



CITY SOLICITOR'S OFFICE • 1140 Terex Road • Hudson, Ohio 44236 • (330) 342-1709

## MEMORANDUM

To: Thomas Sheridan, City Manager

CC: Greg Hannan

From: John Kolesar, City Solicitor

Re: Temporary Construction Site for Turnpike Project

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The City issued a temporary use permit for a construction staging area relating to the Tinker's Creek Bridge Replacement Project on the Ohio Turnpike. The lot is located adjacent to and immediately to the north of the Turnpike with an existing access road from the Turnpike to Stow Road. The project site is about  $\frac{3}{4}$  of a mile to the east.

The issues raised are whether the City Manager may revoke the temporary construction site permit, and may the City Manager decline to renew the permit after the initial one-year term of the permit.

### **Background**

The relevant section of the City's Codified Ordinances permitting temporary uses allows for a temporary construction site in all zoning districts:

#### 1206.04 Temporary Uses

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(c) Contractor's office/temporary construction uses may be permitted by the City Manager as follows:

(1) Permitted in all districts. The use of construction sheds or construction trailers in connection with site construction, or an area used for the temporary storage of building materials and equipment necessary for construction of a permanent use, are permitted temporary uses in all districts, subject to the following regulations and restrictions.

(2) Term of permit. The term of a temporary use permit for construction uses shall automatically expire thirty days after completion of construction, or upon cessation of construction for more than sixty days, or one year after issuance, whichever occurs first. The City Manager may

grant up to three, six-month extensions if the builder maintains active and continuous construction on the site or within the subdivision.

Pursuant to this authority, the City issued a Temporary Use Permit on July 28, 2023, to the contractor for the construction staging area to be used for worker parking, a construction trailer and storage of materials. The use has triggered a response by adjacent property owners, relating to excessive noise during construction hours.

### **Discussion**

Generally, the City may issue a stop work order if there is a violation of the site requirements as set forth in the codified ordinances, or special conditions that were to be met for the city to issue the permit (here, for example, the increased size of buffer zone). In the absence of violations it would be unprecedented. There is no procedure set forth in the code for revoking a permit, however logic dictates that since it was issued through the City Manager by staff the City Manager can revoke it for good cause.

It is clear that the City Manager has discretion not to extend the permit. The Codified Ordinance states that “[t]he City Manager *may* grant up to three, six-month extensions if the builder maintains active and continuous construction on the site.”

The next question that must be considered is what effect will either revoking or not extending the permit have. The Brownfield decision will limit the City’s ability to stop the use of the site for the project. In Brownfield v. Ohio, 63 Ohio St.2d 282, the Ohio Supreme Court held that a State actor, such as the Turnpike Commission, only needs to make reasonable efforts to comply with local zoning. A contractor for the Turnpike Commission is treated likewise. Ohio Logos, Inc v. Catawba Island Twp., 2002-Ohio-5070 (10th Dist. App.); GTE Wireless v. Anderson Twp., 134 Ohio App.3d 353 (10th Dist. App., 1999).

Considering the placement of the site, as close as possible on a private parcel, as well as the applicant proceeding through our permit procedure and complying with adjustment to the conditions, it is likely that a court would find that it made reasonable efforts to comply with Hudson zoning. A court will likely find that the contractor could proceed despite any stop order we would issue. One effect of the Brownfield decision is that only a court order will stop work on state government project. Taylor v. State, Dept. of Rehab. & Correction, 43 Ohio App. 3d 205, 209 (10th Dist. App., 1989); see also <https://www.bricker.com/insights-resources/publications/resolving-zoning-challenges-between-local-governments>.

Based on these considerations, if the contractor ignores the stop order or non-extension of the permit, the City would need to file for an injunction in Summit County Common Pleas Court. The court in deciding whether to issue the injunction would “weigh the general public purposes to be served by the exercise of each power” and “resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens.” pursuant to Brownfield. In other words, since a greater number of the public has an interest in the operation of the Turnpike than Hudson residents who have an interest in the peaceful enjoyment of their property, the court would probably resolve the dispute in favor of the contractor.

Even if the City does not grant an extension of the permit after the initial one-year period, the contractor can continue to work, short of an injunction. The weighing of interests will be similar. The City may be in a better position if, after the one-year period, we can point to a condition that the contractor failed to meet. One such argument might be that the construction site increased volume of traffic or type of traffic (construction vehicles) affecting more people than just those living in the adjacent neighborhood or negatively impacting the safe functioning of the schools. Suggesting an alternate site that eliminates these concerns would also put the City in a better position.

### **Conclusion**

Based on the above considerations, the City should closely monitor the site and only take the step of revoking the permit if the conditions for its issuance are violated, after giving the contractor an opportunity to mitigate. If after the initial one-year period the City does not wish to renew the permit, we should be prepared to argue to a court that the site has caused a change in the nature of the area by increasing traffic, reducing safety and significantly increasing noise levels to adjoining residents. And as a practical matter, the City should communicate its intention not to renew at the end of the year well in advance to allow the contractor to make alternate arrangements.