

MINUTES OF THE ZONING BOARD OF APPEALS
February 13, 2012

The regular meeting of the Zoning Board of Appeals was called to order by Chairman William Cotey at 7:00 p.m. at the Village Hall.

Members present: Chairman William Cotey, Scott Adams, Dan Donahue, Mark Moore, Walter Oakley, Kurt Schultz; and David Semmelman.

Members absent: None.

A quorum was established.

Village Staff present: John Spoden, Director of Community Development; and David Smith, Senior Planner.

Board Member Adams moved, seconded by Board Member Moore, to approve the January 9, 2012, Zoning Board of Appeals meeting minutes.

Motion carried 7 - 0.

OLD BUSINESS:

ZBA 11-21 Dixon and Felicia Brandt, Applicants
720 Meadow Lane

Request is for a variation to increase the maximum permitted Lot Coverage from 45% to approximately 49.8% in order to construct a detached garage in an R-6, Single Family Residential District.

The applicants requested that this item be withdrawn from the agenda.

NEW BUSINESS:

ZBA 12-02 Peter Tosto, Applicant
339 N. Milwaukee Avenue

Request is for variations to: 1) permit an encroachment into the front 35 feet of the first floor tenant space that is all inclusive of said tenant space within the building with street frontage on Milwaukee Avenue within the C-1, Downtown Core Commercial District with an office use; and 2) permit an encroachment into the front 35 feet of the first floor tenant space, but by not more than approximately one (1) foot thereby indicated by the location of the existing demising wall that separates the two ground floor tenant spaces within the building that has street frontage on Milwaukee Avenue within the C-1, Downtown Core Commercial District with an office use.

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ZBA 12-03 Peter Tosto, Applicant
339 N. Milwaukee Avenue

Variation to permit an office use to occupy more than 25% to approximately 51% of the gross first floor area of a building with street frontage on Milwaukee Avenue within the C-1, Downtown Core Commercial District.

Mr. David Smith, Senior Planner, introduced the variation requests. Mr. Smith stated that the petitioner is seeking a variation to permit an encroachment into the front 35 feet of the first floor space within a building with street frontage on Milwaukee Avenue located in the C-1, Downtown Core Commercial District with an office use and a variation to permit an office use to occupy more than 25% of the gross first floor area of a building with street frontage on Milwaukee Avenue located in the C-1, Downtown Core Commercial District. He stated that the Village amended the Zoning Code in 2005 to change the 10% office use allowance in the C-1 District to the current ground floor area restriction for office and financial institution uses in the C-1 District. He stated that the petitioner is seeking approval for these variations in order to remain in the building.

Chairman Cotey asked the Zoning Board of Appeals board members if they have any questions about the ordinance that regulates office and financial institution uses in the C-1, Downtown Core Commercial District.

Board Member Oakley stated that he has a question about where the 'Core Commercial District' is located. He stated that it seems as though the commercial property that includes the Five Guys restaurant is in a facility that seems to be designed more towards an auto-oriented facility as it includes the Dunkin Donuts restaurant with a drive-thru and not so much for pedestrian-oriented traffic. He stated that he considers the core commercial area as the area north of Cook Memorial Park. He stated that south of Cook Memorial Park is more auto-oriented such as Lovin Oven, the banks, Condell Medical Center, St. Joseph Church, etc.

Mr. John Spoden, Director of Community Development, stated that those areas mentioned by Board Member Oakley are in two different zoning districts. He stated that the C-1 District is south of Church Street on the west side of Milwaukee Avenue down to the bank at 325 North Milwaukee Avenue and goes to the north side of Broadway on the east side of Milwaukee Avenue. He stated that Libertyville Crossings commercial development which includes the Five Guys development is zoned C-2 District. He stated that the subject property at 339 North Milwaukee Avenue is zoned C-1 District and is considered part of the core of the downtown by the Code and Zoning Map.

Board Member Adams stated that the subject site is also in the area that MainStreet Libertyville defined as the Heritage Area. He stated that the boundaries are the railroad tracks on the north and Maple Avenue on the South. He stated that the Core Commercial District takes into account those same boundaries as defined by the Heritage Area.

Mr. Spoden stated that on the west side of Milwaukee Avenue the C-2 District ends on the north property line of the bank and the C-1 District begins north of the bank.

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Mr. Peter Tosto, petitioner, stated that his case is that he built the building located at 339 North Milwaukee Avenue in 1980. He stated that it was an office building and nothing but an office building. He stated that he put his wife in the building with 'Tell Two Friends'. He stated that he never got a notice that the zoning changed. He stated that he has been in the building approximately 20 years. He stated that he never got a notice that there was a change in zoning. He stated that his wife wanted to open up a gift shop and that they operated it for about 5 years. He stated that it was apparent that the town did not support the gift shop. He stated that there was not enough action to support it. He stated that they tried, but lost quite a bit of money. He stated that he is at the tail end of the shopping district. He stated that there is not shopping district by his building. He stated that nobody comes past the Lovin Oven unless they are across the street. He stated that he wasn't aware of a zoning change. He stated that rather than having an empty store as there are many of them in town, he moved his office into the space which is a very attractive space. He stated that it makes for a very attractive space for Libertyville. He stated that he was then red-tagged and was told he couldn't be in that space and that is why he is before the Zoning Board of Appeals requesting a variation.

Mr. Don Anderson, 616 Bridle Court, Libertyville, stated he noticed that the occupancy for 'Tell Two Friends' changed to 'State Farm' back in June or July of 2011. He stated that he has a background of appearing before groups such as the Libertyville Zoning Board of Appeals. He stated that the Village of Libertyville is trying to generate retail space in order to generate sales tax for the residents of the community and he is a resident. He stated that when he observed the tenant change he realized that it wasn't normal so he investigated the situation and discovered that the subject tenant space is intended for retail not office. He stated that although when Mr. Tosto stated that he had no knowledge of the Code, the Staff report indicated that Mr. Tosto's wife was served with a notice of the Zoning Code back in June of last year, so he did have knowledge of the Zoning Code. He stated that he contacted the Village and indicated that there may be a problem here. He stated that the Village diligently moved forward to investigate the situation. He stated that he has noticed that Mr. Tosto has ignored the Village requests. He stated that he has kept in touch with the Village on a monthly basis in order to get a status on the situation. He stated that Mr. Tosto, or more appropriately, the State Farm agency, would not respond to the Village. He stated the Mr. Tosto has thumbed his nose at the Village, the Trustees, and the Zoning Board of Appeals with an attitude that conveys he can do what he wants to do. He stated that he didn't think that was right so he kept in touch with Village Staff to follow what was happening because it was an illegal move. He stated that the Village red-tagged the property, the red-tagged was then removed, and the tenant continued to do business there in an illegal occupancy. He stated that the reason that the current ordinance was established in 2005 was to generate tax revenues for the residents. He stated that this is not a legal occupancy. He stated that the owner of the building thinks that that he can move around however he wants to and be immune from any ordinance of the Village. He stated that the ordinances are in place to be obeyed. He stated that if someone wants to change the ordinance, it should be done before moving against the ordinance. He stated that one should not move against the ordinance and then ask the Village what they can do for them while ignoring the ordinance. He stated that he can speed down Milwaukee Avenue and get pulled over by the Police and become upset with that, but that is against the law, so why would he do it and if he did do it, why would he be angry. He stated that he has read the Staff report and that he agrees with the Staff report and he would ask the Zoning

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Board of Appeals to deny the request for the occupancy. He stated that he would ask that the Costas commercial tenant move forward to the front tenant space and that the State Farm agency move to the rear tenant space to where it originally came from. He stated that if the Zoning Board of Appeals should decide to recommend approval of the variation requests, that this tenant space be subject to complying with the ordinance once the tenant space changes hands, but not to allow Mr. Tosto's assigning it to another State Farm agent. He stated that once Mr. Tosto retires or vacates the front space, then the space should become Code compliant.

Mr. Tosto stated when he found out that he was not in compliance with the ordinance, he immediately worked with Village Staff David Smith. He asked if he proceeded to do what he was supposed to do. Mr. Smith stated that Mr. Tosto eventually proceeded with the variation procedure.

Mr. Tosto stated that he got a survey of the building. He stated that he sent in his written notice. He stated that he did everything according to the sheet that he was given. He stated that he did not ignore a 'red tag'. He stated that he does not recall when he received the red tag, but it was on the door and he left it there. He stated that he had a sign in the window.

Mr. Tosto stated that he has been in this town for 40 years. He stated that he is a member of the Rotary and a member of the Lions. He stated that he has done quite a bit of charity work in this town. He stated that for somebody to have so much animosity towards his business in that location is something that he does not understand. He stated that it would be better than having an empty store. He stated that an empty store does not generate any tax money. He stated that an empty store doesn't bring any people to a location. He stated that an empty store doesn't bring people to a retail business in a building that he generated. He stated that he does not know what the problem is except that it is a change of Code that he is now aware of and he is now asking for a variation. He stated that he believes that he should not have to be held to what may happen in the future. He stated that if it is currently a State Farm agency and another State Farm agency wishes to occupy the space then it shouldn't be restricted. He stated that he doesn't understand what the previously speaker is suggesting.

Mr. Tosto stated that the town didn't support a retail store at that location. He stated that he doesn't know if the previous speaker came to the subject location when it was a retail store and bought an item. He stated that he doesn't know anyone on the Zoning Board of Appeals panel who came to the subject site when it was a retail store. He stated that they spent a lot of money on that tenant space. He stated that he thought that they generated a lot of sales tax, but it didn't work and it doesn't work in that location. He stated that if it did work, it probably would still be there because it was his wife's love. He stated that they had to close it down. He stated that in order to make it a viable space, he moved his State Farm office into it. He stated that there was nobody available at that time. He stated that he did not want an empty store at that location. He stated that there are enough empty stores in this town.

Board Member Schultz stated that he wants to thank Mr. Tosto for his continued support of the downtown and his past history. He stated that Libertyville does better with Mr. Tosto's business. He stated that he agrees with Mr. Tosto's comment that he would rather have an occupied store front

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than an empty store front. He stated that one can see too many empty storefronts in the downtown district. He stated that he wasn't here when the Village changed the Code to the current regulation and so he cannot speak as to why that was done. He stated that regardless as to whether the petitioner was red-tagged or knew about the ordinance or not, it boils down to whether or not the granting of the variation would be a good precedent to set.

Chairman Cotey asked for clarification of the 2005 ordinance. Mr. Spoden, Director of Community Development, stated that there was an amendment relative to office uses in the downtown. He stated that prior to the current regulation there was a restriction of office uses to not exceed 10% of the total street frontage in the entire C-1 District. He stated that up until the mid 2000's, it had not been a problem of excessive office occupancies but that began to change and office and financial institution uses began to increase and place pressure on the 10% limit in the downtown and fill up the retail tenant spaces. He stated that the 10% regulation was referred to as the wandering code because it allowed an office use occupancy while sacrificing an opportunity for another office user in the downtown when the 10% was at the maximum capacity.

Mr. Spoden stated that the Plan Commission formed a subcommittee and worked with the Economic Development Commission and MainStreet Libertyville and talked about the office uses in the downtown and this is how the current ordinance came into place. He stated that through the process, it was decided to shrink down the area to just those buildings that front Milwaukee Avenue in the C-1 District, not the entire C-1 District. He stated that part of the process included studying the storefronts in the downtown and determined that the average retail tenant space is approximately 35 feet in depth. He stated that most of the ground floors of the retail tenant spaces in the C-1 that front Milwaukee Avenue could accommodate office area in the back such as a lawyer's office or insurance office. He stated that a notice was put in the newspaper and a public hearing was held in 2005. He stated that the ordinance was then adopted by the Village Board.

Board Member Donahue asked if permits were acquired when Mr. Tosto moved into the front space at 339 N. Milwaukee Avenue. Mr. Spoden stated that only an occupancy permit would have been required. He stated that a building permit would also have been required if there was construction work done.

Mr. Tosto stated that he didn't think that he needed a permit because he wasn't doing any major work inside the space. He stated that all the previous work done in the space was already done for the retail store that previously occupied the space. He stated that he had put in the hardwood floors for the retail store but didn't need to change anything for his office use.

Mr. Spoden stated that there would not have been a requirement for a building permit, but there was a requirement for an occupancy permit.

Board Member Donahue asked if the petitioner would have been noticed of the occupancy permit requirement. Mr. Spoden stated that if the Village were made aware of the tenant moving to a new space, the Village would inform the business entity of the occupancy permit requirement.

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Board Member Semmelman stated that the petitioner apparently moved into the front tenant space in the face of the ordinance. He stated that he sympathizes with the petitioner if he did not know about the ordinance, but it is public law so he should have had constructive notice of the ordinance.

Board Member Moore asked when Costa's, (the rear commercial tenant), move into their space. Mr. Tosto stated that Costa's moved in some time in January or December, but he cannot recall exactly. He stated that their space had been empty for a while.

Board Member Moore asked if the petitioner had listed the front space for lease. Mr. Tosto stated that he had not listed the front space for lease.

Board Member Adams stated that the previous 10% rule was brought about by MainStreet and that they had reviewed what other communities had done to address the issue. He stated that the intent included the need to bring a more pedestrian friendly atmosphere in the downtown. He stated that it was intended to address not just the retail sales tax, but to create better pedestrian conditions in the downtown. He stated that it has enhanced the southern portion of the downtown greatly and that is evidence by the stores that have come in on the eastern side of Milwaukee Avenue when there was retail space available. He stated that a lot of work went into the 10% rule. He stated that when it was changed in 2005, it was determined that it was done so to improve the conditions for the property owners and to make it more conducive for retail tenants. He stated that it will help the downtown survive and that the intent was to not allow excessive amount of first floor office space in the downtown where it should be more conducive for retail tenants.

Board Member Adams stated that he empathizes with Mr. Tosto's testimony, but the ordinance was given to Mr. Tosto's wife when she requested it back in June.

Mr. Tosto asked for clarification as to what his wife requested. Board Member Adams stated that Staff notes that after Mrs. Tosto moved her retail use out of the tenant space, she had a conversation with the Village, and was supplied with the ordinance, and after that Mr. Tosto moved an office use into the front tenant space sometime in July or August. He stated that it was incorrect for Mr. Tosto to move into the front space.

Board Member Moore asked for clarification as to the type of use that Costa's is. Mr. Tosto stated that it is a coin shop and is a retail business. He stated that he had to search for the Costa's business in order to acquire its occupancy.

Board Member Moore stated that Costa's is a retail use and is located south of the Lovin Oven bakery which contradicts the petitioner's testimony that there isn't any retail south of Lovin Oven.

Board Member Oakley asked who the tenant was prior to the 'Tell Two Friends' shop. Mr. Tosto stated that it was an office space for approximately 20 years. He stated that Terry Weppler was once in that space. He stated that it was an attorney's office and a real estate office. He stated that the whole building was built as an office building.

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Board Member Oakley asked Staff how a text amendment is communicated to the property owners. Mr. Spoden stated that when a text amendment affects the whole district, a public notice is placed in the newspaper. He stated that there may be hundreds of property owners within a zoning district. He stated that in the case of the text amendment that affected the C-1 District, the Village also coordinated notification through MainStreet Libertyville in addition to placing the public notice in the newspaper.

Board Member Oakley stated that when Mrs. Tosto opened her retail gift shop that it was the first of its kind at that time.

Mr. Tosto stated that his wife's business was the first retail shop in that space as it had always been office prior to that.

Chairman Cotey stated that there appears to be second hand information presented to the Zoning Board of Appeals regarding the rendering of the ordinance to Mrs. Tosto and she is not present to testify to that issue and there is no one from the Village present to testify to that issue. He stated that he recommends that this case be continued in order to get confirmation to this issue.

Mr. David Pardys, Village Attorney, stated that a continuance would may make sense only if Mr. Tosto is denying any of Staff's written comments that his wife received the ordinance.

Mr. Tosto stated that he is not denying anything, he is only stating that he was not aware of the ordinance.

Board Member Moore asked the petitioner if his wife received the ordinance. Mr. Tosto stated that he doesn't know if his wife received it or not. He stated that he would not be present before the Zoning Board of Appeals if he was aware of everything.

Chairman Cotey stated that the notes from Staff states that in June Of 2011, just prior to 'Tell Two Friends' vacating 339 N Milwaukee Avenue, Suite 101, and being replaced without benefit of an occupancy permit, Staff provided to Helen Tosto, the owner/operator of 'Tell Two Friends' and wife of Peter Tosto, with a copy of Ordinance 05-O-77.

Mr. Tosto stated that he would wonder why his wife would ask for the ordinance if she was leaving that location.

Mr. Spoden stated that Economic Development Coordinator, Heather Rowe, was in a conversation with Mrs. Tosto about the leasing of the space. Mr. Spoden stated that when Ms. Rowe became aware that Mrs. Tosto was leaving the space she attached the ordinance to an email to Mrs. Tosto. He stated that Ms. Rowe's email stated, "As per our conversation, please let me know if I can be of help listing your space on our website in the future. Also, for your reference, I have attached the ordinance which affected office/financial permissions in the downtown."

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Board Member Moore stated that he concurs with Board Member Semmelman in that the ordinance was created and publicly noticed for the public hearing on the text amendment. He stated that it doesn't matter if Helen got the ordinance or not.

Mr. Tosto stated that he is not questioning the ordinance. He stated that he is here to ask for the variation.

Board Member Moore stated that he wants to stay on point.

Mr. Pardys stated that the ordinance is on record even if Mr. Tosto claims to have not been aware of it. He stated that even if there is question as to whether Mrs. Tosto received the ordinance or not, it should not be the focus of the Zoning Board of Appeals unless Mr. Tosto enters this information as part of his justification for the variation.

Mr. Tosto stated that his wife getting the ordinance or not is not an issue for him. He stated that getting the variation is the issue for him.

Chairman Cotey asked when Mr. Tosto built the building. Mr. Tosto stated that he built it in 1980. He stated that interest rates were 20% at that time. He stated that he almost went bust.

Chairman Cotey asked the petitioner if he would like for the Zoning Board of Appeals to vote on the petition. Mr. Tosto stated he would like for the Zoning Board of Appeals to vote.

In the matter of ZBA 12-02.1), Board Member Moore moved, seconded by Board Member Semmelman, to recommend the Village Board of Trustees approve a variation to permit an encroachment into the front 35 feet of the first floor tenant space that is all inclusive of said tenant space within the building with street frontage on Milwaukee Avenue within the C-1, Downtown Core Commercial District with an office use, in accordance with the plans submitted.

Mr. Tosto stated that he understood that he was permitted to go to another meeting.

Mr. Spoden stated that the Zoning Board of Appeals is only a recommending body and their recommendation will go forward to the Village Board.

Board Member Moore stated that regardless of what the Zoning Board of Appeals recommends, this petition item will move forward to the Village Board.

A Roll Call vote was taken.

Motion failed 0 - 7.

Ayes: None

Nays: Moore, Adams, Cotey, Donahue, Oakley, Schultz, Semmelman

Absent: None

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Chairman Cotey read the Staff recommendation for ZBA 12-02(2), as follows: Staff recommends **APPROVAL** for a variation to permit an encroachment into the front 35 feet of the first floor tenant space, but by not more than approximately one (1) foot thereby indicated by the location of the existing demising wall that separates the two ground floor tenant spaces within the building that has street frontage on Milwaukee Avenue within the C-1, Downtown Core Commercial District with an office use for property located at 339 N. Milwaukee Avenue, subject to the following condition:

1. That the Tosto State Farm Agency vacate the front tenant space closest to Milwaukee Avenue and return to the rear tenant space of the ground floor of the 339 N. Milwaukee Avenue building and that the front tenant space become available for a permitted or special permitted use in accordance to the Zoning Code.

Board Member Semmelman stated that ZBA 12-02(2) is a Staff recommendation, not what the petitioner is seeking approval of.

Mr. Spoden stated that Staff drafted recommendation ZBA 12-02(2) as an alternative because even if the petitioner moves back to the rear tenant space, a variation is needed because it would still be too close to the front exterior wall. He stated that Staff was attempting to be all encompassing with the recommendation as provided in the DRC Staff report.

Board Member Moore stated that it is an attempt to save the petitioner the burden of re-noticing the public notices if he chose to pursue the option of moving back into the rear tenant space.

Mr. Tosto asked the Zoning Board of Appeals if he should have come to the public hearing with an attorney. Mr. Pardys stated that it is an option for the petitioner to come to the meeting with an attorney. He stated that there will be another opportunity to address the Village Board who will make the final decision. He stated that the petitioner can be represented by an attorney at the Village Board meeting as well.

Mr. Pardys stated that in the event the Village Board denies ZBA 12-02(1), then ZBA 12-02(2) will enable the petitioner to move into the rear portion of the first floor.

Mr. Tosto asked the Zoning Board of Appeals how they expect him to have a retail business, having spent thousands of dollars to put it in and then needing to spend thousands of dollars to move back. He stated that the front space did not support a retail business. He asked if any of the members of the Zoning Board of Appeals supported or even visited the retail business when it was there.

Chairman Cotey stated that they are not judging his business.

Mr. Tosto stated that they are judging if it should be a retail space.

Mr. Pardys stated that there was an alternative variation proposed by Staff that would be used in the event that the Village Board turned down ZBA 12-02(1), but it would be the petitioner's decision as to whether or not he wants ZBA 12-02(2) to be considered by the Zoning Board of Appeals and Village Board.

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Mr. Tosto stated that he is not going back into the rear tenant space. (ZBA 12-02(2) is withdrawn.)

Chairman Cotey stated that the petitioner may want to consider a change in his business plan if his variation gets denied.

Mr. Tosto stated that the change in his business plan would be to go to court and he will challenge the town of Libertyville on this issue. He stated that what is being done to him here is ridiculous.

Mr. Tosto asked what the purpose of the plat of survey and the \$550 application fee. Mr. Spoden stated that the survey and application fee are required for the public hearing process.

Mr. Tosto asked that in order to get his variation approved does he need a retail business in the space.

Mr. Pardys stated the Zoning Board of Appeals is recommending denial for the variation request to the Village Board. He stated that if the variation is denied, it would be up to the Village Board to decide what action it should take.

In the matter of ZBA 12-03, Board Member Schultz moved, seconded by Board Member Moore, to recommend the Village Board of Trustees approve a variation to permit an office use to occupy more than 25% to approximately 51% of the gross first floor area of a building with street frontage on Milwaukee Avenue within the C-1, Downtown Core Commercial District, in accordance with the plans submitted.

Motion failed 2 - 5.

*Ayes: Oakley, Schultz
Nays: Moore, Adams, Cotey, Donahue, Semmelman
Absent: None*

COMMUNICATIONS AND DISCUSSION:

Board Member Schultz moved, seconded by Board Member Semmelmen, to adjourn the Zoning Board of Appeals meeting.

Motion carried 7 - 0.

Meeting adjourned at 7:50 p.m.