# City of Gahanna

## Meeting Minutes

## Board of Zoning and Building Appeals

200 South Hamilton Road
Gahanna, Ohio 43230

***Lorne Eisen, Chair***
***Paul D. Bryson, Vice Chair***
***Ross Beckmann***
***Donald Jensen***
***Debbie Stefanov***

***Jeremy A. VanMeter, Clerk of Council***

**Thursday, September 28, 2023** **6:30 PM** **City Hall, Council Chambers**

## A. CALL TO ORDER: Pledge of Allegiance & Roll Call

The Board of Zoning and Building Appeals met on Thursday, September 28, 2023, in Council Chambers. Lorne Eisen, Chair, called the meeting to order at 6:30 p.m. Board member Debbie Stefanov led the members in the Pledge of Allegiance. The agenda for the meeting was published on Monday, September 25, 2023.

**Present** 5 - Ross Beckmann, Paul Bryson, Lorne Eisen, Donald W. Jensen, and Debbie Stefanov

## B. ADDITIONS OR CORRECTIONS TO THE AGENDA:

None.

## C. APPROVAL OF MINUTES:

2023-0157 BZBA Minutes 1.26.2023

**A motion was made by Jensen, seconded by Bryson, that the Minutes be Approved. The motion carried by the following vote:**

**Yes:** 5 - Beckmann, Bryson, Eisen, Jensen and Stefanov

## D. ADMINISTERING THE OATH:

City Attorney Ray Mularski administered the oath.

## E. APPEALS - PUBLIC HEARINGS:

BZA-0001-2023 To consider an appeal of Planning Commission's denial of CU-0004-2023 for property located at 788 Taylor Station Road; Parcel IDs: 025-003942, 025-003961, and 025-003959; Current Zoning OCT, Speed Way Towing; Mark Antonetz, applicant.

Chair Eisen instructed how the meeting would be conducted, so that the board is aware of what will be considered and ultimately voted on. He referred to City Attorney Mularski for guidance.

Mularski shared that in the Planning Commission minutes, a motion was made by Tamarkin, seconded by Suriano, that the conditional use be approved. There was one yes, five no's, and one absent. That is what is before the board: whether the conditional use should be approved.

Chair Eisen referred to the Rules of Procedure of Board of Zoning and Building Appeals, amended January 26, 2023. The appellant and any interested party will be allowed a combined time of twenty-five minutes. Questions may be presented from the board as needed. Then, the appellee and any interested party are allotted twenty-five minutes. After, five minutes for the appellant for any further argument, rebuttal, or comments. The same will be allotted for the appellee. Then, questions or comments from the board members may be presented, followed by a motion and decision. Chair Eisen offered an opportunity for any clarifying questions. With that, Eisen turned it over to the appellants.

Laura MacGregor Comek introduced herself as the attorney for the applicant and landowner doing business as Speedway Towing. She asked to present exhibits to the board and passed them out to each board member and the Clerk. Eisen noted this is information that the board was not able to review before the meeting commenced. He stopped the timer. He asked a question directed to Mularski: what are the rules of what the board needs to be doing with information provided during the meeting? Mularski asked if opposing counsel had received a copy of the exhibit, to which Assistant City Attorney Matt Roth stated he received it shortly before the meeting. Mularski asked Roth if he objected to the introduction of the evidence. Mr. Roth did not object, stating the appellant can provide any evidence they want. Mr. Mularski stated to the board they can accept the evidence if they feel it will help them decide. Eisen "informally" asked if the board members had an objection to the material received. The consensus was no, and Eisen allowed the meeting to move forward.

MacGregor Comek thanked the board. She stated that, as noted, the appeal comes from the decision on July 12th to deny the conditional use permit for the property applications at 788 Taylor Station Rd. The basis for the appeal comes directly from that decision and the record that was created before the Planning Commission. The City of Gahanna and the Planning Commission made a fundamental legal error. As noted from the notice of appeal, there are a variety of assignments of error. The first is, they have applied and imposed the wrong law to the case. They have

applied the wrong legal standard to the application and to the property. The city and the Planning Commission's decision was arbitrary and capricious. Her remarks are focused on the errors that were made. She questioned: was that decision arbitrary? Was it capricious? Was it unlawful? Was it unconstitutional? And was it in alignment with the facts that were entered into the record? They are saying it was no to all of those. First, the wrong law, then arbitrary and capricious. She stated that it stands to reason that if you don't know the law or you don't apply the law, then you are making something up. This is a very serious case that involves people's property rights. The government has the role, under police powers, to set certain rules. Those rules should be clear, unambiguous, and applied and enforced upon everybody equally. She feels that did not happen. If you don't know the law, how can you apply the standard? The arbitrariness of the legal process that occurred resulted in a flawed decision. She gave an example of a speed limit. If the speed limit is posted and you know it, then question if you can go 45 in a 35, that is the simplistic analysis she would apply. In addition, there were procedural anomalies with what occurred during the hearing. First, there was a kind of motions practice that occurred with conditions. They were outside of the rules of the Planning Commission. The Planning Commission rules do not provide for that kind of motion procedure. Second, the Planning Commission tried to impose conditions on the applicant. Three of the four are already the law in Gahanna. So, that procedure, coupled with the fiction of trying to impose them as a condition, created confusion and it had a material impact on how the Planning Commission ultimately voted. She knows this because they said so, and she will point to that in the record. Ultimately, Speedway Towing and her clients are trying to fix the property. They have one acre that is already permitted for the towing use. They are asking for the other three to be brought from vacant. Also, tree removal permits were approved by the city, so the acres are cleared. So, their intention is to improve the entire lot: how it looks, how it functions, ultimately for the betterment of the City of Gahanna. So, either the City of Gahanna Planning Commission did not know or understand that three of the four conditions they were trying to impose are already the law. In that way, they were arbitrary and capricious about a variety of things. MacGregor Comek provided another example. The code requires lighting for parking lots. If this is not a parking lot by law, then parking lot lighting is not required. The fact that they applied the wrong law, this tainted every decision that followed. Also, the law in Gahanna for lighting doesn't have a minimum standard. It has a maximum standard. According to law in Gahanna, this is determined by what is adequate. During the Planning Commission meeting, staff admitted that they probably don't need that variance. She shares this because there were already three or four conditions that the commission didn't understand, and now there is a

lighting variance that probably doesn't need to happen because adequate lighting is probably provided. She appreciates that the meetings are conducted about community issues and not with legal rigor, but these are still people's property rights. As she mentioned, staff admitted that probably no variance was needed because there is only a maximum amount of lighting, not a minimum amount of lighting, and it pertained to a parking lot, which this is not. The city and the Planning Commission were trying to add variances for non-existent or vague standards, the former being the worst-case scenario. She shared why this is relevant. First, it created an additional, unnecessary list of variances. A Planning Commission member said, "Due to the list of variances, I don't think this fits." There is a direct correlation. More than one Planning Commission member said that, and relied on the variances and the staff reports. Some variances were necessary. The existing one-acre lot is legal nonconforming, meaning the building was put there before existing setback requirements. To do anything new with the building, meaning pave the front parking area, add new landscaping, redesign drive aisles, variances are needed because of where the building is located. It is "grandfathered," but the proper term is "legal nonconforming." Variances were requested to make improvements to the property. That is important because the "desirable effects" is one of the elements that the Planning Commission was supposed to review and didn't understand that those variances are needed to improve the character and the desirable effects. MacGregor Comek reiterated the points she spoke to already, and stated that next, she hopes to demonstrate that there was speculation and fear about future, prospective land use and unlawful land use. She referenced a Tom Cruise movie in which individuals are arrested before committing a crime. She said this is speculation with unrebutted testimony from her client that expelled all questions. She said it is fair to ask questions but not fair to make decisions based on irrational fears and speculation that someone, at some time, in the future might not do something lawful. Zoning single family homes does not stop because someone might do drugs in them. Zoning good commercial businesses does not stop because someone might speed getting there. That is the kind of irrational thought she is speaking of. She noted that there is already one acre being used for motor vehicle towing use and there is no evidence that the appellant is doing the feared activities that were discussed at length. As her final point, she wondered if the board would be concerned to know that a fictional point was created. If there was another property in the area that had a similar kind of request that was not treated the same and received a different result from Planning Commission, would it pique the board's curiosity? She said there is a companion case about a different, similarly situated property. It has a gravel parking lot, outdoor storage area, same zoning, and the same district in the comprehensive plan.

What is more concerning, aside from the outcome, is that they were not given the same standard of review. They were not given the same scrutiny. Ultimately, she believes the decision was not based on the specific evidence presented in the case. Rather, it was made on irrational fears.

The first page of the packet she handed out was an outline to walk members through relevant code, which she felt was important. These are undisputed facts pulled from record. She did this for the purpose of organizing thoughts. Undisputed facts are:

1. The property is zoned OCT and sits along Taylor Station Rd.
2. The applicant sought a conditional use pursuant to code section 1155.03. Section 1155.03(a)(6) specifically cites NAIC code 48841 Motor Vehicle Towing.

NAICs code is attached in the packet. The NAICs code specifically allows for incidental services such as storage. In the next section, there is Gahanna Code for Parking. The discussion by staff is predicated on determining this application and what the applicant planned to do as a parking lot. It's not a parking lot. It's storage. She referred to Gahanna code and NAICs to determine this. Gahanna City Code does not define parking as a general use. There is a definition in Gahanna Code of Ordinances Chapter 913 that states, "Parking lot or structure means an off-street area or structure, other than the parking or loading spaces or areas required or permitted under the Zoning Ordinance, for the parking of automobiles, and available to the public customarily for a fee." As a practitioner in the land use area, MacGregor Comek knows that storage is different than parking. She does not have to connect this to code because staff, in the prior meeting, lumped storage uses, and parking uses together. This is not lawful. Zoning codes are directly in derogation of property rights. A code can only be enforced if it exists. It can't be made up and a law imposed. Parking is generally something that is available or open to the public. This is a storage lot. The relevance is simple: parking lots have requirements while storage lots do not. As a practitioner she knows that but had to go into the code to prove it to the board. But Gahanna does not have this in its code. It does have 1155.07, which is the section by which the case should have been processed. It specifically pertains to the use and provides the standards only for storage. She stated the wrong code was applied. If there is not a definition, the code gets interpreted in favor of landowners. The government has the power and cannot make up rules as it goes. It must be unambiguous. There is not a separate definition and staff acknowledged that parking lot and storage were jumbled together, and it was not a traditional parking lot. She said traditional parking lot was not

defined either. Parking lot paving, parking lot spaces, and extra ADA spaces calculated based on the number of parking spaces are not required because this is a storage space and not a parking lot. It is a baseline legal argument, and the wrong law was applied. Because it did, it added variances to a list, which was noted as being too long by Planning Commission members. If half of the list was unlawful and unnecessary, then the decision was unnecessary.

MacGregor Comek said she supplied the NAICs code in the packet, which Gahanna Code of Ordinances references. Then, code section 1155.07 is provided. The standards are given, and nowhere does it state that storage areas need to be paved. The code also provides a 1123.01, which is a definitions section. It says words not particularly defined in the code can be found in a variety of other publications. One of those publications is *The Latest Illustrated Book of Development Definitions.* It is a planner's document. It defines storage as an item that is on a location for more than twenty-four hours. It does not define parking as storage. Next in the packet of information is a planner's dictionary, which is provided by the American Planning Association. It defines parking and storage. Parking is not defined as storage. It expressly excludes parking lots in two places. Parking, parking aisles, storage, and outdoor storage are defined. It states parking lots do not qualify for outdoor storage on page 387. MacGregor Comek then directed board members to the next section, which includes an itemized timeline of the Planning Commission hearing. The staff report and/or comments and the Planning Commission comments are noted in the middle column. The left hand column has the time at which the comments took place. She has highlighted assignments of error in gray, yellow, green, blue, and red. The gray indicates speculative items unsupported by evidence in the record. Yellow shows the comprehensive plan and the misuse or misapplication of the comprehensive plan. Green are the errors or incomplete information. Blue is the unequal treatment of law. Red is the errors of law. MacGregor Comek stated that red has been discussed and highlighted staff's jumbling of the two uses together. The next section has two pages from the city's comprehensive plan excerpted. According to the map, the IRI future land use is designated. There are two components to the application of a comprehensive plan. The first is that the law trumps the comprehensive plan. The CUP standards look to impose the comprehensive plan. That is an inherent conflict in how laws are applied. That conflict is resolved in favor of landowners. MacGregor Comek posed the hypothetical statement that it calls for industrial. This is not typically an industrial use. She moved to the next section. She said there is substantial discussion in the staff report and in the record that she highlighted in the error timeline. First, the staff discusses the application of the comprehensive plan. There is a discussion about how to create a

campus, how to intensify land use, and how to increase connectivity throughout the district. She said two tabs back there is a photo of the subject property. When the staff is making the report, they show photos of the property. It has a largely industrial use in the corridor. It has OCT zoning throughout and falls under the IRI. The staff report indicates there is a requirement for intensity. She said there is no code requirement for intensity, and that it is an aspirational development character that exists in the comprehensive plan. She stated they have no idea where this comes from. Staff did some calculations based on twenty-two acres of development and the average is around 11,000 square feet of development. She questioned the meaning of this. She stated that this is not a code requirement but is being used to judge a development, but this standard is not in the law. Furthermore, what does it mean in terms of development? Does it indicate the need for 11,000 square feet of buildings? She said in some of the existing permitted OCT uses, a building is not required at all. She said the reason she shared the photo is that the property is infill. It is fully developed on all four sides, including across the street. She noted it was disingenuous to share a photo of McGraw-Hill because the building typically has trucks in front of the building because of its use as a truck distribution facility. That is the character. The applicant was trying to mimic this with use of landscaping, which was not shown in the exhibit. They are using the comprehensive plan but are not fully informing. It must be assumed that the Planning Commission either knew and disregarded that fact, or they didn't know. Those are two bad ways to make decisions.

She finished with two final points. First, the analysis of a comprehensive plan - she questioned how a campus can be developed on three acres - the application of a comprehensive plan was unlawfully applied. With considerations to storm water and setbacks, she asked what kind of campus could be created. And one of the decisions made by Planning Commission was about the future of the city. She questioned whether McGraw-Hill would tear their building down in the future. She noted the "orderly" properties to north - would they be torn down in the future? The last two documents she must discuss are the staff review for 788 Taylor Station and the ordinance. The staff review for 6301 Taylor Rd came in. It is in the OCT district and IRI in the comprehensive plan. They proposed a gravel lot for a landscaping contractor's business with outdoor storage. That case did not receive the same scrutiny about intensity of land use. She questioned where their campus and sidewalks with connectivity were. That did not happen. Furthermore, in the record, one of the Planning Commission members asked about the pile of gravel in the front of client's business, and asked whether it would be cleared. The client replied that yes, it was there for the lot planned for construction. Contrasting this with the case of 6301 Taylor Rd, when asked what he

planned to store, the applicant informed Planning Commission he would be storing piles of gravel. She concluded by asking the chair if he would like for her to conclude and save additional remarks for rebuttal. He allowed her to close her presentation. She concluded by sharing Ordinance 0037-2023, which was recommended for approval by the Planning Commission on April 12, 2023. The ordinance was passed by Gahanna City Council on June 25, 2023. The ordinance removes outdoor storage from being a conditional use and allows it as a permitted use in the district of OCT. The reason she closes with the remark, is that if City Council sought to change law for the use, knowing that the corridor is OCT, then the decisions made by the Planning Commission made a month later indicating that the applicant's use is not keeping with that character, this is false. It goes directly against the policies set forth by Gahanna City Council.

Chair Eisen noted that MacGregor Comek had referred to the use as towing use multiple times. He asked what other services are being conducted on the site, both now and in the future. MacGregor Comek replied this has been discussed at length. The answer is towing. NAICS 48841 allows towing and storage. That is what happens on the lot. They store vehicles. There is a process by Ohio law by which people have a maximum amount of time to store a vehicle. If a vehicle was towed, the company has an obligation to keep the car safe, called a bailment, they keep it in the condition they got them. They do not touch the vehicles. At the end of 60 days, there is a process by law, by which they can obtain the title. A towing company takes the vehicles away to be sold.

Board member Jensen clarified that the only work being done is towing, and asked if there were any other services such as tune-ups, oil changes, or anything related. MacGregor Comek said that is correct, is in the record below, is prohibited by law, and is one of the conditions that was added. Making it a condition does not make it any more prohibited.

Eisen asked for MacGregor Comek to help him understand the banner on the front of the building that stated, "Speedway Auto Sales LLC." What does the sign mean and why is it there. MacGregor Comek stated there were cars that were finished with their 60-day period and were being sold from the front. She noted the sign says auto care, which is a misnomer, and they are only taking care of the vehicles while they are in the business' possession. There are no oil changes or anything like that. Eisen reiterated that there are three ground mounted signs in front. They state, "Free brake suspension inspection. Discounted oil change. Free air. Battery testing available. Engine and transmission replacement." He asked MacGregor Comek to help him understand why those signs are there, and what they mean. MacGregor Comek stated that question was

not specifically asked at the last meeting. She asked Mr. Shehata to come to the podium and asked him directly, “Are you repairing any vehicles that have been towed? Is there any connection with the activity that occurs in the building with the towed vehicles?” He replied, “No.” MacGregor Comek stated they have fixed up separate cars, it has nothing to do with the towing, the activity in the building might be car maintenance and repair.

Jensen asked if the three acres would just be storage. MacGregor Comek confirmed. She noted this is mostly about the three acres and not the one acre. The three acres is all towed vehicles. Additionally, some vehicles that tow said vehicles. It is all code landscaping and code setbacks. There were no actual variances for those items.

Eisen referenced the property at 6301 Taylor Rd, and asked when that conditional use was approved. MacGregor Comek replied April 12, in the actual Planning Commission meeting that occurred after the workshop.

Bryson said it sounds like there is some use of the parcel that is not part of the conditional use, which is auto repair. MacGregor Comek confirmed. Bryson asked if this is permitted use, a conditional use they had a permit for, or which category does it fall in. She replied it has been used for that purpose since the first permit they received, which she believed was in 2017. Bryson clarified, the activities that are auto repair activities are taking place within the conditional use for this one parcel. MacGregor Comek confirmed. Bryson said under the ordinance for the actions for the Planning Commission, 1169.04. Under (a), regarding when it is mandatory for the commission to approve, he noted there is language in (a)(2) that states, “the proposed development is in accord with appropriate plans for the area.” His intuition was that appropriate plans would include the land use plan, though perhaps the land use plan, when contrary to the zoning code, can’t be used there. He asked if this was MacGregor Comek's contention. She said she had a couple. The land use plan is not mandatory. Also, land use plan says industrial as one of the possible uses. It has language such as “trying to create a campus,” “trying to create connectivity,” or “providing a path.” By its own terms it allows for industrial use. She said there are also elements of the plan that mention change of intensity. In this case, the land goes from three acres of nothing to three acres of industrial land. The result of this has economic benefits to the City of Gahanna. One does not need to explore the benefits to know that “something” from “nothing” is an increase in the intensity of use. She does not know how comparable numbers are nor where they came from. She said a decision based on that data point is unsupported in the record. Going from nothing to something improves

property taxes and creates 7-10 new jobs, which is income tax for the city. That meets a standard of intensity. There is no law that requires creation of a particular level of intensity, and 6301 Taylor Rd is doing the same thing. She questioned where their level of intensity is. She said there is no established law. Bryson went on to note the motion regarding conditions that MacGregor Comek had brought up. He said the (b) section of 1169.04 has approval with modifications. If those had been conditions of approval instead of a motion with modifications to the application, he wondered if this would be appropriate. He acknowledged MacGregor Comek's contention that the motion itself to modify the conditional use application being impermissible. MacGregor Comek replied that the Planning Commission was trying to implement three additional rules that were already rules. She shared that her contention is that an applicant can amend their application at any time that the applicant wants. There is nothing in the rules that says they can't. It is commonplace to suggest a condition and it is agreed to, and for the application to be amended accordingly. In this case, the Planning Commission sought to impose the conditions. Then, they voted on it and it was three to three. Then, they voted on the application without the additions that seemed to make a lot of importance to them. She said it is a fictitious system. Furthermore, if the conditions are not granted, it looks bad. She stressed to the board that it is a legal fiction created to turn down the project. Or, to make it seem more complicated. Or, perhaps they were complicated themselves. She suggested it seemed "weird" that the commission wanted to apply conditions, and then did not. If they did not put the conditions on it, then they just did not want to vote for it. She stated it is not in the rules. Planning Commission made a motion to amend the application, and that is not correct.

Bryson noted that the outdoor storage area was removed from the conditional use, making it a permitted use. But, motor vehicle towing, under the definition, includes storage and remains a conditional use. He asked MacGregor Comek if it was her contention that the three parcels that would be used for the storage of the vehicles is only outdoor storage, or is it, as the application stated, for motor vehicle towing? MacGregor Comek replied it is outdoor storage. She understands the application submitted was an extension of motor vehicle towing. At the time, the definition and application of outdoor storage was a conditional use. That is no longer the case. Stuff can be parked or stored there all day long without being a parking lot. She references this mostly for the policy making. City Council changed the policy for a corridor that is largely zoned OCT and planned for that in the future. She asked what kind of decision that was.

Chair Eisen offered Mr. Roth an opportunity to speak.

Mr. Roth began by putting things in perspective to know what was dealt with in front of Planning Commission and now. The business is a towing company that tows cars for police departments, cars in wrecks, cars that have been part of crimes. They are brought to the lot. It is an existing business. It was presented that the business is growing, they need more room, and the current one acre does not have room for all the cars they would like to impound. What was in front of Planning Commission was getting permission to use the additional three acres for this purpose of towing cars and storing them. There were also design review and variances that dealt with the existing one-acre parcel. The DR and variances were not voted on because they were considered moot after the conditional use was turned down. However, there were aspects of changes to the existing parcel. They were basically paving everything in front of the building. It is gravel now; they were going to pave that. They were going to stripe parking spaces. The people whose cars are impounded have to go to this location, pay their fees, and pick up their cars. Body shops send their own wreckers to pick up the cars and take them to be fixed. There is an aspect of the business that has the public going there. They were going to be paving that portion. They are required, under current code, to have ADA parking with a paved sidewalk that goes up to the front of the building. The owner agreed to all of that. He wants to improve the business. There was discussion in front of Planning Commission about those items. Striping a handicapped parking spot, having a 100% paved surface so a handicapped person could get to the front door. There was discussion about having spots in front so they could sell cars. These were changes to the existing one-acre parcel. None of that was voted on, and is not here tonight. So, the discussion about lighting and other elements is irrelevant. What is being dealt with now is the conditional use on the three additional acres. Counsel for the appellant stated plainly at the start of her argument that there was a fundamental legal error and the wrong legal standard was applied. As he was sitting there, he did not hear that. The appellant is suggesting that the application was treated like a parking lot application, and therefore got turned down because it is being treated as something it is not. That is not what happened. The way he hopes to convince the board, is that if it was being treated as a parking lot, Planning Commission would have told the applicant they must pave the entire three acres. That was never discussed because parking lots are paved, and this was always treated as a storage facility. There was never discussion about putting blacktop on the entire three acres. It was always going to be a gravel lot. It was always going to be a storage lot. That is what Planning Commission considered. Planning Commission and city staff do a good job at considering the relevant factors. There are four things to consider when granting a conditional use. Towing and storage

of vehicles is a conditional use. It is something that is anticipated in this zoning district if there is permission granted by way of a conditional use. The four criteria are:

1. Proposed use is a conditional use in the zoning district. This has been met.
2. The proposed development is in accord with plans for the area. The plans for the area are zoned OCT but there is a master plan for what they'd like to do in that area. It calls for increased intensity. The applicant is saying it is increased intensity because it is nothing right now. But it is going from nothing - woods and weeds and leaves - to gravel. It is not building a building or housing many employees. It is just for use of storage. In the area, there are large buildings with employees, and this is not what they are doing. There is a small increase in what they are doing, perhaps hiring more tow truck drivers, but this is not consistent with everything else around. Planning Commission found this was not met.
3. No undesirable effects. There was a lot of discussion at the meeting about vehicles that have been in accidents and are leaking fluids such as oil and antifreeze onto the gravel surface. There is a retention pond on the site and per testimony, the land slopes to the rear. By having gravel, a permeable surface, vehicle fluids are going to get into the ground. That is something regulated by the EPA, but there is no indication how closely it is monitored. This is a something Planning Commission considered because it is one of the criteria.
4. Keeping with the existing land use character. The existing character of the one acre parcel they are keeping with. Everything around it has been developed to thriving businesses. Planning Commission did not find that this criterion was met.

Overall, only one of four criteria that are appropriate to be considered were met, which is why it was voted down. Roth stated this was clear from the record. He said another item mentioned by the appellant was the neighboring business approved earlier in the year. That business is a

landscaping business. There is a home on the property, and it is a family-owned business. They were putting in gravel along the drive because they had employees that would park vehicles in front of the business during the day and they had landscape trailers to conduct business in the back. It was not a business that had trucks coming 24 hours a day, dropping off damaged vehicles. They were granted that because it was a daytime business in which the employees dropped off their vehicles, went to a job site, returned, and left for the remainder of the day. It is not a constant truck-traffic kind of thing. Additionally, an argument made by the appellant was that the three acres to be fenced in is just storage, implying it is not a towing business. The cars getting there are getting there behind tow trucks. So, tow trucks are going to be using the three-acre parcel too. It is disingenuous to say it is just storage because there is no way for the vehicles to get there other than being towed. Towing and storage was the conditional use they asked for, and that is the conditional use that failed on three of the four criteria.

Chair Eisen invited MacGregor Comek back to the podium for five minutes of rebuttal.

MacGregor Comek stated that it is completely irrelevant whether the neighboring business granted conditional use is family-owned. They have mulch. They have a business with equipment and trucks that get stored. Second, a gravel lot will cost money to engineer and must meet Ohio EPA standards. That is an improved lot. It becomes a different use category other than “vacant,” and the value goes up, changing the intensity. The code doesn’t require a particular amount of improved property value or development. So, this is arbitrary. The landscaping business isn’t increasing the intensity any more than the appellant. So, there is a difference in how this is being applied. She said it is irrelevant that the landscaping business is a family business and noted that Speedway Towing is also a family business, noting the members in attendance and that there is another not in attendance.

She said the law that was violated in the standard is simple. First, parking is not storage. The variances that were required to seek for the three acres added to the list --- Mr. Tamarkin states on the record, “Just given the number of things on the list, I just think it doesn’t fit. When I see that list is so big I kind of think it doesn’t comply.” She said the list would have been cut in half if proper standards were applied. There was a discussion about possible leaking, and the client offered policies and procedures on how they deal with leaking. Also, on the record, they offered testimony that the process of keeping trays underneath vehicles and wrapping vehicles that have been in accidents. The evidence went unrebutted, and they have not been cited for any of it. When talking about

speculation, the business is already happening on one acre. There was a huge discussion about code enforcement and how to monitor whether it becomes a junkyard. MacGregor Comek suggested there is no way of stopping occupants of a single-family home doing methamphetamine, noting that people do not receive punishments on the prospect of future crime, especially when there is nothing in the records indicating that laws have been disregarded. So, the bulk of the conversation is about whether the property will become a junkyard. Other questions focused on parts sales and acquiring vehicle parts. She said this conversation was speculation about fear of the future. She said the essential character is there is a trucking operation to the south, and it is industrial in nature. The appellant's use is industrial in nature. With landscape standards and meeting the proposed code of all of those, yes, they were proposing to pave their parking lot, not the three acres of storage. She said all of this is a benefit to the corridor. It has an industrial feel to it, but it has a good green setback. It has an armory across the street. There is a variety of industrial trucks parked at other uses throughout the corridor. If they go point-for-point, the comprehensive plan was misapplied. She understands that everyone in the future would love a campus, but unless all the buildings around it are knocked down, turning the applicant down for a prospective future land use is completely unreasonable. This decision is contrary to the law and contrary to the facts. It is arbitrary. There was a whole conversation about what is due process for junk yards and junk vehicles. The client told Planning Commission the process. She noted that the business is towing. They make money towing vehicles, not storing them. That is why he knows the numbers so well. There is a sixty-day holding period and then vehicles are turned over. It is part of the business plan and makes sense to get vehicles out to bring new ones in. As far as traffic is concerned, the landscape business is going to have the same number of trucks. Tow trucks will absolutely be included; she is not trying to deny that. There will be about five trucks per day. She noted this is similar to the landscape business. Also, in order to comply with Gahanna city code for becoming a contractor under the city's rules, you have to be within the city. They are trying to spruce up the property and make a good living while being in compliance city code.

Board member Jensen asked what the reluctance is regarding not paving versus gravel. He wondered how, if it stays gravel, 200 or more cars can stay organized. He said he knew it would be more expensive, but added that paving and striping would be more professional and easier to maintain. MacGregor Comek noted that this is not required under the code. Second, it is the cost and the management of how the site is organized. Third, striping is not wanted. She recalled a conversation during the Planning Commission meeting between Mr. Antonetz and the Commission about how the appellant came to the

"striping plan." The striping plan was used to show what the capacity could be. You can't pave gravel with any degree of reliability. So there are two things they do. First, they set up the site to deal with the trucks driving around. They have liability if they cause damage to them. They must be able to, in an orderly fashion, navigate the site by having drive aisles and turn radius. The site and storage must be managed. Second, if there are concerns about how this gets managed, generally speaking, landscaping, there is a six-foot fence. It is very similar to the fence across the street for the armory. They have screening associated with that. They had agreed to parking lot screening even though it is not a parking lot, because they are attempting to meet all code requirements, even though they are not applicable. She said that is what people do when they are trying to impress a board. The client understands the concern and wanted to propose a solution to the concern. She encouraged the board to look at the timeline. The client has been trying to improve the property for over a year. The application was filed in 2022 for variances and design review. They paid the fees and went through the process but were not heard because of the CUP. They were not informed until earlier this year they needed the conditional use permit. They paid the attorney more in fees more than they would have paid for landscaping. MacGregor Comek called this, "disgusting, sad, and unfortunate." Her goal is code compliance. The laws don't require this. They were held to a different standard.

Mr. Roth was invited for rebuttal. He informed the board that he did not argue that changing it from grass and trees to gravel is not an increase in intensity. It is a change, it may improve values, and it is something that it currently is not. He also did not argue that a family business with gravel is a better fit. What he said was that what they are trying to do on the three acres is not in compliance with everything else around it, which is a big box with employees and everything around it paved. That is his point in saying that changing it from grass to gravel is not complying with the code and criteria for the Conditional Use. He is not suggesting a family business would be preferable, or that the business in question is not a family business. He reiterated that around Speedway Towing is big boxes, paved everything, and many employees inside. That is where improvement is not being made. There was discussion at Planning Commission about the site not becoming a junk yard. Shehata was clear that they do not sell parts from cars. What he did say was that if they impound a decent car and no one picks it up for 60 days, they get a title for the car from the state and sell it. The ones that are not in good shape are sold to a scrapper. There was little discussion about how this works. He believed Shehata said someone gives him money and picks up the car. Planning Commission's concern was that they would sell the parts as the scrap yard would, as an additional ounce of income. There was little

discussion about that. There was more discussion about how long the cars were there. There is not dispute that it must be at least 60 days before they can start that process. Planning Commission was trying to come up with the amount of time the car could be on the lot as a condition, just so it doesn't turn into permanent storage. The representative for Speedway Towing said they do not make money off storing cars. Roth believes this is inaccurate because there is a daily charge for storing cars. The Speedway Towing representative said they only make money for towing cars, and they want to tow more cars because that is how they make money. Roth said it is completely inaccurate that they do not make money from storing cars. That is why they want to put the lot there, to store more cars and charge money for storage. As indicated earlier, there are four criteria. Planning Commission considered the criteria and found that three of the four were not met. Those are the same criteria this board must consider.

Mr. Jensen asked if, hypothetically, they simply mowed the area on the three acres, did not come to the city to do the paperwork, and put the cars on there, what would the results have been? Mr. Roth believed Code Enforcement would become involved in that case. He said the city needs to be made aware of tree removal, but they could have mowed the area on their own. A stop work order would have gone out. If they had constructed a fence to hide it, the city requires a permit for fences.

Chair Eisen asked for confirmation that the three parcels are owned by the owners of Speedway Towing at this point. MacGregor Comek confirmed.

The next step, per the rules of procedure, would be to have a motion to determine where to go. In any appeal or an order, adjudication, or decision, the board has three options. They are: find in favor of appellant or appellee; find in favor and amend with modifications; or remand, with instructions, to a city official, employee, or body for further consideration or action.

Mr. Mularski noted a point of order. The chair needs to now introduce into evidence any exhibits he feels are appropriate. These may include the additional packet, the initial packet, previous minutes, or video. If any members object, it can be voted on. If no members object, the evidence can be used in the decision making. Chair Eisen asked if this needed to be done by motion and roll call vote. Mularski said Eisen would determine what to enter into exhibits. If anyone objects, there would be discussion and a vote. If no one objects to the admissions, it gets admitted as an exhibit.

MacGregor Comek said there is a list of exhibits in the notice of appeal. The added exhibit she marked as “D” to line up with previous exhibits A, B, and C. She asked to have the packet provided added as Exhibit D to the existing list. Eisen asked for confirmation that the information provided tonight be added as D. MacGregor Comek confirmed. She also asked, for a point of order, that they are asking for the decision to be overturned. If remanded back, that they be instructed to approve the CUP and the other cases be dealt with later. That is their request.

Eisen reminded the board that the procedure to vote would be for a board member to make a motion, a second to the motion, and there will be commentary permitted by any and all of the members present this evening. Then the clerk will be asked for a roll call.

Mr. Mularski noted that they had not formally admitted anything. Eisen suggested they admit everything, including the packet provided by the city and that submitted MacGregor Comek. For the record, all materials they received became a part of the hearing. Eisen asked if any member would like to make an initial motion to be seconded and voted on.

Beckmann asked if counsel for the appellee said they took that into consideration when they made the final decision -- that they understood the variances that were being considered for the primary parcel. There was a lot of discussion but ultimately they knew that wasn’t part of the conditional use.

Roth stated he forgot how it went to vote. He thought the motion was to approve the conditional use with the additional three or four conditions. That is what they voted on. They first voted to modify the application to include those conditions, then they voted. He thought the conditions were part of what they voted on, and ultimately voted no. He asked if that was not what happened.

MacGregor Comek approached and stated there was a separate motion to impose the conditions that was a 3-3 tie and consequently the motion failed. Roth added that it just went to vote for the conditional use as it was. Mr. Mularski noted that the minutes state, “a motion was made by Tamarkin, seconded by Suriano, that the conditional use be approved.”

Jensen noted it was a 3-3 tie, and asked if that was because of a member’s absence. Mularski noted that the motion failed, so the issue the board is deciding is a motion that was made by the board, which was whether the conditional use be approved, and it was voted down. MacGregor Comek said there were two motions, two considerations. The first was for the conditions, to add the conditions. The second, 5-1, was on the original application without the conditions. MacGregor

Comek had questions for the board. Is the motion to vacate the decision of the Planning Commission and rehear it. So, a remand and rehearing. Bryson concurred it would be a remand and rehearing. The procedural rules read that the disposition must either find in favor, find in favor and amend, or remand with instructions. To be particular, the instruction would be for rehearing on the conditional use as a separate issue from the variances, since the hearing was about all of them even though they took no action on the site plan or the variances. MacGregor Comek restated Beckmann's question. From the meeting, they were presumed to understand all of it. So, the recommendation is to rehear the elements that were already presented to them and make a different decision. Mularski objected, noting that "different decision" was not said. Bryson said the decision may very well be the same. The reason for remand would be two things. One, if they did decide either way and a party was displeased and it came back to BZBA, there would be a clear record for determination of the four factors that they can consider for approval or disapproval, separate from any issue about whether they disapproved because they would disapprove if they were voting on the variances, or any other issue. The record itself is tangled with the discussion of the variances that would be required, or the discussion of whether they have power to impose restrictions. There were elements extraneous to what should be considered. First, it would make the decision comply with the law. Second, if it gets appealed to BZBA, it would present a more straightforward record.

MacGregor Comek asked, if specific reasons are not stated, then they have been arbitrary or based upon facts outside the record. Planning Commission heard it all and made a decision.

Mularski said this is not the time for argument from counsel. It is time for the board to make comments. MacGregor Comek noted that she objects to the consideration because it is giving the government a second bite at the apple to make more arguments after. Mularski reiterated this is not the time for arguments from either counsel. MacGregor Comek stated that was her objection and thanked Mularski. Eisen said the reason he asked the City Attorney for clarification what the board needed to think about during the hearing and additionally, at the time of a motion, was for this reason. He noted a lot of time was spent on the variances. He felt the same way. Whether there were six, whether three were valid, a lot of time was spent on variances. He is not saying use of the site and some of the variances are mutually exclusive, he said a lot of time was spent there. He is not sure if anyone used the term design review, that would have been Planning Commission and not this board. He will not try to conjecture what will happen if it goes back to Planning Commission. He believes a valid point and a valid motion have been made.

Jensen said, if the appeal is rejected, is there an opportunity to appeal to a higher court. If they feel it does not fit in with the appropriate plans for the area, existing land use character, despite the laws and discussion about future planning, the BZBA can make their own decision, arbitrarily and capriciously. Mularski noted that either side can follow 2503 action 2 to the higher court. Jensen asked if the motion was still under discussion. Eisen said yes.

Eisen asked Mularski if there is an opportunity to revise or amend the motion if they wish. Mularski said there is a motion pending, if someone wants to make a motion to amend the motion, they can. Otherwise, they can vote on the first motion.

Jensen said if they remand it back, he is not sure what difference it would make. The Planning Commission would spend more time on the same issues. Beckmann agreed, stating that Planning Commission is capable of separating the variances from the conditional use request. Eisen said they have the option to make a change, as the City Attorney said. Would Beckmann like to make a motion to amend the motion? Bryson said the other option would be to vote on this, it could fail, and there could be another motion. He suggested this as an alternative in case it could be confusing to amend. Eisen said if they vote to remand and it fails, they haven't had a positive procedure moving forward. Mularski said it is not a final determination, correct. Eisen recommended they do that. Beckmann did not have an amendment to the current motion. Eisen suggested they do a vote on the current motion.

Clerk VanMeter restated the current motion, to remand to Planning Commission with the instruction to rehear on the conditional use permit only. Bryson stated that was accurate.

**A motion was made by Bryson, seconded by Jensen, that the Appeal BZA-0001-2023 be Remanded to Planning Commission with the instruction for Planning Commission to re-hear only CU-0004-2023. The motion failed by the following vote:**

**Yes:** 1 - Bryson

**No:** 4 - Beckmann, Eisen, Jensen and Stefanov

Mularski noted they are back to the beginning and have all available options for the appeal. He also noted they do not need to wait for a motion to be able to discuss the motion. The rules allow for them to make comments prior to making a motion. Eisen said in almost every hearing he's been involved in, they have had open discussion by the members. In so much as telling how you might vote before or after the motion. He

opened the floor to the group. Jensen clarified that the motion has to be in a positive format. Mularski agreed. They need to move to uphold the appellee, or something along those lines.

Bryson shared his thoughts. The first question is, is it or is it not a conditional use? He believes it is. There is question whether it is storage or towing. But, since towing, by its definition, includes the storage of vehicles that are towed, and that is more specific than the storage use, he thinks it is a conditional use for towing, which is one of the uses that can be approved in the district. Second, is it in accord with appropriate plans for the area? He feels the appropriate plans include the land use plan for the area. It is not binding, but it is a projection for the future. This is the only thing that “appropriate plans” could mean. What might be possible in the area? It is industrial. It is an industrial use that involves cars in an area, which we already have some of. It is different from other uses in that there are not a high number of employees or a high number of customers or something like that. It is not an enclosed area. He thinks it is in accord with the appropriate plans. He does not think that its use does not undercut the other uses around it. It is not a place that others would not be able to work around. Undesirable effects are speculative to him. It sounds like “I know it when I see it” and he believes that is what the Planning Commission was thinking about. He would not be happy saying that he thinks it will have undesirable effects, which would be reasonable for disapproval. He does not think he can say for certain that it will not have undesirable effects, but he is comfortable saying that he doesn’t think it will definitely cause undesirable things. It is just people picking up their cars where they have been impounded. But if it is in keeping with the existing land use character and physical development potential of the area is where he thinks it may fail. Existing land use character is fine because the area is industrial. But physical development potential as a factor in both A and C tell him that the other things the land could be used for are appropriate things to consider. They are all lots that have street access. They have open space. They are all well sized, and there are a lot of different things that any owner could do on the plots. The physical development potential of the area is specialized retail and similar uses, which seems to be the higher potential for physical development in the area. He has an open mind on all those things.

Eisen said they could make a motion to approve the appeal and see where it goes, with the understanding that, per the Planning Commission meeting minutes, DR-0015-2023, which had to do with design review, site plan landscaping, and V-0016-2023, neither of them went further into any kind of vote because the conditional use was approved. So, the board’s role has to do with conditional use, knowing that this project is

going back to Planning Commission and those items to be voted upon. Whether it goes to workshop or goes straight back to hearing, he stated he does not know all the rules of Planning Commission himself. MacGregor Comek stated her belief that both are options, depending on how they work it out. Mularski stated if the board approves the conditional use, then it is approved unless it is appealed. Then, the variances could be heard or withdrawn, or the variances could be determined to not be needed with the approval of the conditional use. They do not have to be heard, but they can be heard. That is what he heard them say, that they felt they had to be heard, but they can be withdrawn.

Mr. Roth said it was true that the applications had been made and were not pending and had not been voted on. Something must be done with them. If this panel would approve the conditional use, Planning Commission is the next step for the other items. MacGregor Comek concurred that they could be withdrawn or revised. There are options and they have not been heard yet. She felt this was a very viable option.

Eisen said, but if this board approves conditional use, are they saying the property owner, who has come up with the variances, could move forward with the project however they want. Mularski said if they meet the statutes, they can withdraw the variances and proceed with the lot as-is. Bryson clarified, that is only if they decide they don't need variances to be able to do the things they want to do.

MacGregor Comek stated that since the law changed, there may be a different set of standards and to be able to do this allows for a variety of options. Mularski noted it sounded like BZBA thought they had to vote on the variances, and if they don't get the variances they can't move forward. They can move forward; they just move forward without the variances. Bryson asked Mularski, they have to move forward in ways that comply with the code, not things that require variances from the code. Mularski stated he does not want to put words in anyone's mouth but wanted to ensure the board understood.

Eisen said that any argument whether this was motor vehicle storage or towing becomes a moot point. MacGregor Comek asked, if this happens tonight then they are allowed to do what they applied for originally. This at least gives them the base use.

Jensen suggested they make a motion to approve the appeal, discuss, then vote.

**A motion was made by Jensen, seconded by Stefanov, that the Appeal BZA-0001-2023 be Found in Favor of Appellant to approve CU-0004-2023.**

Jensen said that while he made the motion, he will probably be voting no. He agrees with some of the items on the disapproval such as the conditional use, the plans of the area, and the existing land use area. He is concerned that the commentary and follow-up will be two different things and it does not fit into the style of the area.

Eisen said he visited the site again today. He understands they are talking about the three parcels and not the current one-acre parcel, which received its approvals several years ago, before 2019 when the Gahanna land use plan was drafted. He believes in the innovation district and that it is the southern gateway to the city. He has spent a lot of time thinking about the four bullet points of conditional use approval. Eisen is conflicted about items 2, 3, and 4. Not just from what he read in the notes from the Planning Commission meeting, but personally. He saw the picture of McGraw-Hill, which was of the loading dock. He thought this was a bit unfair. They also have a large building. He is sure that other business have trucks coming in, which is not a concern. It might be more organized in the larger plan that allows for 280 cars; he is still making an opinion based on what he sees today and it is a bit of a concern.

Clerk VanMeter reread the motion upon request by the City Attorney and Chair.

**A motion was made by Jensen, seconded by Stefanov, that the Appeal BZA-0001-2023 be Found in Favor of Appellant to approve CU-0004-2023. The motion failed by the following vote:**

**Yes:** 1 - Stefanov

**No:** 4 - Beckmann, Bryson, Eisen and Jensen

**A motion was made by Bryson, seconded by Jensen, that the Appeal BZA-0001-2023 be Found in Favor of Appellee to affirm the denial of CU-0004-2023. The motion carried by the following vote:**

**Yes:** 4 - Beckmann, Bryson, Eisen and Jensen

**No:** 1 - Stefanov

## F. UNFINISHED BUSINESS:

None.

## G. NEW BUSINESS:

### 1. Livestreaming of Meetings

Clerk VanMeter said the city can livestream public meetings to YouTube. City Council and Planning Commission meetings are livestreamed. The

decision has been left up to each individual board and commission that meets in council chambers to determine if its meetings will be livestreamed and uploaded to YouTube. The Property Appeals Board took that action when they met and will have future meetings livestreamed. The BZBA has the choice to discuss and vote on that tonight.

Eisen said this is the way of the world and people are not always able to attend meetings. Everything that happens in the meetings is public record and if there is not a recording, there is a paper record. He has no objections.

Jensen asked if it would truly be live or if it would be uploaded later for viewing. Clerk VanMeter replied that it would initially be live and then accessible later as well.

Bryson liked the idea for transparency and noted he has watched City Council meetings that had previously been streamed.

There was a verbal consensus.

**A motion was made by Jensen, seconded by Beckmann, that BZBA approve live streaming of future meetings. The motion carried by the following vote:**

**Yes:** 5 - Beckmann, Bryson, Eisen, Jensen and Stefanov

## H. POLL MEMBERS FOR COMMENT:

Jensen complimented Eisen for how well he ran the meeting, and Mr. Bryson's ability to make his comments sound professional.

## I. ADJOURNMENT

With no further business before the Board, the Chair adjourned the meeting at 8:18 p.m.

**Jeremy A. VanMeter**
**Clerk of Council**

*APPROVED by the Board of Zoning and Building Appeals, this day of 2024.*

**Lorne Eisen**