

Beavercreek Township Trustees' Special Meeting

Monday, October 17,

2016

Ms. Graff brought the meeting to order at 7:00 p.m.

Roll Call: Ms. Graff; Mr. Roberts.

Others: Ken LeBlanc (Regional Planning and Coordinating Commission); Dave Reed; Mary Nutter; Bob Nutter; Marshall Foiles; Cindy McNamee; Colin Smith; Zachary Apple; David Cotere; Alex Zaharieff, Township Administrator/Public Safety Director; Dawn Frick, Legal Counsel; Ed Amrhein, Zoning Administrator; Laurie Brown, Zoning Clerk.

Case #798 – Rezoning - Kil Kare Inc.

The public hearing notice was read.

Ms. Graff asked Mr. Amrhein to give the Staff Report.

Mr. Amrhein used the Greene County GIS to illustrate the specifics of the parcel in question, including the zoning for adjacent parcels. He pointed out that the parcel was located both north and south of Dayton-Xenia Rd., with the larger portion on the north being zoned Agricultural, while the smaller southern portion is zoned Light Industrial.

Mr. Amrhein then provided some history with regard to the applicants applying to Xenia Township to rezone the adjacent parcel to the east from Agricultural to B-3. He noted the B-3 district was chosen because the applicants' stated use was to build store and locks, and the B-3 district would permit them to do that. That request was denied primarily because of other uses that would have been permitted by the rezoning that were unacceptable to the Board of Trustees in Xenia Township.

Similarly, when the owners approached Mr. Amrhein about rezoning this portion of the parcel for the same type of use, Mr. Amrhein's initial suggestion was to take all the applicants' property in Beavercreek Township and develop a PUD. When Mr. Amrhein explained the PUD process, the applicants felt it would take too long and asked what other options were available. At that time, he told the applicants they had the option to rezone to a traditional zoning district. In looking through the zoning resolution, the zoning district that allows store and locks is I-1/Light Industrial. Rezoning to an I-1 district made sense because there is adjacency with other I-1 properties as well as the southern portion of this parcel already being zoned I-1.

The owners have stated their only intended use for this property is the store and lock and, perhaps, some warehouse facilities. They have included a statement in their application that says they have no interest in any of the other uses permitted by the zoning resolution in an I-1 district. Mr. Amrhein referenced the list of permitted and conditional uses for the I-1 district that he had provided in the Board's packet.

Mr. Amrhein stated the process of rezoning in townships that have a Regional Planning department requires submitting rezoning proposals to that department. The application is then considered in a proceeding that parallels the Zoning Commission. When the Zoning Commission made their 3-2 decision to recommend approval of this zoning request, they did so based on the information contained in Regional Planning's Staff and Executive Committee Reports. They did not have the full board's report at the time, however, that report supported the findings of the other two reports. They recommended denial of the rezoning for a

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variety of reasons which will be explained to the Board later by the director of the Regional Planning & Coordinating Commission.

In considering all the information provided, including briefs filed in support of and against the proposed rezoning, the Zoning Staff has come to the following conclusions:

- Reasons to approve the application:
 - Adjacency of similarly zoned property, including a portion of the subject property itself
 - The absence of adjacent residential districts
 - I-1 and I-2 are the only zoning districts that allow store and lock facilities, however:
 - 18.01(5) states "...in no case shall there be more than one main building on a lot except as specifically provided hereinafter." This means a variance would be required for more than one building.
- Reasons to deny the application:
 - Unsuitability for other uses permitted in the I-1 district
 - The Beavercreek Township Comprehensive Land Use Plan says "Industrial development requires public utilities such as electric power, water supply, gas, and wastewater disposal."
 - The Regional Planning & Coordinating Commission of Greene County has recommended denial at all three levels of review for a variety of reasons.
 - Denial, in the opinion of Zoning Staff, will not deprive the owners of all productive or profitable uses of the parcel. Agricultural and accessory uses would remain viable, as would a variety of other potential uses, should the property be rezoned in some other fashion to a PUD.

In consideration of all this, and despite the recommendation of the Zoning Commission for approval, the final Staff recommendation is for denial, based on the aforementioned reasons and the desire of staff to maintain better control of what happens in a fairly significant area of the Township.

At this time, Ms. Graff informed those present that Mr. Kretz had recused himself from this case.

Ken LeBlanc, Director of the Greene County Regional Planning & Coordinating Commission (RPCC), addressed the Board.

Mr. LeBlanc reviewed with the Board a presentation detailing the zoning of the area, the County and Xenia Township Land Use Plans, the reclamation plan for the gravel pits and lake expansion, the Urban Service Boundary, the hydrology of the area, the location of aquifers, and the groundwater resources map. He noted that both the County and Township plans recommend that this parcel remain as agricultural and open space until an update has been done. RPCC recommended not granting the rezoning until they have had a chance to study that area more.

Mr. LeBlanc noted there is a lot of activity planned in this area with the proposed changes to US 35 and the Valley/ Trebein interchange, regarding exposed aquifer water near there. He noted there is an opportunity for contamination of the aquifer. Ms. Graff noted that the US 35/Valley/Trebein interchange would not come anywhere near the aquifer.

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Mr. Roberts asked to see the County Land Use Plan again and asked for an explanation of what the colors signified. Mr. LeBlanc said white is agriculture, blue is flood plain, and green is open space. Mr. Roberts commented that Mr. LeBlanc had said it needed to stay agricultural because of the waterway, but noted that most of it is already zoned industrial and M-3. The groundwater map was reviewed again. Mr. Roberts commented this was also surrounded by mostly industrial and M-3, not agricultural. At this time he also clarified that it was not a unanimous vote of the RPCC full board to deny the rezoning. The vote was 6 to deny, 3 in favor and 2 abstaining. He wanted that noted since it wasn't in the packet. It was also noted that the M-3 zoning district was in Xenia Township.

Marshall Foiles of Kil Kare addressed the Board. He stated that part of the parcel was already zoned I-1 and, in talking with Ed, it seemed simpler to zone the rest of the parcel I-1. It is surrounded on two sides by I-1 and mining. It has been mentioned that there is agricultural on the other side. That is Kil Kare, there is a business there. It's not like there are homes or a subdivision. There is talk of sewer and water. He doesn't know of too many store and locks that have sewer and water; they don't require it. They are not even going to put an office in the facility. Mr. Foiles noted that any type of use they would try to put there that required sewer and water would be stopped by the Greene County Building Department as part of the checks and balances. He emphasized that what they are asking for is a simple zoning change so they can build some store and lock buildings. A PUD costs tens of thousands of dollars to create. This is just a simple business decision. They would like to have recurring revenue as well as increase land values which in turn would provide more taxes for the County.

Cindy McNamee, attorney for the applicant, addressed the Board. Ms. McNamee stated they she had received the brief in opposition that morning and had not had time to prepare a response. Having only briefly looked through it, it appears the brief is objecting to two different (2) things.

1. **That the Zoning Commission didn't really consider the RPCC decision or didn't have time to consider it.** She was at the Zoning Commission meeting and, while they may not have had the final letter, it was reviewed in basically the final format. She feels that it was not persuasive because it didn't really say very much. She then read from the recommendation: "It is recommended the proposed rezoning request not be approved until a study be done to recommend an amendment to the County and Township plans for this part of Greene County." But, it doesn't say by whom, when it would be done, or who is going to pay for it, and it doesn't say if it is just a study that is required or is it a study that ultimately changes the proposed use. So, while it does make a recommendation, it is very vague. From the property owner's perspective there is no idea how long that would take.
2. **Why not use a PUD?** A PUD is more expensive. Part of this parcel, as previously discussed, is already I-1. In this case, a PUD is not really appropriate because straight zoning fits. They are not looking for a modification to density or any type of mixed use, and the setback requirements are fine, so it just didn't make sense. The PUD process is a two-step process, it's more expensive and they just want to do a store and lock. That's basically why they didn't go that way.

Dave Reed, attorney for Nutter Enterprises and for Bob & Mary Nutter as residents of the Township, addressed the Board. Mr. Reed used the large screen to make a presentation to the Board. Mr. Reed stated he had worked in the area of zoning and land use for 25 years. He emphasized the applicant did not come

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to the Trustees to ask for a store and lock; the applicant is attempting to rezone the entire property which will allow not only that use, but other uses as well. In so doing, there are four (4) basic points that his clients have a problem with:

1. It goes against the established principles of rezoning land.
2. It goes against the recommendation of the Greene County Regional Planning & Coordinating Commission.
3. It goes against the Township's Comprehensive Land Use Plan.
4. It permanently allows 65 potential new industrial uses, many which are not appropriate for this site, not just for this applicant, but for any future owners of this property.

From their perspective, each of these are reasons to turn down the application. When you put them in totality, it would be irresponsible land planning and bad precedent for the Township to allow Industrial rezoning at this location.

Mr. Reed then went through each of the four (4) reasons individually:

1. **It goes against the established principles of rezoning land.** No one ever has the right to have their land rezoned. It is not a vested right; they are not entitled to rezoning. It is a discretionary right of the Township. When you purchase land, you do so with existing zoning. This has been well-established in Ohio case law.
 - a. A rezoning should be to serve the common good.
 - b. A rezoning should not be to benefit a single parcel.
2. **It goes against the recommendation of the Greene County Regional Planning & Coordinating Commission (RPCC).** They have considerable expertise in the area of land planning and play a vital role in guiding development in the unincorporated areas of Greene County. They provided a fairly thorough analysis as to why this does not make sense from an overall perspective. It was not a single issue of sewer and water; they provided seven (7) reasons why this was not a good idea.
3. **It goes against the Township's Comprehensive Land Use Plan.** The Comprehensive Plan was created to establish a guideline for decision-making, particularly for land use and development issues. It instructs that any rezoning requests or development proposals should be evaluated for conformity with the goals of the plan. Should changes in zoning be proposed, the rezoning should be in accordance with the goals and guiding principles of the Comprehensive Plan. One of the stated goals of the Comprehensive Plan is to maintain the Township's unique character, its positive image as a desirable community, and to preserve the rural atmosphere.
 - a. The Comprehensive Plan designates this property as Agricultural. It is also adjacent to 23 acres of agriculturally-zoned land.
 - b. The Comprehensive Plan says there is already adequate Industrial land to meet the future needs of the Township. It is also clear that land without utilities is not to be zoned Industrial.
 - c. There is a process in place to amend the Comprehensive Plan prior to a rezoning that contradicts the plan. If you choose not to follow your plan for purposes of expediency, you essentially have no plan.
4. **It permanently allows 65 potential new industrial uses, many which are not appropriate for this site, not just for this applicant, but for any future owners of this property.** Even if the process had been followed and the standards met, it would still be irresponsible to rezone

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the property to Industrial. There is no reason to open it up to 65 other uses permitted under Industrial zoning. The zoning runs with the land; any successor in title could use it for any of those other purposes. The Township will also lose control over a highly accessed corridor into the Township. A PUD would give control to the Township and protect against the undesired uses in I-1.

At this time, Mr. Reed stated he felt the Zoning Commission had deliberated on this issue; however, it was apparent that several of them did not have experience in the area of PUDs. They would have benefitted from having Mr. Amrhein present to explain to them the true differences between PUDs and I-1 zoning.

Mr. Reed noted that, as previously mentioned, the applicant had asserted to the Zoning Commission that Mr. Amrhein had recommended the I-1 approach, which was seen as meaningful by several of the Zoning Commission members. If the Board determines that a store and lock is necessary in that location, a PUD would be more appropriate than the I-1 zoning.

Mr. Reed stated that his clients have invested more dollars in the Township than probably any other land owner. They are building a thoughtful, well-designed residential neighborhood and are interested in protecting that investment. Mr. Reed then noted that his clients could have zoned their property to a specific zoning category, but they chose to accept the Township's recommendation to do a PUD. As such, they are not asking another property owner to do something they themselves are not doing.

Mr. Reed then briefly reviewed the points previously made and concluded by asking the Board to deny the rezoning application.

Ann Stalter, a member of the Zoning Commission, addressed the Board on behalf of the other commission members. Ms. Stalter acknowledged the inexperience of some of the commission members and noted they were not quite clear on what the Comprehensive Land Use Plan was. With regard to the RPCC report, there was not a lot of discussion of it because it was only in its draft form. The finalized report was sent to the Zoning Commission the next morning, after the decision had been made. There was discussion about water access and overall use, and there was debate with regard to trying to link the existing mining operation across the street with possible future uses. In the end, the Zoning Commission felt they did not have enough information to make that determination.

There being no one else wishing to speak, the public portion of the hearing was closed.

At this time, Mr. Zaharieff echoed some of the Staff recommendations. The applicant was given a couple of different options. The PUD option was recommended by Staff, not just for this parcel, but for all the applicant's parcels. It is consistent with what has been done in both Stonehill Village and Valley Springs Farm developments. The applicant ultimately has the choice of whether to go with a PUD or straight zoning. Mr. Zaharieff felt the need to clarify that, from the beginning, Staff recommended the PUD as the best way to proceed.

Ms. Graff asked if the applicant knew at the time they applied for I-1 rezoning that they would not be permitted to have more than one structure on the parcel. At this time, Mr. Roberts asked for a clarification as to what the one structure referenced, because precedence had been set for multiple store and lock buildings on one parcel.

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Mr. Amrhein explained that the citation regarding one structure on a parcel comes from a section of the zoning resolution called 'General Provisions.' It is intended to apply to all zoning districts, which is the reason the Township will not consider applications for multiple dwelling units even on large parcels of land. There was some discussion of other store and lock facilities in the Township, specifically that they had been granted variances to allow multiple buildings. It was noted that the other store and lock facilities in the Township were located in I-1 districts.

Mr. Roberts commented that part of the problem is there is no other place in the zoning resolution that allows store and locks except in PUDs or by rezoning to Industrial. Mr. Amrhein agreed and noted that an applicant couldn't even apply for a store and lock as a conditional use in some other district.

Ms. Graff asked the last time the list of permitted uses had been significantly modified. Mr. Amrhein said he couldn't answer that as it had not happened in his time with the Township. There has been a minor wording change to add a conditional use in one of the business districts. He noted that updating the permitted uses is on the to-do list for the Zoning Department.

There was some discussion of the word 'unsuitability' as applied to the requested rezoning. Mr. Amrhein clarified that 'unsuitability' was a reference to the Comprehensive Land Use Plan's requirement that utilities are required in an Industrial district for development. He agreed with Mr. Roberts that it did not stipulate that utilities are required for rezoning to Industrial.

Mr. Roberts then thanked Mr. Amrhein for his input and recommendation to the Board. Mr. Amrhein stated that he tries to achieve a balance when considering an application. He presents reasons to approve and reasons to deny. In this instance he feels the reasons to deny outweigh the reasons to approve.

Mr. Roberts addressed Mr. Amrhein's point that denial is not to deprive the owner of all productive and profitable use of the parcel, but noted that denial would deprive him of the one use he wants. Mr. Amrhein stated that he believed case law would indicate the Township is not under obligation to afford an applicant the maximum economic benefit from a property, but is obligated to not deny them any economic benefit. In this case there is profitable use of the land already in place under the agricultural zoning. Additionally, agricultural accessory uses could also be put in place.

There was some discussion of the PUD process for all the applicant's parcels as well as for the single parcel in question, and how that might work with regard to what would be allowed in the PUD. Mr. Amrhein used the Coy/Trebein Schools and Valley Springs Farm as examples of how the PUD might work.

Mr. Roberts briefly discussed the RPCC reports and agreed with Ms. McNamee that the recommendation amounted to a couple of sentences. He also noted, had it not been for abstentions during voting of the full RPCC board, the recommendation might have turned out differently. He said he was very interested as to how the Zoning Commission came to the 3-2 decision.

Ms. Stalter said the commission couldn't come to an agreement regarding the PUD. They looked at it from the perspective of what the zoning was for adjacent parcels. Ms. Stalter noted the commission's frustration and emphasized it would have been easier if the commission could have made the connection to the Comprehensive Land Use Plan.

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Mr. Roberts asked the applicants to clarify why they went with the straight zoning instead of the PUD. Mr. Foiles responded that they were looking for the quickest way to expedite the process, which was the straight zoning. They did not think it would be a problem because, if they wanted to, they could already put a store and lock across the street on the portion of the parcel already zoned I-1. In fact, in some ways it would make more sense across the street.

Mr. Roberts asked Mr. Foiles how long this process has taken. Mr. Foiles said it had been about two (2) months. Mr. Roberts then asked Mr. Amrhein how far along in the PUD process this would be if that had been the chosen route. Mr. Amrhein responded there probably would have been two to three meetings with the Zoning Commission at this point and possibly a resolution. He emphasized it would depend on whether the PUD application was for this one parcel or all of the Kil Kare properties that are in Beavercreek Township. Mr. Amrhein noted the process does specify a fairly preliminary but comprehensive set of plans and considerations. At this time, Mr. Roberts noted that, given where things are now, the PUD might have been the better option.

Mr. Roberts then said it had been pointed out by Mr. Nutter's attorney that no one has the right to have their land rezoned. He asked Mr. Reed if that meant the applicants did not have the legal right to do as they want with their land. Mr. Reed responded that the applicants have the right to do everything permitted under existing zoning; they do not have the right to rezone. Mr. Roberts reminded Mr. Reed that all of the newer development moving in around Kil Kare knew it was there and had been there for quite some time. It was verified that Kil Kare has been in existence since 1951. Mr. Roberts also reminded Mr. Reed that he had said the store and lock should be put somewhere else. He then asked Mr. Reed for clarification as to whether he objected to the proposed use or the rezoning. Mr. Reed responded that zoning should follow the plan in place. Responsible zoning does not support rezoning for one particular use. If rezoning is not supported by the plan, a proposal should be made to amend the Comprehensive Land Use Plan. After the plan has been amended is the time to come forward with a request for rezoning.

Mr. Roberts thanks Mr. Reed for his response but said that did not answer his question. Mr. Reed had specifically stated he was against the rezoning but he also specifically stated that the store and lock should be moved elsewhere. Mr. Reed clarified that he had said there is property elsewhere that is already zoned I-1 where a store and lock could be built. Mr. Roberts again asked Mr. Reed if he was against the rezoning and the store and lock, or just the rezoning. Mr. Reed said they are against rezoning to I-1.

At this time, Mr. Zaharieff verified for the Board that there is precedence for single parcel PUDs in the Township. The prime example would be the new school (Coy/Trebein) which was zoned PUD-C. There is also the property on Dayton-Xenia Road that was recently purchased by the Township. That property had originally been zoned agricultural, was rezoned to a PUD, and then rezoned back to agricultural again.

Mr. Roberts asked Mr. Amrhein if there had been any discussion of amending the Comprehensive Land Use Plan. Mr. Amrhein responded that there had not been any recent discussion with the Zoning Commission with regard to amending the plan.

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Ms. Graff asked if the parcel to the west of the Kil Kare parcel, that is also zoned agricultural, is currently being used as agricultural. Dave Cotterel, Kil Kare Co, said that it is not.

With regard to following the PUD process, Ms. Graff commented that the Nutters were not forced to do a PUD, they did it by choice. It was not forced on them by the Township. Ms. Graff further noted that the Stonehill Village PUD was done at a time when the PUD process was fairly new.

Ms. Graff stated that she had been involved in many zoning cases over the years. She was trained to look at compatibility with adjacent uses and to also consider a reasonable use of the land, not the highest use, but a reasonable use. This parcel has 13 acres: Is that enough for a reasonable agricultural use? Mr. Nutter responded that he is a farmer and that it would be a reasonable use.

Ms. Graff asked Mr. Amrhein what other agricultural uses, besides farming, could be done on the property. Mr. Amrhein read the following from the zoning resolution:

PERMITTED PRINCIPAL USES

Agricultural (Farm) activities
 One-family dwellings
 Sale of farm products grown or raised on the premises
 Township facilities

ACCESSORY USES

Any use customarily accessory or incidental to the permitted uses.
 Farm vacation enterprises.
 Private swimming pools.
 Sleeping rooms. (The renting or leasing of rooms by a resident family.)
 Non-commercial rifle or skeet ranges.

CONDITIONAL USES

Airports
 Cemeteries
 Mining operations
 Public or private recreation facilities
 Home occupation
 Nursery schools/day care centers
 Agri-business
 Churches
 Indoor recreational vehicle and car storage

Ms. Graff then referenced the most recent update to the Comprehensive Land Use Plan, stating that she did not remember why this particular area was left as agricultural when it is adjacent to a significant amount of industrial-zoned property.

Mr. Zaharieff remembered discussion back and forth between the Zoning Commission and the Board of Trustees and stated it had to do with the mining part of it. Several years ago, American Aggregate approached the Township and said the Township needed to have an open dialogue with Xenia Township regarding what will be done with the mining property post-reclamation when it is turned over the both townships. There was some discussion of the American Aggregate property becoming a park someday. Ms. Graff asked if the reclamation plans were on file. It was confirmed that RPCC has a copy.

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Ms. Graff stated that, while she would prefer this goes through the PUD process, she understands that it is perfectly legal for a property owner to request a zoning change. It is not required on the part of the Board to grant everything; however, the Board should look at reasonable uses of property. It is indicated for true industrial development that public utilities would be needed. In this case, there will be no office facilities, so that precludes a need for water and sewer. Should this application be approved, the remaining 60+ uses permitted in an industrial zone could not be approved by the County because of the lack of public utilities.

Mr. Zaharieff clarified that the requirement for public utilities for industrial development was part of the Township's Comprehensive Land Use Plan and not necessarily what is required in the building code.

Mr. Roberts noted that, since the communication from Mr. Reed came so late, he would be interested in hearing if Ms. McNamee had anything further to add.

Ms. McNamee noted that the issues had been addressed on both sides; however, there is a need to look at reasonable uses. Creating a PUD for this one use would be complicated. As has been shown, other permitted uses in the I-1 zoning would not be feasible due to the lack of utilities.

Ms. Graff noted she was glad Mr. Roberts had brought up when the brief in opposition was filed. She asked Mr. Reed when he or his client received notice of this hearing. Mr. Zaharieff responded that they are not within the required area to be notified. Mr. Reed stated they found out from the website. Ms. Brown said she would double-check, but she believed she had sent notification of this meeting to Mr. Reed because she knew he and Mr. Nutter were interested in attending.

There being no further evidence to consider, the Board deliberated.

2016-412 Ms. Graff moved to approve the recommendation of the Beavercreek Township Zoning Commission to approve the rezoning in Case #798 from A-1/Agricultural to I-1/Light Industrial. The motion dies for lack of a second.

There was some discussion as to what happens next. It was clarified by Township legal counsel that if the Board does not make a decision within 30 days from the date this meeting was set, the Zoning Commission's decision would stand as the final decision.

2016-413 Mr. Roberts moved to adjourn. Ms. Graff seconded the motion. The Vote: Mr. Roberts, yes; Ms. Graff; yes. The motion carried.

The hearing adjourned at 8:35 p.m.

Trustee: _____

Fiscal Officer: _____