

**CITY OF HIGHLAND HEIGHTS
MEETING OF THE BOARD OF BUILDING AND ZONING APPEALS
HELD: AUGUST 14, 2008, 7:00 PM**

PRESENT: Board Members Pam Hicks, John Hollis, Charles Kerr (Chairman), Don McFadden, Carol Thomas; Secretary Susan Olson

ABSENT: None

SUBJECT: EDWARD BENCIN, P.P 821-26-001 (462 MINER ROAD) & P.P. 821-26-014 (BLOCK A, LYNDEN DRIVE)

PZ08012 VARIANCES TO LOT SIZE AND AREA REGULATIONS

BACKGROUND:

An Appeal Application was filed on July 24, 2008 by Gerhard W. Budzar, Laura Kuns, Steve Ford, Jake Schott and Tony D'Agostino appealing the decision made by the Planning and Zoning Commission on July 14, 2008 to grant Edward Bencin five variances to lot size and area regulations for Permanent Parcels 821-26-001 (462 Miner Road) and 821-26-014 (Block A, Lynden Drive). (**Note:** The variances apply to each of the six proposed reconfigured lots that will result from consolidating P.P. 821-26-001 at 462 Miner Road with P.P. 821-26-014 known as Block A on Lynden Drive and then splitting the parcel into six buildable lots, each measuring 100 feet wide by 175 feet deep.) The five variances being appealed were granted by the Commission on July 14, 2008 as follow:

MOTION: A motion was made by Mr. Urban to grant Edward Bencin, on Permanent Parcels 821-26-001 (462 MINER ROAD) & 821-26-014 (BLOCK A, LYNDEN DRIVE), a variance of 15,500 square feet from Section 1123.08: "AREA, YARD AND HEIGHT REGULATIONS", which requires a minimum lot area of 33,000 square feet, to allow a lot area of 17,500 square feet; seconded by Mr. Knezevic. Roll call on the motion. Ayes Urban, Kerr, Knezevic, Mastrangelo, Pilla. Ayes all; motion carried.

MOTION: A motion was made by Mr. Urban to grant Edward Bencin, on Permanent Parcels 821-26-001 (462 MINER ROAD) & 821-26-014 (BLOCK A, LYNDEN DRIVE), a variance of 25 feet from Section 1123.08: "AREA, YARD AND HEIGHT REGULATIONS", which requires a minimum building line width of 125 feet, to allow a building line width of 100 feet; seconded by Mr. Knezevic. Roll call on the motion. Ayes Urban, Kerr, Knezevic, Mastrangelo, Pilla. Ayes all; motion carried.

MOTION: A motion was made by Mr. Urban to grant Edward Bencin, on Permanent Parcels 821-26-001 (462 MINER ROAD) & 821-26-014 (BLOCK A, LYNDEN DRIVE), a variance of 10 feet from Section 1123.08: "AREA, YARD AND HEIGHT REGULATIONS", which requires a minimum side yard setback of 20 feet, to allow a side yard setback of 10 feet; seconded by Mr. Knezevic. Roll call on the motion. Ayes Urban, Kerr, Knezevic, Mastrangelo, Pilla. Ayes all; motion carried.

MOTION: A motion was made by Mr. Urban to grant Edward Bencin, on Permanent Parcels 821-

26-001 (462 MINER ROAD) & 821-26-014 (BLOCK A, LYNDEN DRIVE), a variance of 15 feet from Section 1123.08: “AREA, YARD AND HEIGHT REGULATIONS”, which requires a minimum rear depth of 70 feet, to allow a rear depth of 55 feet; seconded by Mr. Knezevic. Roll call on the motion. Ayes Urban, Kerr, Knezevic, Mastrangelo, Pilla. Ayes all; motion carried.

MOTION: A motion was made by Mr. Urban to grant Edward Bencin, on Permanent Parcels 821-26-001 (462 MINER ROAD) & 821-26-014 (BLOCK A, LYNDEN DRIVE), a variance of 25 feet from Section 1123.08(h): “AREA, YARD AND HEIGHT REGULATIONS”, which requires a minimum lot depth of 200 feet, to allow a lot depth of 175 feet; seconded by Mr. Knezevic. Roll call on the motion. Ayes Urban, Kerr, Knezevic, Mastrangelo, Pilla. Ayes all; motion carried.

Ms. Olson read the Roll Call.

MOTION ON THE MINUTES: The reading of the Minutes of the Appeal Hearing for Keri Dickey held July 10, 2008 was dispensed with. Ms. Thomas moved to accept the Minutes as written; seconded by Mr. McFadden. Ayes Hollis, Kerr, McFadden, Thomas; abstain Hicks. Motion carried.

Chairman Kerr explained the order of events for the Appeal Hearing as listed on the Agenda. He advised the appellants, Gerhard W. Budzar, Laura Kuns, Steve Ford, Jake Schott and Tony D’Agostino and the appellee, Edward Bencin, of their right to be represented by an attorney. Both parties waived that right.

TESTIMONY OF APPELLANTS:

Gerhard Budzar, homeowner, 458 Lynden Drive, Highland Heights, Ohio 44143, directly across the street from vacant parcel Block A, read a letter expressing objections to the decision of the Commission made on July 14, 2008. The letter was signed by the following residents: Laura Kuns, 471 Miner Road; Martin Kuns, 471 Miner Road; Geraldine Budzar, 458 Lynden Drive; Gerhard Budzar, 458 Lynden Drive; Jacob Schott, 467 Lynden Drive; Donna Schott, 467 Lynden Drive; Linda Maskulka, 472 Miner Road; Ann D’Agostino, 460 Lynden Drive; Anthony D’Agostino, 460 Lynden Drive; Steven Ford, 455 Lynden Drive; Jerome Janis, 450 Miner Road; Barbara Ford, 455 Lynden Drive; and John & Rose Manos, 447 Miner Road. Mr. Budzar made minor additions to the letter as noted below. (*Exhibit A*)

Mr. Budzar stated that Steven Ford, homeowner, 455 Lynden Drive, Highland Heights, Ohio 44143, was not notified of the June 9, 2008 Planning and Zoning Commission Hearing.

In response to Mr. Budzar’s inquiry if he should play all or part of the tape of the Commission Public Hearing held on July 14, 2008, Chairman Kerr replied it would be more effective to play sections of the tape pertaining to the points Mr. Budzar wants to address.

Mr. Budzar played a segment of the tape in which Assistant Building Commissioner Austin states both parcels at issue are part of the Highland Woods Subdivision. Mr. Budzar stated it is apparent the Commission granted the variances based on their impression the parcels at issue are governed by the restrictions established for the Highland Woods Subdivision, when in fact, P.P. 821-26-014 on

Miner Road is not part of the Highland Woods Subdivision.

Mr. Budzar had submitted a copy of the deed, the official plat map obtained from Cuyahoga County and information from the Auditor that indicates 462 Miner Road is not part of the Highland Woods Subdivision. (*Exhibit B*)

Mr. Budzar expressed frustration and dissatisfaction that Law Director Paluf has not agreed to comply with the requests of the residents to meet to discuss this matter. Chairman Kerr replied Law Director Paluf is not present at this meeting in the event the outcome of this proceeding results in litigation and he is called upon to represent the City.

Anthony D'Agostino, homeowner, 460 Lynden Drive, Highland Heights, Ohio 44143, directly across the street from vacant parcel Block A, stated the Planning and Zoning Commission did not handle this matter in a professional way and did not research this matter. He said the tape from the Commission meeting held on July 14, 2008 proves the Commission gave erroneous information when the Commissioners stated their reasoning for the manner in which they voted to grant the variances was based on the fact the parcels at issue are part of the Highland Woods Subdivision, when in fact, the parcel on Miner Road is not. He said due diligence must be made especially when dealing with a former City official, former Fire Chief Edward Bencin.

Jacob Schott, homeowner, 467 Lynden Drive, Highland Heights, Ohio 44143, directly south and abutting vacant parcel Block A, stated he objects to the development of the parcels at issue for the following reasons: uncertainty if the homes that will be built or the families that will move in will be in keeping with the character of the neighborhood; issues of public safety with heavily traversed Miner Road; and difficulty configuring a safe layout of garages and driveways for three houses built side-by-side on 100 foot wide lots. He said he is opposed to the proposed lot width of 100 feet but is not opposed to the lot depth of 175 feet. He said current Code technically allows only two homes to be built on the parcels at issue, and objects to six homes being built, but is not adverse to four homes being built on the parcels. He stated there would be no undue hardship to the applicant if the variances are not granted. He cited what he referred to as case law from municipalities in New York, Minnesota, and New Jersey as standards for granting variances: granting the variance will not adversely affect the rights of adjacent property owners or residents; variances will not adversely affect the public health, safety, order, convenience, prosperity or general welfare; request for a variance is not based exclusively upon the desire of the owner, lessee or occupant or applicant to make more money on the property. In response to Chairman Kerr's inquiry if he could attribute those standards to their particular cases, Mr. Schott replied no. Mr. Schott said the owner of Block A, Forest City/Paris Development, has not maintained the parcel for many years and that he and other homeowners have been maintaining the lot and cutting the grass. He expressed dissatisfaction that the City did not help Mrs. Williams, the former homeowner at 462 Miner Road.

Laura Kramer Kuns, homeowner, 471 Miner Road, Highland Heights, Ohio 44143, directly across the street from P.P. 821-26-001 on Miner Road, referenced HHCO 1113.13 which states, in part, the Commission may permit variations of not more than ten percent decrease of area regulations in residential districts. She said the following two of the five variances granted by the Commission significantly exceed the amount that can be varied thereby violating the code: 1) a variance of 15,500 square feet from Section 1123.08: "AREA, YARD AND HEIGHT REGULATIONS", which

requires a minimum lot area of 33,000 square feet, to allow a lot area of 17,500 square feet. (Ms. Kuns said this is a 53% decrease); and 2) a variance of 10 feet from Section 1123.08: “AREA, YARD AND HEIGHT REGULATIONS”, which requires a minimum side yard setback of 20 feet, to allow a side yard setback of 10 feet. (Ms. Kuns said this is a 50% decrease).

Ms. Kuns again referenced HHCO 1113.13 which further states, in part, variations may be given for lots that are of restricted area and in which the owner owns no adjoining lot or where additional land cannot be acquired equitably. She said this is contrary to this specific case, for the fact that the two parcels at issue can be adjoined, and then subdivided according to current Code. Ms. Kuns said the proposed plan to create six lots does not come close to meeting current Code.

Ms. Kuns referenced HHCO 1113.10(a) which states, in part, the Commission shall consider only the practical difficulties in the strict application of the Zoning Code for variances pertaining to area requirements. She said there are no practical difficulties or hardships involved in this matter.

Ms. Kuns referenced HHCO 1113.10(c) which states, in part, a standard for granting a variance is that the variance will not be materially detrimental to the public welfare or injurious to the property or neighborhood. She expressed concern that once the parcels at issue are consolidated and split the resulting six reconfigured lots will have no deed restrictions to tie them into the Highland Woods Subdivision and there will be no control over what will be built on the lots, which could potentially be cluster housing, and which ultimately has the potential for material detriment to their property values.

Ms. Kuns referenced HHCO 1113.10(d) which states, in part, the granting of a variance will not be contrary to the general purpose, intent and objectives of the Zoning Code. She said that granting variances after consolidating the parcels at issue is contrary to this code.

Ms. Kuns noted the variances granted by the Commission changed every dimension of the parcels at issue and subsequently changed the zoning of the property and challenged whether this action should have been put to referendum as required by HHCO 8.02.02-4(e).

Ms. Kuns referenced a letter dated May 16, 2008 from City Engineer Blackley to Assistant Building Commissioner Austin which is Mr. Blackley’s review of the Preliminary Plat dated May 8, 2008 for the six reconfigured lots as well as his approval for the development of a final plat. Ms. Kuns stated the Public Hearing to request the variances was not held until June 9, 2008. She questioned why the plat was approved prior to the required variances being obtained, and said it appears the plat was a done-deal and that it was pre-determined the variances would be approved. Chairman Kerr replied it may or may not be the case; however, it is common practice for the Building Department to seek the advice of the City Engineer in advance of pursuing certain projects.

Ms. Kuns stated the Commission is always granting variances and questioned why the City even has a Code. She requested the Board overturn the decision of the Commission who did not do their job.

TESTIMONY OF EDWARD BENCIN (APPELLEE):

Edward Bencin, homeowner, 5964 Whiteford Drive, Highland Heights, Ohio 44143, and partner with Michael Gottlieb, 3504 Courtland, Ohio 44122, who together own P.P. 821-26-001 at

462 Miner Road, responded to the aforementioned comments of the appellants as follows: he informed the Commission at their first meeting on May 12, 2008 that Block A on Lynden Drive was part of the Highland Woods Subdivision and that the property at 462 Miner Road was not; the Commission rescheduled the Public Hearing from June 9, 2008 to July 14, 2008 when it was discovered that notices were not sent to all required property owners; cluster homes are not allowed in Highland Heights; he is in discussion with M&M Homes who built most of the homes in Highland Woods; the City ARB and Code regulate all building in the community; the bill for City Engineer Blackley's review of the proposed plat was paid by Mr. Bencin and not by the City.

Mr. Bencin submitted the following evidence to the Board: plat of surrounding parcels with lot sizes; proposed preliminary plat plan for parcels at issue; and drawing of sewer and water connections for Block A. (*Exhibit C*)

Mr. Bencin explained the chain of events as follows. He purchased the property at 462 Miner Road at a Sheriff's auction and then met with Assistant Building Commissioner Austin and City Engineer Blackley to discuss 462 Miner Road and Block A. He was advised by Mr. Blackley that the best use of the property was to consolidate the two parcels and subdivide it into six 100 foot by 175 foot lots to conform in size with surrounding lots. Mr. Blackley then advised Mr. Bencin to have an engineering company prepare a plat to be submitted to the Commission. Mr. Bencin appeared before the Commission who decided to handle this matter as variance requests because the property is contiguous to a subdivision. Mr. Bencin then approached Forest City to purchase Block A.

Chairman Kerr stated the title holder for Block A on Lynden Drive is Paris Development and inquired if Mr. Bencin had authorization as a third party to request variances on this property. Mr. Bencin replied he has a signed contract with Mr. Sam Miller of Forest City to purchase Block A contingent on the variances being granted and that the contract must be closed by November 1, 2008.

Mr. McFadden referenced HHCO 1113.10, which states, in part, the Commission may grant variances when application is made to the Building Commissioner for a building permit and same is refused. In response to Mr. McFadden's inquiry if the applicant had applied for a building permit, Mr. Bencin replied no because the parcels have not yet been consolidated and split. In response to Mr. McFadden's inquiry if there is a hardship with complying with existing Code, Mr. Bencin replied this matter could possibly have been handled as a non-variance issue.

Mr. Bencin stated there are existing water, sanitary and storm sewer connections on Block A for each of the three lots. He stated that lot sizes of 100 feet by 175 feet would conform with surrounding lots and that lots with a 150 foot width would stick out like a sore thumb.

REBUTTAL OF APPELLANTS:

Mr. Budzar stated there is a catch basin at Block A with a large steel dome and a catch basin at 462 Miner Road. He said Mr. Bencin misspoke when he said that no sewer work is necessary to build on Block A on Lynden Drive. Chairman Kerr stated he saw the catch basins being described.

Mr. Budzar stated that Mr. Bencin told him and seven other residents at a previous meeting that his hardship for requesting the variances is all about the money. Mr. Budzar argued there is no hardship and referenced HHCO 6.04.01 which establishes that a prerequisite for granting a variance is to avoid unreasonable hardship to property owners.

Ms. Kuns stated the Commission Public Hearing Minutes held on June 9, 2008 reflect that Assistant Building Commissioner Austin stated he would research the records and report his findings to the residents. She said the tape of the Commission Public Hearing held on July 14, 2008 indicates he did not research the matter because he states both parcels at issue are part of the Highland Woods Subdivision. She said there is a large cluster development in Aberdeen. She stated the intense desire to have the parcels at issue subdivided into 100 foot by 175 foot lots is problematic because surrounding lots have varying dimensions with lot widths ranging from 100 feet to 150 feet.

DISCUSSION OF EVIDENCE BY BOARD:

Chairman Kerr expressed concern that the application for variances was not submitted by Paris Development, the legal owner Block A. Mr. McFadden replied he is somewhat certain that Mr. Bencin is considered an owner of Block A because he signed a contract for purchase of the property.

Mr. McFadden referenced HHCO 1113.10, which states, in part, the Commission may grant variances when application is made to the Building Commissioner for a building permit and same is refused. He noted the Commission does not have the power to grant a variance without the application for a building permit which, in this case, was never submitted.

Chairman Kerr referenced HHCO 1113.13, which states, in part, variations may be given for lots that are of restricted area and in which the owner owns no adjoining lot or where additional land cannot be acquired equitably. He said there are no exceptions to this ordinance and that the new proposed parcels should be governed by current Code.

MOTION: A motion was made by Ms. Thomas that the Board of Building and Zoning Appeals affirm the decision of the Planning and Zoning Commission made on July 14, 2008 to grant five variances to Edward Bencin to lot size and area regulations for Permanent Parcels 821-26-001 (462 Miner Road) and 821-26-014 (Block A, Lynden Drive); seconded by Mr. McFadden. Nays Hicks, Hollis, Kerr, McFadden, Thomas. Nays all; motion denied.

Chairman Kerr requested that the secretary poll the Board members in the majority for their reasoning in the matter in which they voted. The consensus of the Board for not affirming the decision of the Commission was that the standards for granting a variance were not met according to HHCO 1113.10; the Commission did not have the predicate power to grant the variances because an application for a building permit had not been made as required by HHCO 1113.10; and variances were granted that exceeded the maximum allowable variation of ten percent as established by HHCO 1113.13.

Chairman Kerr advised Mr. Bencin of his right to appeal the decision of the Board with the Common Pleas Court according to HHCO 1114.10.

ADJOURNMENT: A motion to adjourn the meeting was made by Ms. Thomas and seconded by Mr. McFadden. Said meeting adjourned at 8:50 p.m.

INTRODUCTION OF EXHIBITS:

- Exhibit A: Letter from Appellants objecting to variances
- Exhibit B: Sheriff's Deed for 462 Miner Road
Highland Woods Subdivision No. 1 Plat
Highland Woods Subdivision No. 1A Plat
Legal Description of P.P.'s 821-26-001, 013, 014, 060 and 821-28-018, 020
- Exhibit C: Plat of Highland Woods
Preliminary Plat of proposed reconfiguration of parcels at issue
Drawing of water and sewer connections

INTRODUCTION OF CORRESPONDENCE:

- #1: May 9, 2008 – Request for Hearing application by Edward Bencin, including preliminary plat
- #2: May 12, 2008 – P&Z Regular Meeting Minutes of Mr. Bencin's review of plans
- #3: May 16, 2008 – Letter of review from City Engineer Blackley of preliminary plat
- #4: May 30, 2008 – P&Z Legal Notice for Public Hearing on June 9, 2008
- #5: June 9, 2008 – P&Z Public Hearing Minutes
- #6: June 9, 2008 – Letter from Laura and Martin Kuns objecting to variances
- #7: June 13, 2008 – P&Z Legal Notice for Public Hearing on June 23, 2008
- #8: June 16, 2008 – P&Z Legal Notice for Public Hearing rescheduled from June 23rd to July 14th
- #9: July 14, 2008 – P&Z Public Hearing Minutes
- #10: July 14, 2008 – P&Z Regular Meeting Minutes
- #11: July 14, 2008 - Letter from Laura and Martin Kuns objecting to variances
- #12: July 14, 2008 – Letter of Opinion from Law Director Paluf
- #13: July 24, 2008 – BZA Appeal Application
- #14: August 4, 2008 – Notice of Appeal Hearing
- #15: August 14, 2008 – Agenda of Appeal Hearing

Susan Olson, Secretary

Charles Kerr, Chairman