Mr. Rusnov – One last thing. We are fully aware that you did this as an honest mistake, and that was considered by all members.

2) **FRED AND BARBARA LEYBA, OWNERS, Cont'd**

Mr. Evans – You get one bite out of the apple.

Ms. Zamrzla – Mr. Hall, the Secretaries that you would have addressed are all familiar with the hand out for a shed. I'm concerned that you're saying that you were told there was nothing that we could give you that spelled out that you'd be limited to 12' by 16'; no higher than 12' high for a lot less than 34,000 SF. You weren't given anything like that?

Mr. Hall – I wasn't, and believe me, it isn't my intention to get anyone into trouble. I brought that up just to let you know that when I went into this I really felt that there was nothing available. That was on my mind. The two ladies that were sitting there, I basically asked if they had something like this, and they said no we don't.

Ms. Zamrzla – Okay. Thank you.

Mr. Hall – There was another contractor sitting there, and he said to me that he usually just puts some stone down and builds it on the stone. So I handed in my application permit, and on I went.

Ms. Zamrzla – Thank you.

Mr. Hall – Please don't get anyone in trouble.

Mr. Evans – We're always looking for ways to improve and make sure that we don't invite people here because we don't need people coming here, there's enough that we don't have to invite people. Okay, so the variance has been approved. There is a 20 day waiting period during which time Council may review our decision. You will get a notice from the Building Department when that time has passed. Then you'll be all set.

Mr. Hall – Thank you so much for your time. I appreciate it.

Mr. Evans – Okay, thank you. Is there any other business to come before the Board?

Mr. Kolick – I suppose you want Findings of Facts and Conclusions of Law on anything denied this evening, do you not?

Mr. Evans – No, I wouldn't think that we want that, do you guys think that we want that? No. I didn't think so. Yes, we'll ask for Findings of Facts and Conclusions of Law please.

Mr. Kolick – Alright, very good.

Mr. Evans – With that, we will stand adjourned.

Signature on File
Mr. Evans, Chairman

Signature on File
Kathryn A. Zamrzla, Sec'y

Nov. 20, 2018
Approval Date