

**A RESOLUTION REVERSING THE BOARD OF ZONING APPEALS' DECISION IN CASE NO. 08-2023 AND DECLARING AN EMERGENCY**

WHEREAS, the Village of Richfield's Board of Zoning Appeals ("BZA") Case No. 08-2023 involves an application for use variances for the property located at 4751 Brecksville Road ("Subject Property") located in the Village's General Business District (C-2 District) pursuant to Section 1107.07 of the Planning and Zoning Code. Specifically, the variances sought are: (1) a variance from Section 1105.19 of the Planning and Zoning Code to permit outdoor storage of two (2) enclosed trailers and two pieces of machinery no larger than said trailers, but not products, supplies, or merchandise of any kind; and (2) a variance from Section 1107.03(c) of the Planning and Zoning Code to permit parking on gravel rather than asphalt and concrete;

WHEREAS, Case No. 08-2023 was initiated by application by Frank Tomaro upon Council's decision to exercise its "Call up authority for Conditionally Permitted Uses" pursuant to Section 1173.07 of the Codified Ordinances pertaining to an approval of a conditional use of the Subject Property, which application was submitted by On-Call Waterproofing.com (submitted by Frank Tomaro), when, after Council reviewed the Planning Commission's approval of the conditional use application, the Council determined that the Planning Commission acted in excess of its authority by authorizing uses of the Subject Property which are not permitted by the Planning and Zoning Code, specifically, parking vehicles and equipment on non-paved services are not permitted by the Planning and Zoning Code and only the Board of Zoning Appeals has the authority to authorize variances from the requirements of the Planning and Zoning Code;

WHEREAS, the BZA heard Case No. 08-2023 on July 26, 2023, and voted to grant the requested variances for the reasons stated during the BZA proceeding, not because the BZA determined the applicant made an evidentiary showing requisite to obtain a use variance pursuant to Section 1107.09(c) of the Codified Ordinances;

WHEREAS, on Thursday, July 27, 2023, the Secretary of the BZA filed with the Clerk of Council a copy of the transcript of the Board proceedings that resulted in the granting of the variance;

WHEREAS, on August 1, 2023, at the Regular Meeting of Council, the Council heard a report regarding Case No. 08-2023 and decided to schedule a hearing on Case No. 08-2023 so that the Council could determine whether it would "reverse or modify the decision" of the BZA pursuant to Council's authority in Section 1107.19 of the Codified Ordinances;

WHEREAS, on August 2, 2023, a letter was sent to On-Call Waterproofing, c/o Frank Tomaro advising him of the Council's desire to conduct a hearing on August 15, 2023 in order to determine whether it will take any action pursuant to Section 1107.19 of the Codified Ordinances regarding Case No. 08-2023, and advising that during that hearing "Council will consider the transcript and materials submitted during Case No. 08-2023" and "Council will allow you and the Village administration to present evidence addressing the requirements that must be satisfied in

order to receive a variance under the Village's Codified Ordinances" a copy of said letter is attached hereto as Exhibit A;

WHEREAS, at all times up to that date, Frank Tomaro has held himself out as having the authority to act on behalf of himself, On-Call Waterproofing, Inc., On-Call Waterproofing.com, and with the authorization of the property owner, 4751 Brecksville Road, LLC; further, the application for variance in Case No. 08-2023, submitted by Frank Tomaro, indicates that Bernatte Tomaro was the owner of the Subject Property, and Ms. Tomaro participated in the BZA proceedings;

WHEREAS, on August 15, 2023, the Council conducted a hearing regarding Case No. 08-2023, and after considering all evidence submitted to the BZA, reviewing the transcript of those proceedings, and considering the evidence and arguments made by all interested persons and parties, passed a motion to prepare a resolution to reverse the BZA's decision in Case No. 08-2023;

WHEREAS, this Resolution memorializes Council's decision for reversing the decision of the BZA in Case No. 08-2023.

NOW, THEREFORE, BE IT RESOLVED by the Council of the Village of Richfield, County of Summit, State of Ohio that:

SECTION 1. That the recitals set forth above are hereby incorporated into the analysis set forth in Section 2 of this Resolution.

SECTION 2. That Section 1107.09(c) of the Village's Codified Ordinances establishes the standards that must be met in order to obtain a use variance. In Case No. 08-2023, the BZA did not find that the applicant (whether it was Frank Tomaro, On-Call Waterproofing, or some other entity) presented competent, credible, or reliable evidence which satisfied all of the standards requisite to obtain a use variance pursuant to Section 1107.09 of the Codified Ordinances. Instead, the BZA decided that, given the unique procedural posture of the case (i.e. application for a variance submitted upon the Council's exercise of its call up authority), and the fact that the applicant's conditional use approval was being reviewed by Council, it was appropriate to approve the variance "in name only" so that the applicant could have a second bite at the apple in presenting evidence regarding the standards necessary to obtain a use variance pursuant to Section 1107.09 of the Codified Ordinances.

The applicant was afforded ample notice of the August 15, 2023 proceedings and was advised that it/they, as well as the Village would have the opportunity to present evidence regarding the standards necessary to obtain a use variance.

Council reviewed the audio of the BZA proceedings in Case 08-2023 and the evidence presented by the parties in that case.

On-Call Waterproofing, Frank Tomaro, Bernadette Tomaro, and 4751 Brecksville Road LLC were aware that the proceedings were going to take place and were given an opportunity to participate by presenting evidence and making legal arguments.

The Council considered the arguments presented by On-Call Waterproofing, Frank Tomaro, Bernadette Tomaro, and 4751 Brecksville Road LLC, as well as the arguments presented by the Village Administration, and other third parties.

After considering all evidence and arguments, the Council concludes:

1. In order for On-Call Waterproofing, Frank Tomaro, Bernadette Tomaro, or 4751 Brecksville Road LLC to engage in outdoor storage of two enclosed trailers and two pieces of machinery no larger than said trailers, but not products, supplies, or merchandise of any kind and in order for those persons/entities to park on gravel rather than asphalt and concrete those persons/entities must obtain variances from Sections 1105.19 and 1177.03(c) of the Codified Ordinances. Such uses could not be authorized by the Planning Commission. It was therefore appropriate for the BZA to consider those use variances.

2. Use variances are governed by Section 1107.09(c) of the Codified Ordinances. All of the standards in Section 1107.09(c) must be satisfied in order for a use variance to be granted. Based on the evidence submitted to the Council and the BZA, the Council makes the following findings with respect to each standard:

- a. The variance requested stems from a condition, which is unique to the property at issue and not ordinarily found in the same zoning district.

The variances requested do not stem from any conditions unique to the Subject Property and not ordinarily found in the zoning district.

With respect to the requested variance for outdoor storage, the evidence presented shows that there is ample area within the building for the storage of equipment inside; however, because the Subject Property is being shared by multiple tenants, there is limited space available to store items inside. It is not unique to the Subject Property to have multiple tenants on a property in the C-2 Zoning District. The fact that the main building currently lacks the capacity to store the requested items inside while other tenants are using the building space does not demonstrate that this standard has been met. Other arguments made during the hearings on this element were equally unpersuasive and are rejected.

With respect to the requested variance for parking on unpaved surfaces, no evidence has been presented to establish that there is some unique condition on the Subject Property not ordinarily found in the zoning district which justifies the variance. The sole argument made for this point was the fact that it is possible that an addition to the building on the Subject Property may be constructed at some point, and paving where the parking on unpaved surfaces is currently taking place could make it more cost-prohibitive to construct the addition in the future. This

argument does not carry the requisite burden for this standard. The Subject Property is relatively flat in nature and paving is possible.

This standard has not been met for either variance.

- b. The hardship condition is not created by actions of the applicant.

With respect to the requested variance for outdoor storage, the hardship condition—lack of space inside the building—was created by either the property owner, On-Call Waterproofing, Frank Tomaro, Bernadette Tomaro, or some combination of those persons or entities. Those persons or entities controlled the number of tenants with access to the building on the Subject Property. If fewer tenants were in the building, then the need for outdoor storage would be eliminated.

With respect to the requested variance for parking on unpaved surfaces, the evidence presented shows that the only reason parking is being requested is because there is a desire to potentially construct an addition to the main building on the site. This is a hardship condition of the applicant’s own making, either through the applicant’s actions or the actions of other persons/entities controlled by the applicant.

This standard has not been met for either variance.

- c. The granting of the variance will not adversely affect the rights of adjacent owners.

With respect to both the outdoor storage variance and the parking on unpaved surfaces variance, the evidence presented does not establish that the rights of adjacent owners are not affected. The secondary effects of allowing outdoor storage in the C-2 District on the Subject Property has the potential to diminish property values, compromise the future commercial uses of adjacent properties, and could interfere with the quiet enjoyment of one legal non-conforming residential property adjacent to the Subject Property.

This standard has not been met.

- d. The granting of the variance will not adversely affect the public health, safety, or general welfare.

With respect to both the outdoor storage variance and the parking on unpaved surfaces variance, the evidence presented does not establish that the rights of adjacent owners are not affected. The secondary effects of allowing outdoor storage in the C-2 District on the Subject Property has the potential to diminish property values, compromise the future commercial uses of adjacent properties, and could interfere with the quiet enjoyment of one legal non-conforming residential property adjacent to the Subject Property.

This standard has not been met.

- e. The variance will be consistent with the general spirit and intent of the zoning code.

With respect to the outdoor storage variance, the general spirit and intent of the Zoning Code is to promote the public health, safety, convenience, comfort, prosperity, and general welfare. *See* Section 1101.01 of the Codified Ordinances. The fact that outdoor storage is not permitted by the Village Zoning Code in the C-2 District shows that the Council has determined that outdoor storage in the C-2 zoning district is not consistent with the public health, safety, convenience, comfort, prosperity, and general welfare in the Village. Further support for this conclusion is supported by considering the potential “secondary effects” of outdoor storage in the C-2 District. No evidence has been presented to demonstrate the requested variance is consistent with the general spirit and intent of the Zoning Code.

With respect to the paved surface variance, the general spirit and intent of the Zoning Code is to promote the public health, safety, convenience, comfort, prosperity, and general welfare. *See* Section 1101.01 of the Codified Ordinances. The fact that parking on unpaved surfaces is not permitted in the Village shows that the Council has determined that the requested variance is not consistent with the general spirit and intent of the zoning code. No evidence has been presented to demonstrate the requested variance is consistent with the general spirit and intent of the Zoning Code.

This standard has not been established.

- f. The variance sought is the minimum which will afford relief to the applicant.

With respect to the outdoor storage variance, the variance sought is not the minimum which will afford relief to the applicant. Storage can be done inside the building on the Subject Property. Further, to the extent outdoor storage is required, that use can be completed elsewhere in the Village. No evidence has been presented to satisfy this standard.

With respect to the paved surface variance, the variance sought is not the minimum which will afford relief to the applicant. The applicant is able to pave the area of the Subject Property where parking on an unpaved lot is occurring. The fact that there may be an expansion to the building in the future does not establish that a variance to allow for parking on an unpaved surface is warranted.

This standard has not been met.

- g. There is no other economically viable use, which is permitted in the zoning district.

With respect to the outdoor storage variance, the evidence presented shows that there are other economically viable uses permitted in the zoning district. Indeed, there are several viable uses currently on the Subject Property and other properties in the C-2 District. No

evidence has been presented to demonstrate that there are no economically viable uses on the Subject Property that are permitted in the zoning district.

With respect to parking on unpaved surfaces, the evidence presented shows that there are economically viable uses permitted in the zoning district without any parking on unpaved surfaces. These uses are taking place on the Subject Property and throughout the C-2 District.

This standard has not been met for either requested variance.

3. Based on the foregoing, there is no evidence presented to meet the standards requisite to obtaining a use variance pursuant to 1107.09(c) of the Codified Ordinances. Therefore, pursuant to Section 1107.19 of the Codified Ordinances, this Council hereby reverses the decision of the BZA in Case No. 08-2023 in its entirety.

SECTION 3. It is found and determined that all formal actions of this Council concerning and relating to adoption of this Resolution were adopted in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such were in meetings open to the public, in compliance with legal requirements, including Section 121.22 of the Ohio Revised Code.

SECTION 4. This Resolution is hereby declared to be an emergency measure, necessary for the immediate preservation of the health, safety and welfare of the residents of the Village and for the further reason that this Resolution must take immediate effect in order to ensure that there is no ambiguity that the Council has by resolution reversed the decision of the BZA in Case No. 08-2023 within the timeframe set forth in Section 1107.19 of the Codified Ordinances; and for the same reason, the Mayor is instructed to immediately execute this resolution upon presentment; wherefore, provided this Resolution receives the affirmative vote of two-thirds of the members of Council it shall take immediate effect upon signature by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

PASSED: 8-19-23

Lucy A. Philippon  
President of Council

Michael Wheeler  
Mayor

Dated: 8/21/2023

ATTEST:  
Jeff [Signature]  
Clerk of Council

1375 East Ninth Street  
One Cleveland Center, 10th Floor  
Cleveland, OH 44114  
Direct Dial 216.377.1492  
PHONE 216.623.0150 FAX 216.623.0134  
bchojnacki@ralaw.com

WWW.RALAW.COM

August 2, 2023

**VIA FEDEX**

OnCall Waterproofing  
c/o Frank Tomaro  
176 State Road  
Hinckley, OH 44233

Re: Board of Zoning Appeals Case No. 08-2023

Dear Mr. Tomaro:

Section 1107.19 of the Codified Ordinances of the Village of Richfield authorizes the Council of the Village of Richfield to “reverse or modify the decision of the Board by a resolution of Council which states the reasons for its decision. If no action is taken by Council within such thirty-day period, then the decision of the Board shall be final.”

Be advised that the Village Council of the Village of Richfield will be conducting a quasi-judicial proceeding to determine whether it will reverse or modify the decision of the Board in the above-referenced action.

During that hearing, the Council will consider the transcript and materials submitted to the Board of Zoning Appeals during the above-referenced variance proceeding. In addition to those materials, Council will allow you and the Village administration to present evidence addressing the requirements that must be satisfied in order to receive a variance under the Village’s Codified Ordinances.

The Village Council will conduct this proceeding at the regularly scheduled Council Meeting on August 15, 2023 at 6:30 p.m. at 4410 W. Streetsboro Road, Richfield, OH 44286.

At the conclusion of the proceedings, Council may either: (a) take no action; or (b) take action that will result in the Council passing a resolution to “reverse or modify the decision of the Board.”

Please contact me if you have any questions or if I can do anything else to assist you.

Respectfully,



Benjamin Grant Chojnacki

