

Borough of Ben Avon
7101 Church Avenue, Ben Avon, Pennsylvania 15202
Regular Meeting of Council – November 12, 2013
Minutes

Call to Order

Council President Lloyd Corder called the meeting to order at 7:00 p.m.

Pledge of Allegiance

Council Members Present

Rob Galbraith, Michael Bett, Earl Bohn, Lloyd Corder, Richard White, Brian Tokar, Sue Weiss

Council Members Absent

None

Others Present

Megan Ott, Solicitor

Ed McGee, Engineer

Dale Regrut, Public Works Foreman

Carmella Hallstein, Secretary

Jim Rupert, Chief; Ben Avon Volunteer Fire Department

Norbert Micklos, Chief; Ohio Township Police Department

Public Participation

None

Approval of Minutes

Motion: Mr. White; Second: Mr. Bohn; Motion carried by unanimous voice vote to approve the minutes of the October 15, 2013 council meeting.

Engineer's Report – Report given by Ed McGee

Financial Report - Report given by Brian Tokar, Chair

Motion: Mr. Tokar; Second: Mrs. Weiss; Motion carried by unanimous voice vote to approve the October 2013 financial reports as presented.

Motion: Mr. Tokar; Second: Mr. White; Motion carried by unanimous voice vote to approve the November 2013 accounts payable reports as presented, authorizing payments of \$150,695.93 from the general account.

Motion: Mr. Tokar; Second: Mr. Bett; Motion carried by unanimous voice vote to advertise the 2014 Budget as presented.

Motion: Mr. Tokar; Second: Mr. White; Motion carried by unanimous voice vote to advertise Ordinance No. 765, levying an *ad valorem* real estate tax for 2014.

Intergovernmental Cooperation Report – No Report

Administration Report – No Report

Public Works / Building and Property Report – *Report given by Rob Galbraith, Chair*

Public Safety / Strategic Projects Report – *No Report*

Fire / Public Affairs Report – *No Report*

Property Maintenance and Code Enforcement Report – *No Report*

Mayor's Report – *No Report*

Emergency Management Report – *No Report*

Police Chief's Report – *No Report*

Fire Chief's Report – *Report given by Jim Rupert, Chief; Ben Avon Volunteer Fire Department*

Tri-Borough Joint Planning Commission Report – *No Report*

Solicitor's Report – *Report given by Megan Ott, Solicitor*

New Business

None

Old Business

Ordinance No. 764

George Trent of 7180 Brighton Road addressed council about Ordinance 764. See Exhibit A. Mrs. Ott stated that she respectfully disagreed with Mr. Trent's legal interpretation, but did agree with Mr. Trent about the reference to Section 2724. Mrs. Ott stated that Section 2724 was a remnant of the old Borough Code and should be changed to Section 2720. Mrs. Ott provided council members with a copy of all of the potential operative portions of the Borough Code as it applies to shade trees. She stated that there were not any portions of Ordinance 764 that violate or otherwise contradict the powers allowed by the Borough Code. Mrs. Ott stated that Ordinance 764 was appropriate for action, but recommended that the finally version be changed to reference Section 2720 of the amended Borough Code. Mr. Bohn expressed his concerns and made several comments. See Exhibit B. Mrs. Weiss stated that she did not think there was any legal problem with creating a commission that advises council. She stated that the borough's shade tree commission would be an advisory group and would not have any kind of penalty powers or enforcement powers.

Motion: Mr. Bett; Second: Mrs. Weiss; Motion carried by voice vote to adopt Ordinance No. 764, which establishes a borough shade tree commission by amending Chapter 25 of the Ben Avon Borough Code of Ordinances. Mr. Bohn opposed the motion.

Adjournment

Motion: Mr. White; Second: Mr. Tokar; Motion carried by unanimous voice vote to adjourn the meeting at 7:45 p.m.

Respectfully submitted,

Carmella Hallstein

Borough Secretary

Comments on Proposed Shade Tree Committee Ordinance #764 12 Nov 2013

1 A Shade Tree Ordinance is a good idea as it frees this concern from the Council and delegates the process to a Commission.

1. However, the proposed Ordinance 764 is the worst piece of proposed legislation I have ever seen.
2. It is badly written, contains errors, and shows a lack of understanding the protocols of the Borough. In the 2nd paragraph, it ordains h Code. On page 1 of the proposal, in the 2nd paragraph it ordains "pursuant to Sec 2724 et seq' of the Boro Code" be amended. It does not acknowledge that these Section of the code were repealed 17 May 2012. So it means nothing.
3. It does not acknowledge the Sections of the Shade tree Commission ordinance which were amended at that time, specifically Sec 2721, Sec 2722, and Section 2724.1, specifying the duties and other functions of the commission.
4. Specifically, Section 2721 as amended in 2012, states, " Council by ordinance may establish a commission to be known the Shade Tree Commission and delegate to the commission exclusive care , custody, and control of shade trees and authorization to plant, move, and maintain and protect shade trees on the streets and highways in the Borough. The commission may make and enforce for the care and protection of shade trees...."
5. The section then goes on to specify the duties of the commission, as amended, in Sections 2722 and 2724.1
6. The proposed ordinance 764 does not meet any of the standards set forth in the current shade tree commission ordinance approved by the Borough Code. As such, it cannot be approved.
7. It is recommended, the Chairman , on a point of order , declare the proposed ordinance 764 does not meet the protocol of the Borough Code established in Section 2721 amended and section 2724.1 amended in may 2012, as such is unsupportable and voids.

Chapter 25
^
and

George Trent, 12 Nov 2013

Ben Avon Borough Council
Remarks
By Councilman Earl Bohn
Tuesday
Nov. 12, 2013

Re: Ordinance 764 Establishing a
Shade Tree Commission

On the motion to adopt Ordinance No. 764 ...

One – The text of this ordinance contains errors of fact, namely:

- Paragraph Roman Numeral Two states that Ordinance 764 arises pursuant to Section 2724 of the Borough Code of the Commonwealth of Pennsylvania. Section 2724 of the Borough Code was repealed by the Legislature on May 17, 2012 under Public Law 262, No 43.
- The definition of a shade tree under Ordinance 764 appears to contradict the definition as stated by the Borough Code. Ordinance 764 claims authority over trees on private property. The clear language of the Borough Code limits jurisdiction to trees (quote) “on the streets and highways in the borough” (unquote).
- The definitions section of Ordinance 764 includes the definition for a permit, yet the sponsors stated publicly that the commission would not have the authority to require permits. This appears to be inconsistent and may be in error for other reasons to follow.

Two – The language of Ordinance 764 is vague, imprecise, confusing and therefore prone to misinterpretation and abuse.

- Namely, Ordinance 764 uses unorthodox language such as the phrases “educate the public,” ... “work proactively with,” ... and “work with property owners.” To be proper law -- that is, to be clear, precise, and enforceable – borough ordinances use words such as “prohibit ... require ... designate ... mandate ... penalize ... and assess.” Properly worded ordinances avoid the use of the vague and evocative language associated with the mission statements of non-profit and charitable organizations.

- Furthermore, Ordinance 764 is offered as an amendment to Chapter 25 of the borough’s current code of ordinances. Ordinance 764 appears to contradict portions of Chapter 25.
 - For example, sections 102 and 202 of Chapter 25 delegate Council’s authority regarding trees to the Street Committee. Ordinance 764 would delegate council’s pertinent authority to the shade tree commission In this way, Ordinance 764 would seem to create conflicting lines of authority.
 - In addition, 25-103 of the existing code seems to distinguish between nondescript trees and shade trees as defined to mean Elm, Maple, Horse Chestnut and Pin Oak. 25-103 prohibits the planting of any trees within the line of the street

in front of private property. 25-201 permits the planting of shade trees within the line of the street, namely between the curb and the sidewalk. Ordinance 764 makes no such distinction, and to the extent that Chapter 25 contains internal contradictions or inconsistencies, Ordinance 764 fails to resolve them.

- Ordinance 764 contains internal inconsistencies, namely:
 - As previously noted, Section 25-301 defines the word permit, but nowhere does the ordinance give the commission the authority to require permits or issue permits. By the same token, Section 25-302 empowers the commission to “benefit the urban forest” but nowhere does the ordinance define the urban forest. The Borough Code of Pennsylvania references municipal forests, but in a section that is separate and apart from its treatment of Shade Tree Commissions.

Three – Ordinance 764 appears to be unlawful:

Statutory law and case law – including Dillon’s Rule as affirmed by the U.S. Supreme Court in *Hunter versus Pittsburgh of 1907* – make it abundantly clear: boroughs are creations of the state. All of the authority exercised by Ben Avon Borough is authority delegated to it by the

Commonwealth of Pennsylvania. Ben Avon has no powers beyond those enumerated in the Borough Code.

- The Borough Code makes no mention of “working proactively with” property owners. It makes no mention of other such vague powers and touchy-feely relationships between residents and local government.
- To the contrary, the Borough Code grants to Ben Avon and all boroughs certain tangible, concrete powers, such as the authority to
 - “Plant, transplant, remove, maintain and protect shade trees on the streets and highways of the borough” ...
 - Levy taxes to pay for such activity ...
 - Employ and pay persons to perform the work
 - Enforce regulations
 - Assess costs against property owners who fail to comply, and to
 - Assess penalties and place leins.Yet none of these powers are stated, or even referenced, by Ordinance 764.

Four – Council members stated publicly that this shade tree commission would be toothless, with power only to educate the public and work proactively with property owners. Toothless, powerless shade tree commissions are not permitted under the Borough Code.

According to the Pennsylvania Association of Boroughs, namely Shelley Houk, the PAB's highly regarded director of research, the Borough Code does not permit a council to create a hybrid commission such as the one described by the sponsors of Ordinance 764. In her words, Ben Avon Borough Council may choose to delegate to a shade tree commission those powers enumerated in the Code regarding shade trees. Or council may decline to do so. This is an either-or proposition, delegate or not. There is no half-way switch. Furthermore, Council may not invent powers such as "work proactively" and delegate only these hybrid powers to the commission.

To conclude: Ordinance 764 contains error of fact. It contains provisions that are inconsistent or contradictory within its own language and in regard to Borough Code Chapter 25, which it aims to amend. These deficiencies would be prone to misinterpretation and abuse. Ordinance 764 appears to be unlawful under the Borough Code.

Therefore, it should be rejected. If council votes to adopt this ordinance, its action could become subject to appeal in the courts of Pennsylvania.

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