

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

STATE OF OHIO ex rel. BOSTON HILLS)	CASE NO.: CV-2007-07-4696
PROPERTY INVESTMENT LLC, et al.,)	
Plaintiffs,)	JUDGE PATRICIA COSGROVE
vs.)	
VILLAGE OF BOSTON HEIGHTS,)	<u>AGREED JUDGMENT ENTRY</u>
OHIO,)	
Defendants.)	
)	

Plaintiff, State of Ohio ex rel. Boston Hills Property Investment LLC (“Plaintiff” or “BHPI”), and Defendant Village of Boston Heights (“Defendant” or “Village”), by and through their respective counsel of record, hereby agree and stipulate to this Agreed Judgment Entry (“Agreed Entry”). This Agreed Entry resolves all issues arising out of this action and all other issues that may have been raised by the Parties in this action, relating to the development of Plaintiff’s approximately ± 160 acres of undeveloped real estate (the “Property”) in the northwest quadrant of the SR 8/E. Hines Hill Road intersection.

The Parties hereby agree, and this Court does so order, that this matter be reduced to a judgment upon the terms of this Agreed Entry.

I. **DEFINITIONS**

A. **“Village”**: The Village of Boston Heights, Summit County, Ohio.

B. **“Zoning Code”**: The Planning & Zoning Code of Village of Boston Heights, Summit County, Ohio, as amended through the 2006 Replacement Supplement, all relevant and incorporated provisions of which are attached hereto as Exhibit “B.”

C. **“Plaintiff”**: BOSTON HILLS PROPERTY INVESTMENT LLC, Plaintiff herein.

D. **“Action”**: This lawsuit entitled *State of Ohio ex rel. Boston Hills Property Investment LLC v. Village of Boston Heights, Ohio*, Summit County, Ohio Court of Common Pleas Case No. 05 CIV 1680.

E. **“Property”**: Refers collectively to the entire approximately ± 160 acres of undeveloped real estate described and depicted in Exhibit “A” hereto.

F. **“Use Designation Plan”**: Refers to the plan prepared by Donald G. Bohning & Associates, Inc., attached hereto as Exhibit “C,” generally depicting the intended uses for the primary land areas within the Property.

G. **“Integrated Commerce Center” or “ICC”**: A land use designed to integrate retail, medical, hospital, and/or office uses and structures to provide a broad range of goods, services, and commercial activities in one location, for projects requiring a large area of land, proximity to adequate roads, and a marketing area sufficient to support its potential, subject to the provisions of this Agreed Entry.

H. **“Hospital”**: An institution providing primary health services and medical or surgical care to persons, primarily inpatients, suffering from illness, disease, injury, deformity, and other abnormal physical or mental conditions and including, as an integral part of the

institution, related facilities, such as laboratories, outpatient facilities, training facilities, medical offices, and staff residences.

II. DEVELOPMENT GUIDELINES FOR THE PROPERTY

A. General Zoning Requirements: The Parties stipulate and agree that Plaintiff may develop the Property in accordance with the following development guidelines (“**Development Guidelines**”), including, where indicated, and with only those Zoning Code provisions expressly incorporated herein. No Zoning Code provision is incorporated into this Agreed Entry unless expressly identified as incorporated into this Agreed Entry. Zoning Code provisions that are incorporated by reference within the Zoning Code provisions that are expressly incorporated in this Agreed Entry shall be applicable to the Property if and only if those incorporated provisions are themselves expressly identified as also being applicable to the Property.

B. Uses: The Property shall be developed as follows. All uses listed hereunder, including all site and area requirements associated with such uses, regardless of their characterization in the current or any future Zoning Code or otherwise, shall for all future purposes, and except to the extent otherwise expressly qualified herein, be deemed permitted uses of the Property as stated herein, and may hereafter be altered, expanded, completed, constructed, re-constructed, substituted, and/or modified, as a permitted use in accordance with the provisions of this Agreed Entry. Notwithstanding the foregoing, although nothing in this Agreed Entry shall, or shall be construed to, deprive the Village of its discretion or authority to rezone the Property legislatively in the future, based upon changed circumstances. Such discretion and authority shall not be used to deprive Plaintiff of the benefits of this Agreed Entry.

1. Development Areas Within the Property: The Property shall for development purposes be segmented into two (2) Development Areas, the sizes and boundaries are provided in this Agreed Entry:

a. Development Area 1: shall refer to the approximately ± 100 acres situated in the northwest quadrant of the intersection of E. Hines Hill Rd. and SR 8, as reflected on the Use Designation Plan attached as Exhibit "C" hereto; and

b. Development Area 2: shall refer to the remaining land (i.e., approximately ± 60 acres) along the western and northern boundaries of the Property, as reflected on the Use Designation Plan attached as Exhibit "C" hereto.

2. Uses of the Property: Except as modified in this Agreed Entry, the permitted uses of the Property shall include the following:

a. Development Area 1: All "Permitted Uses" and "Conditionally Permitted Uses" described in the Zoning Code in:

i) Chapter 1157 (Office/Professional District), including hospital uses, except that bed and breakfast establishments described in §1157.03(a) shall remain a Conditionally Permitted Use and that although permitted uses herein, the aggregate floor area of all uses denominated as "Conditionally Permitted Uses" in Chapter 1157.03(a) shall not exceed thirty percent (30%) of the aggregate usable floor area of all office buildings in Development Area 1;

ii) Chapter 1159 (General Business District), except that dry cleaning and laundry services described in §1159.03(a), quasi-public institutions and organizations and/or operation, instructional and meeting

facilities for non-profit uses described in §1159.03(g), laundromats described in §1159.03(j), funeral homes described in §1159.03(l), and other compatible uses described in §1159.03(m) shall remain Conditionally Permitted Uses, and that temporary buildings for uses incidental to construction work described in §1159.03(d), although a permitted use herein, may remain on the Property only until substantial completion of construction has occurred, and that sporting goods stores described in §1159.03(h), although a permitted use herein, must comply with the provisions of §1159.03(h); and

iii) Chapter 1160 (Retail Business District), except that taverns described in §1160(d) and automobile sales described in §1160(e) shall remain Conditionally Permitted Uses, and that, although a Permitted Use, only one vehicle service station described in §1160(a) may be constructed and/or operated in Development Area 1; and

b. Development Area 2: Permanently deed restricted green/open space, in accordance with paragraph C(3) below.

3. ICC District Uses: The term “ICC District Uses,” shall refer collectively to permitted uses of the Property described in paragraph B(2) above.

4. Accessory Uses: All uses, structures, and activities that are necessarily and customarily incidental and subordinate to the principal (either permitted or conditionally permitted) uses allowed in the ICC District shall be deemed to be included within the meaning of “permitted uses” for purposes of this Agreed Entry.

C. General Area Parameters:

Notwithstanding anything to the contrary in the Zoning Code or the specific provisions of it incorporated in this Agreed Entry, the ICC District shall include and be subject to the following area parameters:

1. Limitation of Area of Retail Business District Uses: Not more than sixty five (65) acres in Development Area 1 shall be devoted to Retail Business District uses, provided, however, that retail sales and service uses permitted within a hospital or office building shall not be deemed a Retail Business District use for purposes of calculating the aforesaid sixty five (65) acre Retail Business District use limitation.

2. Building Height: The maximum height of buildings in the ICC District shall be as follows:

a. Retail Store Buildings: The maximum height for any retail store building in the ICC District shall be thirty-five (35) feet measured from finished grade at the first floor level of the main entrance of the building, provided, however, that HVAC and other mechanical equipment and architectural accent features such as skylights, towers, parapet walls and entry features, may extend higher; and

b. Office Buildings:

i) The height of office buildings shall be governed by Section 1157.05;

ii) Subject to the provisions of Section 4 of this Agreed Entry, the maximum height for any medical office building or hospital in

Development Area 1 shall be seventy-five (75) feet measured from finished grade at the first floor level of the main entrance of the building;

iii) HVAC and other mechanical equipment and architectural accent features such as skylights, towers, parapet walls and entry features, on any building in Development Area 1, may extend higher than the limits stated in this paragraph C(1)(b).

3. Intensity of Use: Sections 1157.07, 1159.07, and 1160.07, shall not apply in the ICC District, and the following shall apply:

a. Limitation of Building Coverage: The aggregate area of footprints of all buildings constructed in Development Area 1 shall not exceed thirty three percent (33%) of the total land area contained in Development Area 1.

b. Retail Stores:

i) Building Size: One retail store shall be permitted to have a maximum footprint of 125,000 square feet, a maximum of two-stories, and a maximum of 215,000 total square feet, and a second, single-story retail store shall be permitted with a maximum of 125,000 square feet; as modified by and subject to the foregoing;

ii) All remaining retail stores shall be limited to a single-story and shall not exceed 50,000 square feet per store. Multi-tenant buildings, accommodating multiple stores, shall be expressly permitted; and

iii) Notwithstanding the foregoing, if and only if a full-service hospital facility is constructed in Development Area 1, then Building Size regulations in Development Area 1 shall be modified to delete permission

for a second, single-story retail store with a maximum of 125,000 square feet.

c. Office Buildings Other Than Hospitals:

i) Building Size: Office buildings, except for hospitals, shall be governed by Section 1157.07(c); and

ii) Hospital/Medical Office Buildings: The maximum occupiable area of a hospital or hospital/medical office complex shall be 450,000 square feet, and no more than one such hospital or hospital/medical office complex shall exist in Development Area 1.

Notwithstanding the foregoing, other buildings may exist in Development Area 1 devoted to similar medical and medically related purposes which comply with this Agreed Entry and the provisions of the Zoning Code, where applicable.

4. Open Space: Approximately sixty (60) acres of the Property shall be devoted to permanent open space, by deed restriction (the “Deed Restriction”), as shown approximately on the Use Designation Plan attached hereto as Exhibit “C” and referred to herein as Development Area 2. Except as provided below, the Deed Restriction shall limit the use of Development Area 2 to park land, including only passive recreational activities such as walking paths. The Deed Restrictions shall not prohibit the Village from planting trees on the property in Development Area 2 after the completion of the mounding as described in Section C(3)(a). BHPI and the Village will negotiate in good faith to determine the precise language of the Deed Restrictions. In the event the Village, after such time as BHPI obtains a building permit for the construction of any building in

Development Area 1, desires to own the property comprising Development Area 2, BHPI shall, upon the Village's written request, contribute to the Village the property comprising Development Area 2 by delivering to the Village a General Warranty Deed conveying such property, free and clear from all encumbrances, except easements, covenants, restrictions of record, taxes and assessments not yet due and payable, and the Deed Restrictions, whereupon the Village shall acknowledge receipt, in form reasonably satisfactory to BHPI, of the voluntary contribution of such property.

a. Notwithstanding the foregoing, the Village and BHPI agree that they will negotiate in good faith to determine a location or locations on the property in Development Area 2 in which BHPI may deposit and permanently mound top soil, provided that the mounding will not result in a diversion of water from the drainage areas in which such mounds are located, and provided further, that upon completion of such mounding, BHPI will plant ground cover.

5. Setbacks and Yards:

a. Front Yards: No buildings shall be constructed within seventy-five (75) feet from the right-of-way line of any dedicated roadway adjoining or within the ICC District. Parking shall be permitted in front yards.

b. Interior Roads: Subject to paragraph C(4)(a) above, Sections 1157.06, 1159.06, and 1160.06 of the Zoning Code shall have no application to the yards around buildings or structures adjacent to private interior roads within the ICC District, except that Sections 1157.06(d), 1159.06(d), and 1160.06(d) shall apply in such District.

c. Setback of Buildings From the Westerly Boundary of Development

Area 1: No retail building shall be constructed within four hundred (400) feet from the westerly boundary of Development Area 1 as depicted on Exhibit “C” (the “Western Boundary Setback”), and in the event that any office or hospital building exceeds forty (40) feet in height, measured from finished grade at the first floor level of the main entrance of the building, such building shall be setback three (3) feet from the westerly boundary of Development Area 1 for each one (1) foot of height of such building in excess of forty (40) feet.

6. Streets: Private streets shall be permitted, but not required and, in either case, streets shall be designed within a minimum Right-of-Way width of sixty (60) feet, except for circulation drives in parking lots, and constructed in accordance with applicable engineering standards.

7. Off Street Parking: The following parking regulations shall apply in the ICC District, and shall be in lieu of the regulations under Sections 1151.07 and 1151.08 of the Zoning Code:

a. Parking shall be provided at the minimum ratio of five (5) spaces for every 1,000 square feet of aggregate floor space of sales area of all retail store and office buildings in Development Area 1;

b. Parking shall be provided at the rate of one (1) space for each bed in any hospital and at the minimum ratio of five (5) spaces for every 1,000 square feet of gross floor area of all medical office space in medical office buildings or hospitals, excluding stairwells, elevators, restrooms, janitorial storage space, and mechanical rooms;

c. The width of any parking unit consisting of two traffic lanes and two adjacent 90 degree-angle parking stalls shall be at least sixty (60) feet, and each lane shall conduct traffic in one direction only;

d. All parking stalls shall be nine (9) feet by eighteen (18) feet; and

e. Sections 1157.09 shall not apply in the ICC District.

D. Other Zoning Standards: The following additional standards from the Zoning Code shall apply to the development of the Property:

1. Site Plan Review: Except to the extent modified in this Agreed Entry, site plans for a proposed ICC District or any change thereto shall be submitted for review and approval in accordance with Sections 1151.05 and 1151.06 of the Zoning Code.

a. Conformity with the Agreed Entry: Notwithstanding anything to the contrary in this Agreed Entry, any site plan that is found to substantially conform to the provisions of this Agreed Entry shall be deemed in compliance with and as satisfying all discretionary standards stated in Sections 1151.05 and 1151.06, and/or any other standards deemed applicable to the site plan under the Zoning Code. No site plan that substantially complies with this Agreed Entry shall require or be deemed to require any variance or legislative accommodation as a condition to its approval.

2. Other Provisions: The ICC District shall be subject to the provisions of Chapter 1171 (Additional Use, Height, and Area Regulations), Chapter 1177 (Trees and Timber Cutting Regulations and Restrictions), and Chapter 1181 (Riparian Setbacks) of the Zoning Code, except that the Village agrees that the requirements of Chapter 1181 shall be deemed satisfied by the issuance to BHPI of any required environmental permits

issued by the United States Army Corp of Engineers (“Army Corp”) and the Ohio Environmental Protection Agency (“OEPA”), and that the Village will not oppose the issuance by the Army Corp or OEPA of any environmental permits required for the development of Development Area 1.

E. Central Water and Sanitary Sewer Facilities: The Parties intend that the Property shall be serviced by central water and central sanitary sewer facilities. Accordingly, the Parties covenant to exercise due diligence and to cooperate fully in undertaking, in a timely manner, all actions required or helpful to secure the provision of central sanitary sewer and water services to the Property.

III. MISCELLANEOUS PROVISIONS

A. Hierarchy of Governing Regulations: This Agreed Entry shall prevail over any conflicting provisions in the Zoning Code and shall be liberally construed to effect the ICC District Uses contemplated herein. A conflict between the Zoning Code and this Agreed Entry shall be deemed to exist whenever any provision of the Zoning Code not incorporated into this Agreed Entry would, if applied to development of the Property, prohibit, impair, diminish, condition, limit, or otherwise reduce the effect of any right conferred under this Agreed Entry. If no such conflict exists, and if this Agreed Entry is silent on the issue, the Zoning Code shall control.

B. Permitted Uses and Structures: The uses and structures authorized under this Agreed Entry, including but not limited to all of the provisions of Article II(B) hereof, are and shall be regarded as permitted uses and structures. However, nothing contained herein shall preclude the Plaintiff, or its successors or assigns, from obtaining any variance in the future for

any proposed future use of any part or all of the Property, and neither the existence nor the content of this Agreed Entry shall create or be deemed to create self-created unnecessary hardship or self-created practical difficulties with respect to such future variances.

C. Development Authorized by This Agreed Entry: Development and construction activities undertaken by Plaintiff, and its successors and assigns, which conforms to, and is reviewed and approved in accordance with, this Agreed Entry, shall not require any further or additional administrative or legislative review, approval, recommendations, or action by the Village, or its boards and commissions, to be deemed authorized. So long as development of and construction on the Property complies with this Agreed Entry and these Development Guidelines, the Village shall issue as warranted all certificates authorized or required under its Codified Ordinances, including its Zoning Code, with respect to such development, construction, and ultimate occupancy of the ICC District Uses.

D. Succession: This Agreed Entry shall be binding upon and inure to the benefit of the Parties hereto and to their successors in interest to, or in jurisdiction over, the Property. Such successors shall be deemed fully vested as Parties to this Agreed Entry.

E. Interpretation, Application, and Modification of this Agreed Entry: The following procedures shall constitute the exclusive remedial framework to resolve all questions concerning the interpretation, application, and/or modification of this Agreed Entry and concerning the use of the Property, or any portion thereof, pursuant hereto:

1. Consensual modifications to this Agreed Entry, including all consensual resolution of questions of interpretation and/or application hereof, may be executed at any time by a stipulation signed by both Plaintiff and the Zoning Inspector, which shall be submitted to the Court for approval and filing with the clerk of courts.

2. All questions involving the interpretation and/or application of this Agreed Entry, as to which the Parties hereto are unable to agree, shall first be submitted in writing to the Zoning Inspector. The Zoning Inspector may confer with any persons, parties, officials, boards, or others deemed necessary to assist in responding to any submitted questions. The Zoning Inspector shall within twenty-one (21) calendar days of submission to him/her issue to the Parties a decision concerning any such unresolved question(s).

3. Any Party hereto aggrieved by a decision of the Zoning Inspector made under paragraph (E)(2) of Article V of this Agreed Entry shall seek redress as follows:

a. first, by appealing the matter to the Village's Board of Zoning Appeals, pursuant to Chapter 1145 of the Zoning Code; and

b. then thereafter by motion to this Court seeking enforcement of this Agreed Entry.

4. If redress concerning the Zoning Inspector's decision is first sought from the Board of Zoning Appeals under paragraph (E)(3)(a) of Article V of this Agreed Entry, then any Party hereto aggrieved by the Board of Zoning Appeals' decision may seek redress by way of motion to this Court, in accordance with the provisions of this Agreed Entry, filed within thirty (30) days from the date the minutes of the Board of Zoning Appeals' decision are formally approved and adopted.

5. The Parties hereto agree that the Court, in addition to and without limiting all other relief it is empowered to grant, may at either Party's request modify any part of this Agreed Entry in a manner the Court deems reasonable in order to effect the ICC District Use objectives hereof, and to hold in contempt any Party that fails to comply with

the terms of this Agreed Entry. All modification(s) hereof by the Court shall be binding upon the Village and the Plaintiff.

6. All decisions by this Court concerning this Agreed Entry and the use of all or any part of the Property hereunder shall be final.

7. The rights and remedies set forth in this Agreed Entry are in lieu of all other rights and remedies otherwise available to the Parties, including without limitation all rights under Revised Code Chapter 2506. To the extent not specifically provided for in this Agreed Entry, all other and further rights of appeal are hereby expressly waived by the Parties.

F. Dismissal of Claims: Except as provided elsewhere in this Agreed Entry, all claims asserted by the Plaintiff against the Village in this action, including all claims for declaratory relief and all claims which could have been asserted against the Village, including any claims for loss or damage resulting from a deprivation of Plaintiff's use of the Property, are hereby released by Plaintiff and are dismissed with prejudice. This Agreed Entry resolves all remaining claims by the Plaintiff against the Village.

G. Continuing Jurisdiction: The Court of Common Pleas for the County of Summit, Ohio, shall retain jurisdiction concerning all matters relating to or arising out of the validity, interpretation, breach, and/or enforcement of this Agreed Entry.

H. Waiver of Appeal: The Parties hereto expressly waive all rights of appeal from this Agreed Entry.

I. Hospital Uses in Development Area 1: The parties hereto jointly agree to exercise reasonable diligence and work in good faith to secure a commitment from a hospital to locate within Development Area 1.

IT IS SO STIPULATED.

Sheldon Berns (0000140)
Gary F. Werner (0070591)
Berns Ockner & Greenberger, LLC
3733 Park East Drive, Suite 200
Beachwood, Ohio 44122
(216) 831-8838
(216) 464-4489 fax
sberns@bernssockner.com
gwerner@bernssockner.com

Attorneys for Plaintiff

John T. McLandrich (0021494)
Roland J. De Monte (0081129)
Mazanec, Raskin, Ryder & Keller Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: jmclandrich@mrrklaw.com
rdemonte@mrrklaw.com

Counsel for Defendant Village of Boston Heights

IT IS SO ORDERED.

The Honorable Patricia Cosgrove
Judge of the Court of Common Pleas
County of Summit, State of Ohio

Date: _____