

**TOWNSHIP OF O'HARA
ZONING HEARING BOARD
REGULAR MEETING MINUTES
September 8, 2008**

MEETING was called to order at 7:30 P.M. by, Mr. Russell Orkin, Chairman in the Township of O'Hara Municipal Building, 325 Fox Chapel Road, Pittsburgh, PA 15238. On roll call, Mr. Russell Orkin, Chairman, Mr. Robert Willison, Vice Chairman and Mr. Christopher Klein, Alternate. Robert Goehring, Zoning Hearing Board Solicitor was also present. Scott Chermak, Zoning Officer was present on behalf of the Township. Forty interested parties were also in attendance. All persons wishing to give testimony during the hearing were sworn in.

ZONING HEARING BOARD CASE NO. 1088 Was heard by the Board regarding a request from Ms. Cindy Harris and Mr. Richard Heath, 53 Fox Pointe Drive, Pittsburgh, PA 15238. The applicant proposed the request the following action:

- 1) Appeal from municipal action, letter from Zoning Officer dated January 26, 2006.
- 2) Interpretation of Zoning Ordinance.
- 3) Substantive challenge to validity of Zoning Ordinance.

Applicable sections of Zoning Ordinance per submitted application are 72-1.6, 72-5.21 and 72-5.22 of the O'Hara Township Zoning Ordinance. The subject property is located in a "R-2" (Suburban Residential) Zoning District.

Present at the hearing were Cindy Harris and Margaret Fried, Attorney for Cindy Harris and Richard Heath. Also present were Scott Chermak, Zoning Officer, Julie Jakubec, Township Manager and Buchanan Ingersoll and Rooney PC on behalf of O'Hara Township.

Ms. Margaret Fried, Attorney for Cindy Harris and Richard Heath introduced herself to the Board and told them she would speak concerning the legal aspects of this case and other people would speak after her including Cindy Harris. Ms. Fried summarized a brief history of this case.

In February, 2003, after complaints from neighbors, the Zoning Officer of O'Hara Township issued a cease and desist order and a notice of violations for the property at 53 Fox Pointe Drive for "house concerts" that were promoted from and held at the residence of Cindy Harris and Richard Heath. Which is located in a R-2 Zoning District and in that district this is not a permitted use. Ms. Fried made copies of that enforcement notice and passed them out to the Board members.

After that the house concerts continued and seemed to be going ok until January, 2006. Cindy and Rick got a letter again from saying as per the Zoning Hearing Board decision of April 14, 2003, the cease and desist order issued to you specific to holding concerts in your home was upheld and it has come to my attention that since the time you have had concerts a your home and it appears that you are also planning four more concerts. Please be advised that should these advertised concerts or any other concerts occur, you will be in violation of the cease and desist order. The Township will then institute a proceeding in front of the district magistrate and will seek to have you fined in the amount of \$500 for each violation. I look forward to your cooperation in this matter. This is from Cindy

Davis, Zoning Officer.

Ms. Fried said at that time Cindy and Rick called me and said they are completely banning my house concerts. So I called the Zoning Officer and met with her and the Township Solicitor, Phil Weis. I told them of the changes Cindy and Rick made for the house concerts. They decreased the number of them and they have taken down their website and they never charged and they had never profited at all from these concerts. The money that they collected was always given to the performers. Ms. Davis and Mr. Weis response was "it doesn't matter, no changes matter. It says here that you have to cease and desist." That was the decision of the Zoning Hearing Board.

Ms. Fried said after that fruitless discussion, we decided to file a complaint in the United States District Court, which we did. The district court ruled and the Third Circuit affirmed that to Cindy and Rick that the letter from Cindy Davis (the 2006 letter) was not a final order and that Cindy and Rick had to go back to the Zoning Hearing Board and get a final decision on this 2006 letter from Cindy Davis.

So were here to appeal this letter and we're here to say that an interpretation of the ordinance is a violation of Cindy and Rick's right to be treated open handedly as other residents who have parties and their right to speak freely in their own homes with invited guests and to make music and so forth and with whom they want in their own home. Interpretation of Zoning Ordinance and substantive challenge to validity of Zoning Ordinance.

Mr. Orkin stated it seems to me that the statute of limitations has lapsed and you chose not to come to the Board and therefore you're late, so I have no understanding as to why you believe we should be having this hearing on these points. Ms. Fried said first off, we are not here on the 2006 letter. We're here to get an interpretation of the ordinance which is our right. We're here to challenge the validity of the ordinance and there's no statute on that. As to the question of the 2006 ordinance it's our position that the 30 days stopped running when we filed in federal district court and the reason we did that is that we have case law that supports that. Mr. Orkin wanted to know if Ms. Fried was talking about equitable tolling. Ms. Fried said yes and she proceeded to tell him about a case which is titled LaVallee and Mr. Orkin said he has read that and he gave his view on that. 1. The public at large had an interest in that case and here we have a private interest. 2. The court acknowledged that there was some confusion in their legal statutes and regulations as to what jurisdiction, so there was some issue over who had jurisdiction of the matter. So Judge Weis held it under those circumstances there was equitable tolling, here it is completely distinguishable. Mr. Orkin stated that the municipality's planning code couldn't be more explicit in giving exclusive jurisdiction to this Board.

Mr. Goehring said they failed to see any language where it was directed back to the Zoning Board. Ms. Fried said this is where it should have been filed. Mr. Goehring replied that's different from saying it should go back to the Zoning Board. Ms. Fried said that's where it should be filed, then we're back here filing it now. Mr. Goehring said you're out of time. Ms. Fried said she is not talking about the 2006 letter, I am talking about an entirely new thing here. I want to look at the interpretation of the Zoning Board and we're allowed to do that under the Zoning Code.

Cindy Harris said she would like to address one issue because frankly I think there's a lot of

confusion at what is going on in my house. We were told by the Zoning Officer and the lawyer for the Township the letter from 2006 could not be appealed. And in fact, we were told in 2003 that on the cease and desist order, that we could never come back to this Board. Any appeal would be in another court all together.

Ms. Harris said there is no commercial activity here. What we are doing is hosting parties for our friends. What we like to do at our parties is listen to live music. But if the Township gets complaints from residents they must send the police. However, I do need some closure on this matter that is why we are here.

Ms. Ellen Woods, 50 Fox Pointe Drive spoke to the Board and had concerns as to emergency vehicles such as an ambulance being able to get down the street when the concerts are going on as the people who attend these park in the street. Ms. Woods son requires an emergency vehicle frequently and she wants to make sure that they do not block both sides of the street as that could cause a hardship.

Brendan Stuhan, Esq. For O'Hara Township asked Ms. Harris some questions. Mr. Stuhan asked Ms. Harris if she had any evidence of being told by Phil Weis that the 2006 date was not appealable? Ms. Harris replied I was not told that by Mr. Weis but by the Zoning Officer Cindy Davis. Mr. Stuhan asked her if she had been told anything pertaining to the 2006 letter, and she replied that her lawyer can tell him what Ms. Fried and Mr. Weis talked about in their meeting.

Mr. Stuhan said you talked about parties where people have paid for food. Ms. Harris replied I never said about paying for food. People do pitch in for pizza and beer. Mr. Stuhan said these aren't chipping in to pay for food, you mean, all the money goes to the performer? Ms. Harris replies yes, it is no different than a political fund raiser. Mr. Stuhan when you invite all your friends to the party, how many people are on your email list? Ms. Harris replied probably something in the neighborhood of 500 people on that email list and yes I do know all of them. Mr. Stuhan said he was very impressed by that. Also, do you post the schedules on any websites, do you discuss them on any blogs or chat rooms, or any message boards? Ms. Harris replied no. Mr. Stuhan asked how about flyers at your place of business? Ms. Harris replied no. Mr. Stuhan said do you write letters about the concerts saying your going to have them? Ms. Harris said yes, because its an acceptable invitation.

Mr. Stuhan asked Ms. Harris if she instructed the people to be careful about parking for these concerts? She replied simply put to follow the ordinance. There has never been a single violstion the Township can attest to.

Mr. Stuhan inquired as to what the suggested donation at the December 2007 party was. Ms. Harris said we were suggesting people chip in ten dollars. Mr. Stuhan said and there were 25 people at the party? Ms. Harris replied yes. Mr. Stuhan said how many of them chipped in ten dollars? Ms. Harris said I don't count, I couldn't tell you. Mr. Stuhan said how much more can they chip in? Ms. Harris said, I don't count, I have no idea. I am not sitting there and looking at the basket to see if so and so is chipping in. I don't do that. Mr. Stuhan said those are all the questions I have. Mr. Orkin replied thank you. Ms. Fried said she would like the Board to please be very specific in your decision as to

the reasons.

Mr. Orkin said having listened to all of the evidence that has been submitted and having considered the decision of the Western District Court, the Federal Court for the Western District of Pennsylvania, and the appeal decision by the Third Circuit Court of Appeals. Having looked at the Municipality's Planning Code, namely Section 909.1 on jurisdictions in which Zoning Hearing Board has exclusive jurisdiction. Having looked at the res judicata effect of the decisions that have been made by the courts, at this time, I am moving that we find the application to the Zoning Hearing Board to be untimely and barred by the statute and to the effect that we are asked to look at the constitutionality of Section 72.1.6 and 72.5.22 A. I move that we hold that those two sections of our Zoning Ordinance be declared constitutional and that there be nothing about them that is unduly brought or nothing about them that is unconstitutional. Is there a second to that motion?

Seconded by Mr. Christopher Klein. Motion carried unanimously.

Ms. Fried said, I do not believe you ruled on one basis we checked off, which was the interpretation of the ordinance as applied to that. What is your ruling on that? Mr. Goehring said I think if you want to amend the motion to include a denial of the interpretation previously determined or were not timely, I think that was the appropriate ruling. Ms. Fried said she did not here that. Mr. Goehring replied that the interpretation was either previously decided or untimely. Ms. Fried said what was the previous decision? Mr. Goehring said we have 45 days in which to enter a written opinion with findings of fact and conclusions of law. You can refer to that at that time. Ms. Fried said thank you.

Mr. Klein moved to incorporate by reference what Mr. Goehring makes as a basis for a decision, i.e. the present appeal is untimely. I believe that the 2003 decision was correct because from what I heard tonight, it sounds like exactly the same type of activity that took place in 2003 when we decided this was a commercial activity there. I would request Mr. Orkin's motion to include those reasons as a basis for denial. Mr. Orkin asked if there was a second? Mr. Willison seconded it. Mr. Orkin said the ayes have it. You will have your written decision in forty five days.

ZONING HEARING BOARD CASE NO. 1089 Was heard by the Board regarding a request from Mr. David Toal, Counsel, for Nook hook, 1335 Freeport Road, Pittsburgh, Pa 15238 wishes to obtain the necessary variances for proposed Retail Sales of Malt Beverages on property located at 1335 Freeport Road, Pittsburgh, PA 15238. The subject property is located in a "SM" (Suburban Manufacturing) Zoning District. As proposed, the request violates Chapter 72, Sections 72-9.54 and 72-2.9 of the O'Hara Township Zoning Ordinance. As proposed, the applicant wishes to operate a retail beer distribution from the proposed location at 1335 Freeport Road. The structure was previously occupied by CiCi's Pizza. Approximately half of the facility would remain restaurant use while the retail distributor would occupy the other half of the facility. Mr. Toal passed a packet of information to the Board so they would become more familiar with the project. He said the building was formerly CiCi's Pizza and it has suffered some fire damage. If you look at the first picture, that's a shot from Freeport Road. The second picture is the entrance for part of this building that will remain a restaurant. The third photograph is the area in which the distributorship would be located and it is not visible from the road. It has no presence on Freeport Road. On the next two drawings, one shows that is a small retail sales area that is accompanying this area and the warehousing of the

project is on the final drawing. This is where we come in the property warehousing and retail sales that whole area will be available for people to wander around and to see the product. Mr. Jon Amodeo will describe this part.

Mr. Amodeo told the Board what I want to do with this building is bring a service or a product to O'Hara Township which is not present. It is a very high end microbrewery. It is something that is a passion of mine and I see a niche that we have and your Township is perfect for the niche as the high-end brews. Mr. Toal asked, are you regulated by the LCB? Mr. Amodeo replied yes, very much. Mr. Toal asked, and you must sell a minimum quantity; is that correct? Mr. Amodeo replied, yes sir a minimum quantity for any beer distributor is 168 ounces. Mr. Toal asked, do you sell to bars and taverns and restaurants? Mr. Amodeo said yes sir, part of our license is that we are able to do that. We build relationships as we go out and introduce ourselves and they come to us and pickup their product as we do not have delivery vehicles. We will not sell anything like pizzas or anything like that. We are splitting the building, we will occupy half of it and I am not sure who will be on the other side, but we would like to get someone who wants to put a restaurant in there. Mr. Orkin said there were letters from CB Richard Ellis the authorized agent for Pang Brothers agreeing to the submission of the application for a variance.

Motion by Christopher Klein to approve the variance as requested. Seconded by Mr. Robert Willison. Motion carried unanimously.

MINUTES

Approval of the July 7, 2008 meeting minutes.

ADJOURNMENT

Having no further business, the meeting was adjourned at 9:25 p.m.

Mr. Christopher Klein, Alternate