

RECEIVED
MAR 17 2017
BY: Kim Banning

NOTICE OF APPEAL OF DECISION OF GAHANNA PLANNING COMMISSION
RECORD OF ACTION – CERTIFIED FEBRUARY 22, 2017
APPLICANT/APELLANT: DONALD T. PLANK
ON BEHALF OF ACCESS OHIO, LLC
LANDOWNER: ACCESS ENERGY, LLC

**STATEMENTS OF THE REASON AND
LEGAL BASIS FOR THE APPEAL**

1. On August 8, 2016, Attorney Donald Plank, on behalf of Access Ohio LLC, filed an application for a conditional use to permit “living quarters as an integral part of a permitted use building.” Said conditional use is set forth verbatim in the Zoning Ordinance of the Municipality of Gahanna (hereinafter referred to as “ZOMG”), §1153.03(b)(2). Notwithstanding the clear language of ZOMG §1153(b)(2), the City zoning staff and the Planning Commission, respectively, treated and considered the application strictly as a “Conditional Use Application to allow a residential drug and alcohol rehabilitation facility in a Community Commercial (CC) zoning district.” (See Record of Action Dated February 22, 2017, attached.) That miscategorization of the conditional use requested by Access Ohio caused the Planning Commission to inappropriately and illegally accept, consider and base its decision on testimony that addressed perceived notions of the behavior and character of those who would reside at the living quarters rather than on legitimate land use issues such as traffic, noise, lighting, setbacks, buffering and screening.
2. The Planning Commission failed to legally apply ZOMG §1169.40(a). Section 1169.40 provides:
 - (a) Approval. The Planning Commission shall approve an application for a conditional use if the following four conditions are met:
 - (1) The proposed use is a conditional use of the zoning district and the applicable development standards established in this Zoning Ordinance are met.
 - (2) The proposed development is in accord with appropriate plans for the area.
 - (3) The proposed development will not have undesirable effects on the surrounding area.
 - (4) The proposed development will be in keeping with the existing land use character and physical development potential of the area.

As to item 1 above, the proposed conditional use is “living quarters as an integral part of a permitted use building.” The permitted use is the “alcohol and drug treatment, outpatient clinics” (see staff’s initial staff report – undated). The City acknowledged that the proposed use is a conditional use of the Community Commercial zoning district (see Staff Comments updated 2/15/17).

PAID
MAR 17 2017
\$500.00
BY: Kim Banning

As to items 2, 3 and 4 of Section 1169.40, the Planning Commission's determination that the requested conditional use constituted "a proposed development" and, therefore, items 2, 3 and 4 were applicable in the matter at hand, was contrary to law and the facts presented. Surely the simple application of §1169.40(a) should recognize the distinction between the term "proposed use" and the term "proposed development." The proposed use is "living quarters"; the proposed development is the existing physical structure housing the living quarters. The testimony was that the existing building was approved by the City and constructed as a 100 bed nursing home. City records showed no building or zoning violations on the property. The testimony was that no enlargement or expansion of the nursing home building was proposed or planned. The evidence was that the development took place in 1977 and that the City participated in the financing of the nursing home. The Planning Commission's determination that the former 100 bed nursing home being used as a 70 bed living quarters constituted a "proposed development" resulting in the bizarre determination by the Board that the existing building, if used for living quarters for the underlying permitted use of the property (or even if reused as a nursing home), now fails to comply with area plans, has undesirable effects on surrounding area, and is not in keeping with the existing land use character and physical development potential of the area, when the only change to the property from the nursing home to the proposed use is the handicap status of the intended residents. (Note: many of the uses permitted in the CC district do not comply with the area plan, creating a conflict between the zoning code and the zoning staff's cited area plans in its staff report.)

3. The Planning Commission's decision is contrary to the facts and testimony presented at the hearings.

PROPOSED EXHIBITS NOT ALREADY CONTAINED IN THE RECORD

For the purposes of this Appeal, the Appellant considers the record of this matter to be contained on the City of Gahanna's website. At the time of the filing of this Appeal, the website listed and contained 39 separate items and the minutes of the February 22, 2016 Meeting of the Planning Commission.

List of Exhibits Not Already Contained in the Record

- (a) Audio recording and written transcript of February 22, 2016 Planning Commission Meeting. The Appellant has been told that the audio recording has been destroyed or misplaced and is presently not available.
- (b) June 21, 2016 letter from Donald Plank to Shane Ewald. Ten copies of this letter are being filed with this Appeal.
- (c) December 5, 2016 letter from Donald Plank to Shane Ewald. Ten copies of this letter are being filed with this Appeal.
- (d) December 22, 2016 letter from Donald Plank to Shane Ewald. Ten copies of this letter are being filed with this Appeal.

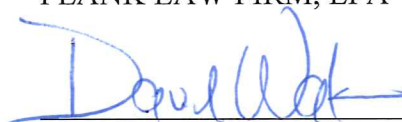
- (e) Correspondence from John Johnson to Jean Matthews-Mitchell. Ten copies of this correspondence are being filed with this Appeal.
- (f) Appellant reserves the right to supplement this list of exhibits.

**AFFIDAVIT AND LISTING OF NAMES AND ADDRESSES
OF PROPERTY OWNERS / MAILING LABELS**

The Appellant has filed an affidavit listing the names and addresses of all property owners contiguous to and directly across the street from the property at issue in this appeal. The Appellant has also filed mailing labels addressed to these property owners.

Respectfully submitted,

PLANK LAW FIRM, LPA



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Attorneys for Appellant



City of Gahanna

200 South Hamilton Road
Gahanna, Ohio 43230

Record of Action

Conditional Use: CU-0009-2016

File Number: CU-0009-2016

To consider an amended Conditional Use Application to allow a residential drug and alcohol rehabilitation facility in a Community Commercial (CC) zoning district, for property located at 121 James Road and 175 W. Johnstown Road; Parcel ID No.s 025-000855, 025-000798, 025-000890; Access Ohio LLC; Donald T. Plank, applicant.

(Original Application/version 1: Advertised in the RFE on 9/22/2016 and 12/1/2016)

The City of Gahanna Planning Commission met on 2/22/2017 to consider along with other business, a Conditional Use application, CU-0009-2016.

A motion was made by Burba, seconded by Hicks to approve the application, contingent upon the attached conditions. The motion failed.

The Conditional Use Application was **DENIED**.

Please consider this an official copy of the Record of Action for this Conditional Use application. You may request a hard copy of this Record of Action to be mailed to you by contacting the City of Gahanna Council office at 614-342-4090.

Kayla Holbrook, Deputy Clerk of
Council

February 22, 2017

Date Certified

CU-0009-2016 CONDITIONS:

1. That the building located at 175 West Johnstown Road (Parcel ID Nos. 025-000798, 025-000890) will be operated solely as an outpatient facility providing therapeutic intervention for clients by appointment only.
2. That the building located at 121 James Road (the "Residential Facility"; Parcel ID No. 025-000855) will be operated as a residential facility providing intense therapy and counseling in a residential setting for clients.
3. That both facilities will be operated by a state licensed provider of treatment for persons afflicted with drug and alcohol addiction.
4. That clients are permitted to stay for up to consecutive 180 days at the Residential Facility, Parcel ID No. 025-000855.
5. At the Residential Facility, Parcel ID No. 025-000855, smoking shall be permitted only at the existing patio area in the northwest, and shall be specified as a designated smoking area.
6. There shall be no outdoor group or other activity permitted between the hours of 8:00 p.m. and 8:00 a.m. at the Residential Facility, Parcel ID No. 025-000855.
7. There shall be a fence along the property lines as submitted in the application.
8. The existing access drive to and from James Road will be closed to all traffic except emergency vehicles and occasional maintenance and contractor vehicles, within 2 years from the date of granting the zoning certificate for the Residential Facility, Parcel ID No. 025-000855, provided that a traffic impact/access study, approved by the City of Gahanna, concludes that West Johnstown Road is the appropriate means for ingress and egress for the site.
9. The state licensed provider, of the Residential Facility, Parcel ID No. 025-000855, shall:
 - a) There shall be no person under the age of 18 permitted to be a resident.
 - b) There shall be no person with an outstanding arrest warrant, or pending criminal charges, permitted to be a resident.
 - c) No person with a felony criminal record involving serious physical harm within the last five (5) years shall be permitted to be a resident.
 - d) There shall be no person identified as a sex offender under Ohio Revised Code permitted to be a resident.
 - e) That all prospective residents will have successfully completed a minimum of a 7 day detox before being admitted to the Residential Facility.
 - f) That all residents are drug tested when they enter the program and when they return from any offsite/chaperoned appointments.
 - g) That all residents are given unscheduled urine tests approximately 4 times a week and rooms are periodically searched.
10. There shall be no drug safe zone on the site.
11. That residents of the Residential Facility are not permitted to have vehicles at the site.
12. Staff shall monitor the yard area of the Residential Facility, Parcel ID No. 025-000855, before and during the period a resident is permitted to use the yard.
13. That there will be an unarmed licensed security officer at the Residential Facility, Parcel ID No. 025-000855, at all times.
14. That the facilities are required to have the required signage prohibiting concealed carry on the site.
15. That all doors at the Residential Facility, Parcel ID No. 025-000855, will be alarmed with locks that have a 30 second delay between alarm and opening.
16. Law enforcement services will not be used to transport residents to and from routine and non-emergency offsite appointments.
17. Residents of the Residential Facility shall not be permitted to leave the facility between the hours of 8:00 p.m. and 8:00 a.m.

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June 21, 2016

Shane Ewald
City Attorney
City of Gahanna
200 S. Hamilton Rd.
Gahanna, OH 43230

Via E-mail Only

RE: Gahanna Code

Shane,

I wanted to follow up from our conversation Friday with an explanation of our reading of the Gahanna Code before I call you this afternoon. This analysis focuses only on the Code and its application to my client's use and not on the fact that similar type uses may be located in different zoning districts within Gahanna.

My client's property is zoned CC, Community Commercial District. Section 1153.03(a) of the Gahanna Code sets forth the uses permitted in the CC, District. Subsection 2 of Section 1153.03(a) lists "809 Health and allied services, not elsewhere classified." The reference to "809" is from Major Group 80 – Health Services, contained in the Standard Industrial Classification Manual. Number 809 has three (3) subgroups. Subgroup "8093 Specialty Outpatient Facilities, Not Elsewhere Classified" specifically lists: Alcohol treatment, outpatient clinics; Drug treatment, outpatient clinics; and Outpatient treatment clinics for alcoholism and drug addiction. Subgroup 8093 best describes my client's intended use of the property. Based on the above, I believe it's clear that my client's intended outpatient use is permitted in the CC, District.

My client also proposes to use the property, a former nursing home, for living quarters for inpatient treatment. As to that component of my client's use of the property, Code Section 1153.03(b) lists the conditional uses permitted (subject to Chapter 1169) in

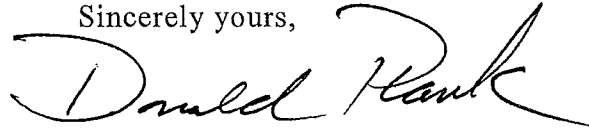
Shane Ewald
June 21, 2016
Page 2

the CC, District. Subsection (2) thereof lists: "Residential Living quarters as an integral part of a permitted use building." I am not sure how this subsection has been interpreted in the past, but a simple reading of the language supports our position that residential living quarters is permitted within a building used for a Section 1153.03(a) permitted use.

Shane, we fully understand that the residential component requires Planning Commission approval of a conditional use application. We make no claim that my client is entitled to the residential component of the permitted use for the property as a matter of right. We are prepared to file a conditional use application and present our request to the Planning Commission.

Thank you for your attention to this matter. We will talk this afternoon, if you are available.

Sincerely yours,

A handwritten signature in cursive script that reads "Donald Plank". The signature is written in black ink and is positioned below the typed name.

Donald T. Plank

DTP/bp

372.00//Corres/LtrEwald Gahanna Code (6-21-16)

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December 5, 2016

Shane Ewald
City Attorney
City of Gahanna
200 S. Hamilton Rd.
Gahanna, OH 43230

Via E-mail Only

RE: Residential Rehabilitation Facility, 121 James Road

Shane:

This correspondence is intended to put the City of Gahanna on notice that all the residents at the proposed above-referenced facility (the "Facility") will be individuals recovering from drug and/or alcohol addiction. As such, all are considered by the Fair Housing Act (the "Act")¹ to be handicapped and thus, afforded the protection of the Act relative to their choice of housing.

As was explained when we met with the City, individuals will reside at the Facility for periods of time ranging from thirty (30) to ninety (90) days. During that time, the individuals will receive therapy necessary to assist them with major life activities, i.e., job retention, parenting, social interaction, etc. During that time, the Facility will be the residents' home for practical and, consequently, legal purposes.

In addition to prohibiting discrimination of the handicapped in their choice of housing, the Act requires "reasonable accommodation in rules, policies, practices or services when such accommodation may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling."² As you know, the Facility is intended to occupy the existing nursing home building at 121 James Road. The proposed use of the building by Access Energy is, in many respects, identical to that of a zoning-permissible

¹ The Fair Housing Act is codified at 42 U.S.C. §§ 3601-19.

² See *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1185 (E.D.N.Y. 1993), citing 42 U.S.C. § 3604(f)(3)(B).

Shane Ewald, Esq.
December 5, 2016
Page 2

nursing home use, except for the nature of the handicap of the residents and the level of therapy provided.

It is not necessary at this time that the parties agree as to what would constitute a reasonable accommodation by the City in its interpretation of its zoning code relative to the Facility. I would opine, however, that the current interpretation by the City that the proposed use is not a permitted use in the City, is likely not an interpretation of a rule that provides the requisite reasonable accommodation under the Act.

As to the hearing before the Planning Commission this Wednesday, I intend to withdraw our request for a variance. I am of the opinion that the proposed use of the Facility is indeed a conditional use by the application of Gahanna Code Sections 1153.03(a)(2)809 and 1153.03(b)(2) and, therefore, no variance is necessary.

Nothing contained herein is intended to preclude our continued discussion of this matter. Please call with any questions or for general discussion.

Thank you,

A handwritten signature in cursive script that reads "Donald Plank". The signature is written in dark ink and is positioned above the printed name.

Donald T. Plank

DTP/bp

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December 22, 2016

Shane Ewald
City Attorney
City of Gahanna
200 S. Hamilton Rd.
Gahanna, OH 43230

***Via E-mail followed by
Ordinary U.S. Mail***

RE: Residential Rehabilitation Facility, 121 James Road

Shane:

My office (I am out of town) received a call yesterday from Bonnie Gard requesting a meeting between the City of Gahanna administration and me and my client, Access Energy. I believe this request is a good sign and I am hopeful the parties will be able to reach a resolution that is acceptable to all concerned. In anticipation of the meeting, this letter shares with you some of my thoughts regarding the residential rehabilitation facility referenced above.

In my letter to you dated December 5, 2016, I stated it is not necessary that the parties agree at this time as to what would constitute a reasonable accommodation by the City in its interpretation of its zoning code relative to my client's use of its property as a residential facility for persons recovering from alcohol and drug addiction. However, based on my research of the Gahanna Zoning Code in preparation for the December 7, 2016 meeting of the Gahanna Planning Commission, I believe that the zoning code lends itself to an interpretation that accomplishes the reasonable accommodation requirement of the Fair Housing Act. It is for that reason I request, on behalf of my client, Access Energy, that the City make a reasonable accommodation by interpreting its zoning code in a manner that concludes that the residential facility use is a permitted use in the CC, Community Commercial District. The simple rationale follows.



Section 1123.31 of the City of Gahanna Zoning Code defines the term "Home For Substance Abusers." Included in that Section 1123.31 definition are the terms "Hospital, Nursing, Rest and Convalescent Home."¹ Unfortunately, the term "Home for Substance Abusers" is not used elsewhere in the Gahanna Zoning Code. Significant, however, the Section 1123.31 companion terms: "Nursing Home", "Rest Home" and "Convalescent Home" are all permitted uses in the City's CC, Zoning District. It requires no abuse of interpretation of its zoning code for the City of Gahanna to conclude that like defined uses are permitted uses in the same CC, Zoning District.

An additional or alternative accommodation would be for the City, in its interpretation of its zoning code, to acknowledge that living quarters for a drug and alcohol rehabilitation center is a conditional use. In that regard, I have included with this letter the letter that we recently sent to the neighbors who spoke at the Planning Commission meeting. The enclosed letter should help clarify how the properties at 175 W. Johnstown Road and 121 James Road will be operated.

I look forward to our meeting in early January. Please feel free to contact me if you have any questions before then.

Have a Happy Holiday.

Thank you,


Donald T. Plank 

DTP/bp

Encl.

372.00//Corres/LtrEwald Part II uses (12-22-16)

¹ The term "Hospital" is also singularly defined in Section 1123.30.



Jean Matthews-Mitchell,

In reviewing your job performance/attendance over the last 30 days, I am dis-satisfied with your performance and do not feel that you are a good fit for our organization.

It is with regret that I am terminating your employment, effective immediately.

John Johnson, CEO

2611 WAYNE AVENUE BUILDING #64 DAYTON, OHIO 45420 P: 937.256.7801 F: 937.256.7811

AFFIDAVIT

STATE OF OHIO,
COUNTY OF FRANKLIN, SS

1. I, Christopher Kessler, being duly sworn and deposed, state that I am an adult who is competent to testify, and I make this affidavit from my own personal knowledge.

2. To the best of my knowledge, attached hereto as Exhibit A is a listing of the names and addresses of all property owners contiguous to and directly across the street from the property located at 121 James Road, Gahanna, Ohio 43230 and 175 W. Johnstown Rd., Gahanna, Ohio 43230, as appearing on the Franklin County Auditor's current tax list.

3. FURTHER AFFIANT SAYETH NAUGHT.



Christopher Kessler

Sworn before me this 15th day of March, 2017.



David Watkins
Attorney At Law
Notary Public - State of Ohio
My commission Has no Expiration Date
Ohio Revised Code Section 147.03



Notary Public

My commission expires: _____

N/A

EXHIBIT A**121 James Rd. & 175 Johnstown Rd. Contiguous Property Owner Information**

<u>Name</u>	<u>Mailing Address</u>	<u>Parcel ID No.</u>
1 Mile High Investments, LLC	151 W. Johnstown Rd., Columbus, OH 43230	025-000808-00
2 Access Energy LLC	175 W. Johnstown Rd., Columbus, OH 43230	025-000798-00
3 Access Energy LLC	175 W. Johnstown Rd., Columbus, OH 43230	025-000890-00
4 Lawrence Antoine	8964 Shoreham Dr., Las Angeles, CA 90069	025-013457-00
5 Douglas & Martha Huss	144 Creekside Green Dr., Columbus, OH 43230	025-013605-00
6 Karen Cowans	142 Creekside Green Dr., Columbus, OH 43230	025-013464-00
7 Patricia & Zoran Botic	140 Creekside Green Dr., Columbus, OH 43230	025-013665-00
8 George & Jean Herbst	138 Creekside Green Dr., Columbus, OH 43230	025-013664-00
9 Garry & Marianne Devictor	134 Creekside Green Dr., Columbus, OH 43230	025-013436-00
10 Jeffrey & Kristen Bateman	136 Creekside Green Dr., Columbus, OH 43230	025-013663-00
11 JR Nicewarner	143 S. James Rd., Columbus, OH 43230	025-000856-00
12 Mark Sweatland	1200 Taylor Station Rd., Columbus, OH 43230	025-000926-00
13 Bryan Ruder & Jennifer Dietrich	128 James Rd., Columbus, OH 43230	025-000927-00
14 Richard Lenihan	115 Orchard Dr., Columbus, OH 43230	025-000928-00
15 Lizabeth Dible	110 James Rd., Columbus, OH 43230	025-000947-00
16 158 Johnstown Road LLC	158 Johnstown Road, Columbus, OH 43230	025-000842-00
17 Challomilu Enterprises Inc.	2701 Tally Ho Dr., Blacklick, OH 43004	025-000797-00
18 Time Warner Cable Midwest LLC	7820 Crescent Exec Dr., Charlotte, NC 28212	025-000826-00
19 United Dairy Farmers Inc.	3955 Montgomery Rd., Cincinnati, OH 45212	025-000820-00
20 Club Properties Investments LLC	1207 Harrison Pond Dr., New Albany, OH 43054	025-000862-00

APPLICANT:

Access Energy LLC
c/o Donald Plank, Attorney
411 East Town Street
Columbus, OH 43215

OWNER:

Access Energy LLC
99 N. Brice Rd., Suite 360
Columbus, OH 43213

CONTIGUOUS PROPERTY OWNERS

Mile High Investments, LLC
151 W. Johnstown Rd.
Columbus, OH 43230

Access Energy LLC
175 W. Johnstown Rd.
Columbus, OH 43230

Lawrence Antoine
8964 Shoreham Dr.
Los Angeles, CA 90069

Douglas & Martha Huss
144 Creekside Green Dr.
Columbus, OH 43230

Karen Cowans
142 Creekside Green Dr.
Columbus, OH 43230

Patricia & Zoran Botic
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Columbus, OH 43230

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1207 Harrison Pond Dr.
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Access Energy LLC
c/o Donald Plank, Attorney
411 East Town Street
Columbus, OH 43215

OWNER:

Access Energy LLC
99 N. Brice Rd., Suite 360
Columbus, OH 43213

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MAR 21 2017

BY: Kim Banning

SUPPLEMENT TO:

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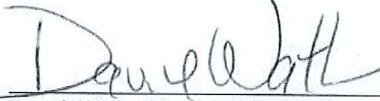
PROPOSED EXHIBITS NOT ALREADY CONTAINED IN THE RECORD

(a) After Appellant filed his Notice of Appeal, Appellant was informed by counsel for the City of Gahanna that counsel believed Appellant had mischaracterized statements made concerning the audio recording of the February 22, 2016 Planning Commission Meeting. At this point in time, the City of Gahanna reports that the audio recording was not destroyed or misplaced and it appears that the Meeting may not have been recorded at all.

The Appellant has no independent knowledge of the circumstances related to the lack of an audio recording of the Meeting and, at this point in the appeal, holds no opinion on the matter.

Respectfully submitted,

PLANK LAW FIRM, LPA



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