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May 13, 2011

Board of Zoning Appeals
City of Cleveland
601 Lakeside Avenue, Room 516
Cleveland, Ohio 44114-1070

Re: ***Supplement to 4/29/11 Motion for Reconsideration of Decision on Appeal***
From Notice of Non-Conformance, June 18, 2010
Calendar Nos. 10-194, 10-259, and 10-260
Property: 4300 Bradley Road
Owner: William and Mary Ellen Bauman and Bradley Rd., Inc.
Applicant: Ty, Inc./Tom Simich
Hearing: April 18, 2011

To Whom It May Concern:

This supplement is submitted in support of Applicant's Motion for Reconsideration. Specifically, it is sent in response to the May 9, 2011 correspondence submitted to the Board by Ward 12 Councilman, Anthony Brancatelli. Councilman Brancatelli's letter contains several misrepresentations, including as to the nature and import of the Board Resolution he attached to it. Based upon his prior inconsistent statements, his testimonial credibility and truthfulness are substantially compromised. Under Ohio law, his statements merit being given no evidentiary weight by the Board. The grounds for this conclusion are stated below. A copy of his letter and the single-page attachment to it are attached here as Exhibit "A." Copies of the hearing transcript pages that are cited below are attached here as Exhibit "C."

1. In his May 9 letter, Councilman Brancatelli objects to Applicant's submission of the April 15, 2011 Letter of Intent ("LOI") executed by Applicant and the City of Cleveland. He claims that it is "not valid" because he has not signed it. On the morning of the April 18, 2011 hearing in this appeal, however, Councilman Brancatelli sent an e-mail in which he admitted that he was not a party to the LOI and that he had insufficient interest, standing, and/or involvement to qualify him to sign it. Councilman Brancatelli made those e-mail representations to the Applicant, to Applicant's lawyers, to representatives of the City's administration, to counsel for the City, and to representatives of the Old Brooklyn Community Development Corporation ("OBCDC"). A copy of the e-mail communication chain ending with Councilman Brancatelli's representations is attached hereto as Exhibit "B." Furthermore, Councilman Brancatelli's signature on the LOI is legally unnecessary. The LOI is in fact signed by an authorized representative of

the City, and Councilman Brancatelli's authority as but one Council member does not empower him to speak on behalf of the entire City.

2. In his May 9 letter, Councilman Brancatelli states that he "firmly supports" the Board's denial of Applicant's appeal. In his April 18 e-mail, however, he represented to the recipients identified above, which included top City administrators, that he supported the "action being taken" in the LOI. Those LOI "action[s] being taken" necessarily included the City's express commitment to support the favorable disposition of Applicant's appeal concerning the grading/excavating operations.

3. In his May 9 letter, Councilman Brancatelli states that "[a]t the April 18th hearing all representatives from the City chose not to support the appeal or variances needed to allow Surface Mining" on the Bradley Road Property. At least two Board members accorded that fact some weight during the hearing. (Hearing Trans., 115:20-117:1.) Exhibit "B" makes clear, however, that this statement is at least partially untruthful. Councilman Brancatelli, who was "at the April 18th hearing," was at that time personally aware of the City's express support in the LOI for the appeal and/or variances. Exhibit "B" shows that Councilman Brancatelli's involvement in reviewing the LOI extended at least as far back as the week preceding the hearing. It shows that on Thursday April 14 he was forwarded draft changes to the LOI from Darnell Brown, the City's Chief Operating Officer. Indeed, at an April 5, 2011 meeting to discuss the LOI, Councilman Brancatelli stated to the group present that he would appear at the April 18 hearing and present the LOI on the City's behalf. Exhibit "B" further shows that on the very morning of the April 18th hearing, Councilman Brancatelli reminded the City's officials that he would appear at the hearing and support the LOI's objectives. That he asked at the hearing for such a representative to step forward and speak in support of the LOI cannot conceal his failure to honor the multiple representations he made to the City officials that he himself would do so.

4. To his May 9 letter, Councilman Brancatelli attaches an October 23, 1989 BZA Resolution from Calendar No. 89-200. (See Exhibit "A" hereto.) He represents that the 10/23/89 Resolution "denied the Landfill in its entirety." This is false, and simply reading the Resolution confirms it. The first WHEREAS paragraph in the 10/23/89 Resolution states that it relates to an appeal involving only a "310' x 300' land locked parcel (with access from Bradley Road by easement)..." The area approved by the Ohio Department of Natural Resources ("ODNR") for "surface mining" is itself 8.2 acres and is within the landfill area on the properties, but it does not include any part of the 2.13-acre parcel referenced in the 10/23/89 Resolution. Indeed, the Bradley Road Landfill properties comprise more than ± 38 acres, exclusive of the 2.3-acre parcel referenced in the 10/23/89 Resolution. Thus, Councilman Brancatelli's conclusion that the landfill "should not be operating there today" is erroneous and not supported by 10/23/89 Resolution. Referring to that same Resolution, Jan Huber, the Board's Secretary, misguided the Board towards the same erroneous conclusion at the April 18 hearing. (Hearing Trans., 9:25-10:15; 110:1-11.)

5. In his May 9 letter, Councilman Brancatelli persists in erroneously describing the grading/excavating Applicant proposed as “strip mining.” This is not the first occasion where Councilman Brancatelli has made this mistake. He previously characterized Applicant’s proposed grading/excavating activity as “strip mining” in correspondence he sent to the ODNR, during that agency’s review of Applicant’s “surface mining” permit application. He was corrected in that error by no less than Christopher Jones, Esq., the former Director of the Ohio EPA, who called Councilman Brancatelli’s characterization “both inaccurate and misleading.” (See Exh. “M” submitted by Applicant in these proceedings.) That Councilman Brancatelli persists in misleading on this point supports the inference that he is now doing so willfully, and casts reasonable doubt on his concern for the accuracy of his statements.

6. In his May 9 letter, Councilman Brancatelli objects that Applicant’s 4/29/11 Motion for Reconsideration attached to it a judgment entry/consent decree, and related settlement agreement, from U.S. District Court Case No. 1:04-CV-01757-PCE (the “Federal Lawsuit”). He contends that “[n]one of these are relevant to the perceived right to do strip mining and the Appeal and Variance requests.” This statement is false, even if grading/excavating activities were the precise issues raised in the appeal. The properties’ use as a landfill dates back decades, and the permit status of the landfill was brought up almost immediately by Board Member Donovan, as Applicant’s presentation at the hearing was getting underway. (Hearing Trans., 9:18-23.) The inseparable nature of the landfill and proposed grading/excavation uses was made explicit by Applicant. (Hearing Trans., 14:8-15:4.) Mr. Riccardi noted that Applicant’s “surface mining” permit application to the ODNR itself identified how the proposed grading/excavating activity co-exists with landfill operations on the properties. (Hearing Trans., 27:8-25.) On the appeal in 10-259, Board Member Donovan explicitly made landfill use of the property the predicate for his conclusions about the Zoning Administrator’s ruling in that appeal. (Hearing Trans., 48:12-25.) Similarly, Board Member Dobbins went so far as to characterize the appeal as one involving a “junk yard” and a “dump.” (Hearing Trans., 84:7-85:24.) To the extent that the Board’s decisions turned on its view about the merits of resuming landfill operations on the properties, the Board erred. That issue was not before the Board and has, in fact, already been determined in another forum. The Board’s error in this regard became apparent during the April 18th proceedings, and that is what supports the introduction and relevance of the Federal Lawsuit documents.

The foregoing inconsistencies, misrepresentations, and inaccuracies bear on the Board’s determination about the credibility and weight due Councilman Brancatelli’s statements. It is well-established that as the trier of fact, this Board is entitled to determine the credibility of witnesses, and is entitled to believe all, part, or none of the testimony of any witness. *Stovall v. City of Streetsboro* (11th App. Dist.), 2007 WL 1882604, 10 (internal citations omitted). A trial court would also conduct its own appraisal of witness credibility were this Board’s decisions to be appealed further by the Applicant. *NIRA, Ltd. v. City of Columbus* (10th App. Dist.), 2003 WL 21267473, 2. As the Supreme Court of Ohio has stated:

Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate or modify the administrative order. Thus, **where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight.** Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order. (emphasis added)

University of Cincinnati v. Conrad (1980), 63 Ohio St.2d 108.

Respectfully, Applicant requests that Councilman Brancatelli's May 9 letter and other record statements be assessed in light of the foregoing, and appropriately given little if any weight by the Board.

Very truly yours,

Gary F. Werner

GFW:rls

Cc: Tom Simich
Richard Riccardi, Zoning Administrator
Mark R. Musson, Esq.

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