MINUTES

MAY 3, 2011

BOARD OF ADJUSTMENT **LONG HILL TOWNSHIP**

CALL TO ORDER AND STATEMENT OF COMPLIANCE

The Chairman, Dr. Behr, called the meeting to order at 8:03 P.M.

He then read the following statement:

Adequate notice of this meeting has been provided by posting a copy of the public meeting dates on the municipal bulletin board, by sending a copy to the Courier News and Echoes Sentinel and by filing a copy with the Municipal Clerk, all in January, 2011.

PLEDGE OF ALLEGIANCE

ROLL CALL

On a call of the roll the following were present:

E. Thomas Behr, Chairman
Sandi Raimer, Vice Chairman
Edwin F. Gerecht, Jr., Member
Maureen Malloy, Member (arrived @ 8:10 P.M.)
Felix Ruiz, Member

Christopher Collins, 1st Alternate

Barry Hoffman, Bd. Attorney
Thomas Lemanowicz, Bd. Engineer
Kevin O'Brien, Twp. Planner
Dawn Wolfe, Planning & Zoning Administrator

Excused: John Fargnoli, Member
Michael Pesce, 2nd Alternate

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EXECUTIVE SESSION
It was determined that there was no need to hold an executive session.

ANNOUNCEMENT
Dr. Behr announced that the Board of Adjustment will hold an educational session on May 17, 2011 and urged all members to be in attendance.

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RICHARD & SUSAN SCHUMANN **#09-08Z**
1 Semerad Rd. & 1932 Long Hill Rd. **Request for**
Block 12502, Lots 15 & 16 **Extension of Approval**

Present: Michael Kates, attorney for the applicants
Richard Schumann, co-applicant

R. J. O'Connell, certified shorthand reporter

Mr. Michael Kates, attorney for the applicants, said that Board of Adjustment had approved the above referenced application for a minor subdivision with minor variances on September 21, 2010. Condition No. 5 of the approval Resolution required the applicants to submit subdivision

deeds to Mr. Hoffman and dedication deeds to the Township Attorney. To get to that point, there was some engineering work that had to be done which consumed some time. He said that the purpose of his clients request this evening is to extend the approval date to finish that process and get back to the Board's experts with the necessary elements to perfect the subdivision.

In response to Dr. Behr, Mr. Kates said that he contemplated the matter to be complete relatively soon, however there is a "fly in the ointment" which he wished to discuss. He said that Mr. William Kaufman, the owner of adjoining Lot 16, has a concern/confusion about dedicating a 25' R.O.W. width along Long Hill Rd. for future roadway widening. Therefore, he said that he needed some time to speak to him and show him that what the Board is requesting is, essentially, harmless and will not interfere with his project as it exists and that it is in his interest to have a road widening that services his commercial property. He said that that is not the reason that he wrote his original April 12th letter to Mrs. Wolfe to request the extension, that was based upon getting the documents prepared, but as it turned out, when he went to Mr. Kaufman to get his signature on the dedication deed, he experienced some difficulty. He said that if, in fact, he is oppositional to it, he will be coming back to the Board to amend the application but, as it stands now, he felt that he could persuade him to go along with it.

Also in response to Dr. Behr, Mr. Kates said that it was hard for him to verbalize the nature of Mr. Kaufman's concern because he did not think it was a legitimate one. He said that he seems to think that in giving an easement for future road widening, he is somehow diminishing the value of his property. He said that he did not think that is the case because it is insignificant and he is not changing the parking configuration and has buffering on the road side of the property. He felt that it is a matter of talking to him. Not having participated in the proceedings, he said that Mr. Kaufman's concern now is if he really has to give it up. That is a question that he and Mr. Kaufman will discuss and that he may take it up with the Township Engineer, as well, to determine whether it is indeed necessary. He said that he seems to think it isn't but he feels it is.

Dr. Behr agreed with Mr. Kates and said that his hope would be that the matter be resolved.

Mr. Kates stated that he would like as much time as he could. He said that he reviewed and approved Mr. Hoffman's draft proposed Resolution extending his client's time for compliance and he believed that he has included, as an outside date, the month of July. He said that he did think he will need the month of July to get an answer from Mr. Kaufman.

Mr. Hoffman noted that the Board members have not yet seen his draft Resolution. He pointed out that, when granting extensions, we always try to do them retroactive to the date when the previous or original approval expired so that there is no gap in protection against zoning changes, etc. The existing expiration date which is allowed pursuant to the statute is 190 days from the date of original subdivision approval on September 21, 2010 brings us to March 30, 2011, so we are already a little more than a month behind just to catch up to the present expiration date and he suggested, under all the circumstances, that it would not be inappropriate for the applicants to be given a 120 day extension from that present expiration date because that is really, in effect, just going forward for about 90 days, or actually a little less than that and it will bring the applicants to July 28th. He distributed copies of the draft Resolution to the Board members. He said that the one thing we make it a practice in doing in any matter where there is an extension granted, is to reconfirm or reiterate the prior conditions as all remaining in effect, with the exception of the required proof of tax payment. He said that we normally require that such proof be updated to the date of the extension rather than left a year or so behind. He asked Mr. Kates if he intended on presenting any witnesses.

Mr. Kates replied, "No". He said that he wanted to be here as a courtesy to the Board and confirmed that he was comfortable with Mr. Hoffman's draft Resolution.

Mr. Collins made a motion to adopt the a draft of the annexed Supplemental Resolution granting the applicants a 120 day extension (from March 30, 2011 to July 28, 2011) within which period as extended to file their subdivision deed or map with the County. Mrs. Raimer seconded the motion.

A roll call vote was taken. Those in favor: Mrs. Raimer, Mrs. Malloy, Mr. Ruiz, Mr. Collins, and Dr. Behr. Those opposed: None.

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(Due to a conflict of interest in the following application, Mrs. Raimer recused herself and left the meeting).

GLENN DREYER **#10-03Z**
32 Valley View Road **Bulk Variances**
Block 13604, Lot 3

Present: Gary Haydu, attorney for the applicant
Glenn Dreyer, applicant
Robert Gazzale, licensed professional engineer

R. J. O'Connell, certified shorthand reporter

Proof of service was submitted.

In response to Dr. Behr, Mr. Hoffman said that present application is a revised version for the subject property. The prior application was denied by the Board of Adjustment and Paragraph 13 of the Resolution of denial which was adopted on July 6, 2010 reads "The denial by the Board of Adjustment of this application is without prejudice to the applicant's right to submit a new application which addresses the concerns of the Board that are expressed in this Resolution or which is for a substantially modified or different plan". He said that that verbiage is consistent with the doctrine of res judicata which means that, if a matter has once been heard and litigated or administratively disposed of, it cannot be represented unless the new application is for a proposal that is significantly or substantially different. In terms of substantiality, it is a question for the Board to address. He said that, at the outset of this application, he felt that there is a res judicata issue. There is a letter in the file where he noted that this could be treated as a threshold type of situation. He said that, perhaps more recently, he has come to the approach in several towns of taking the position that what that ends up doing is duplicating time and effort in testimony because, if the applicant is amenable to proceeding in this fashion (which is a question for counsel to comment upon), he thought that he can just go forward with his rights reserved, and the Board's rights reserved, and present the testimony on all of the issues. Ultimately, the Board will then deliberate and decide and, at that point, discussing the evidence that we hear, make its judgment as to whether there is, in fact, a substantially changed application. If the answer that the Board feels is appropriate to that question is "Yes", the Board will then continue to the next phase of its deliberations on the merits of the revised application. He said that that enables the applicant to put forth all of the proofs one time around instead of having to go through them, first on presenting testimony and posing the question of res judicata, and then going through it a second time with some overlap. He said that he was open to any other views that people might hold on the matter.

Dr. Behr said that he would turn the meeting over to counsel for the applicant and allow him to express his opinions.

Mr. O'Brien and Mr. Lemanowicz were sworn.

Mr. Gary Haydu, attorney for the applicant, said that the present application is substantially different from what had been previously litigated. He said that he brought a letter memorandum of February 4, 2011 and directed it to Mrs. Wolfe, as the Board Administrator, and copied counsel on the communication. He felt that the letter speaks for itself and is a rather simplistic approach to the analysis of what res judicata is. He had no objection in proceeding in whole and presenting the case in whole. He did, however, think that it is absolutely imperative that at some point there be a vote on the issue of res judicata because he needs to perfect that for appellate purposes – so that issue needs to be specifically voted upon. He said that he did not have a

difficult time in presenting the *entire* testimony when it comes time for the vote on the res judicata issue and then he felt that he should be given the opportunity to sum up the specific facts applicable to that issue before the matter is then presented to the Board for a vote because he wouldn't want the Board be overwhelmed with a lot of material and forget the point that we are talking about.

Dr. Behr felt that, to subdivide them as Mr. Haydu has described, makes complete sense and, if Mr. Haydu is comfortable with that, that is how the Board will proceed.

Mr. Haydu replied that he was comfortable.

Dr. Behr said that, at such point when it seems appropriate for Mr. Haydu to present his summary *just* on the res judicata issue, then he should do that.

Mr. Hoffman felt that everyone is on the same page.

Mr. Haydu said that, present this evening, is Mr. Robert Gazzale, licensed professional engineer, who appeared at the earlier application, was qualified as an expert, and offered testimony. He requested that he again be approved for that purpose.

Mr. Robert Gazzale was sworn and accepted as an expert. He confirmed that he had an opportunity to be involved in the drafting of an original plan of the development of the subject property and also had an opportunity to revise the plan on several occasions, most recently on 11/9/10. The plan, as depicted, highlights an as-built with some shaded areas indicating what is planned to be removed. He said that the property is currently improved with a single family home, a brick paver driveway, patio, and walkways. There are some retaining walls at the northerly end of the property which provide a play area between the house and a steep slope area. There are existing stormwater management control features on the property. The house is served with an individual septic system. As it currently exists, the property exceeds the maximum permitted lot coverage in the R-2 Zone, in which it is located. There is also an issue with a F.A.R. violation based upon the current zoning, but noted that there were no F.A.R. regulations in effect at the time the house was constructed. He said that the house meets all of the yard setbacks, so it does not appear that the house is overly large for the property.

Mr. Hoffman said that, as he mentioned early on in a letter as a *possible* issue to be addressed during this hearing, the testimony has now reestablished that the F.A.R. requirement didn't exist at the time this house was built. Therefore, the only basis for it now requiring an F.A.R. variance would be if the applicant is proposing to expand or enlarge the dwelling in any way. Other than that, he felt that the F.A.R. criteria are protected or grandfathered because it wasn't an issue or requirement in effect in Long Hill Township at the time the house was built. He said that, if those facts can be confirmed, including from the Board's consultants, then the F.A.R. issue may conceivably go away and not be a requirement and that would then eliminate the only d-type of variance for the proposal. He felt that the Board should hear, not only from Mr. Gazzale, but from the Board's own consultants and counsel should have the opportunity at some point to comment on that as well because of the consequences resulting from either requiring or excusing any F.A.R. standard for the lot.

Mr. Haydu replied that the probative question he would ask Mr. Gazzale is if his plan contemplates any modifications to the physical structure of the home?

Mr. Gazzale replied that it does not. Although he was not directly involved at the time, he said that to his knowledge, the home that was built at the time the original building permit was issued was built in accordance with that permit and has not been modified since.

Mr. Haydu said that, on that basis, he would take the position that the F.A.R. criteria is a pre-existing nonconforming situation and his client cannot now be held to a great standard than what standard existed at the time that the building permits were issued and the construction was commenced. To do otherwise, he said would put his client in a very punitive type position.

Mr. Hoffman replied that he had no difference in that legal position. Initially, when the question of the form of notice came up, he suggested including a need for a F.A.R. variance as a *possible* issue so that they have given notice for it, but to the extent that the facts are as indicated or outlined by counsel and the witness, and subject to confirming that position by the Board's consultants, he did not think that the applicant should be subjected to having to comply with construction of a dwelling that is not now changing in so far as the F.A.R. standards since the dwelling was built at a time when there was no F.A.R. in Long Hill Township.

Mr. O'Brien said that he had nothing to add other than there is no external addition to the home.

Dr. Behr said he felt that it is clear that the F.A.R. requirement goes away and, as it goes away, with it the obligation for a d-variance with its heightened burden of proof.

Mr. Hoffman said that, if any Board member had a question pertinent to that particular issue, it should be brought up at this time. Other than that, he said that it could be left for deliberations on the entire proofs.

There were no questions or objections from the Board members as to waiving the requirement based upon the testimony presented.

In response to Mr. Haydu, Mr. Gazzale reviewed the proposed modifications made to the plan. He said that the R-2 Zone provides for a maximum lot coverage of 20% which in this case is 7,500 S.F. The improvements as they currently exist provide for a coverage of 27.55%, or 10,331 S.F. He said that what is shown on his plan in the darkest shading on the lot are areas of impervious coverage currently on the property that could be removed in order to reduce the maximum coverage to 22.87%. That includes the removal of some existing driveway down to a minimum width of 13'; removal of a patio to the northwest of the property, along with a connecting walkway from that patio to the front porch; and removal of a couple of patio or landing areas in the vicinity of the landscape retaining walls to the north of the property beyond the back yard. All told, he said that would provide for a reduction of 1,756 S.F. to 22.87%. He said that the 2.87% overage on the coverage category amounts to 1,076 S.F.

Also in response to Mr. Haydu, Mr. Gazzale agreed that, on an engineering basis, he would consider the reduction in coverage by 1,756 S.F., which also reduces the percentage by approximately 4.7%, as being significant. He said that he had previously prepared a plan that required much more in the way of stormwater management, including an additional drywell in the back yard, and more grading. He said that they are still proposing an additional drywell adjacent to the existing driveway which will collect most of the driveway area. That drywell is designed to accommodate 2,300 S.F. of impervious area and the overage is on the order of 1,075 S.F., therefore they are providing twice the capacity based on the actual overage.

In response to Dr. Behr, Mr. Gazzale said that, as it currently exists, 0% of the driveway is directed to any stormwater management facility and the proposal represents an improvement. The driveway contains almost 3,200 S.F. and better than 2/3 of the driveway will be directed to a stormwater management facility.

In response to Mr. Hoffman, Mr. Gazzale confirmed that, currently, none of the runoff from the driveway is held back or under some stormwater controls. He noted that the roof leaders are directed to an existing drywell which has a capacity of more than double of what would be called for based upon the overage of impervious coverage. He said that the over design allows for a larger storm to be handled within that drywell.

In response to Mr. Haydu, Mr. Gazzale said that reducing the driveway width on the northeasterly side to 13' will not measurably change the functionability of the driveway. He said that a 13' width will still provide adequate ingress and egress for emergency vehicles, although it is approaching the minimum. He said that he would not recommend reducing the width to below 13' from a safety point of view. He said that the majority of the existing driveway is at 13' and the applicant is proposing to eliminate the widened area to make it consistent and a still

appealing looking driveway from Valley View Rd. He said that the northern portion of the driveway that has a rounded appearance to it provides for the homeowner to be able to back out and exit onto Valley View Rd. driving forward, without having to back down a 150' long driveway. He felt that backing down a 150' driveway provides some additional hazards on a functional level and noted that a wider driveway is easier to navigate, especially in inclement weather. He said that he has seen people have trouble with a 13' wide driveway that is 30' long.

Also in response to Mr. Haydu, Mr. Gazzale said that the applicant is proposing to remove the 825 S.F. patio that appears on the northwest side of the dwelling, along with the brick paver walkway that connects that patio to the front porch, which contains another 436 S.F. It was his understanding that the impervious coverage that is going to be removed is basically going to be replaced with grass areas, as opposed to some other cover.

Mr. Haydu referred to a photograph of the north view of the dwelling from Valley View Rd. He noted that to the left side of the photo there are countless trees.

Mr. Gazzale agreed and said that the trees Mr. Haydu was referring to still exist today. He also referred to a photo that shows some trees which also appear to be in the front yard, along with a number of plantings that appear to be yews of some sort. Beyond the yews is the lawn area which is largely the location of the septic system which is why there are no large trees planted in that area. He also noted one tree off to the side which is contained in a low wall which is shown on his plan to the east of the existing septic field. He said that the landscaping the front of the house is appropriate for a house that is served by an individual septic system.

Mr. Haydu referred to a photo of the south side of Valley View Rd., across from the subject property and noted that there are a number of existing evergreen trees of significant height.

Mr. Gazzale agreed and added that he was not aware of the date the evergreen trees were installed.

In response to Mr. Haydu, Mr. Gazzale said that he had reviewed the remaining landscaping and trees that are in the rear of the yard looking north at the back yard. He said that there a quite a few trees planted in and amongst the landscape retaining walls. He felt that the landscaping was professionally and adequately done and described it as "very attractive". He felt that the loss of 13-15 trees has been reasonably and adequately replaced with the plantings that Mr. Dreyer has done. He said that, typically, a Township's Tree Removal Ordinance does not penalize the removal of trees within the footprint of the home. He said that he would have to speculate as to where the 12-13 trees were that were removed and would expect to receive a credit for those trees that were within the footprint of the home. He said that the areas that are not used for either the septic field or recreation of the homeowner are certainly well planted.

Mr. Haydu said that the original plan called for one retaining wall and the as-built plan indicates that there is more than one retaining wall now – there are a series of retaining walls. He asked Mr. Gazzale if, in his opinion, any of the walls exceed 6'?

Mr. Gazzale replied that the maximum height, as measured by his field crew and certified by himself, is approximately 4'5". He felt that it is an attractive style wall and noted that the terraced wall provides more usability than a single freestanding wall that might approach 14'-15'. The terraced wall allows for flat areas which provides space for landscaping which is much more attractive than a shear faced wall would be. It is also not a safety concern which certainly a 14'-15' high wall would be which would need some type of barrier to prevent someone from tumbling off of it. Although a fall off of a 4' wall would hurt, as well, it would be less likely to cause a serious injury.

In response to Dr. Behr, Mr. Gazzale said that the first existing retaining wall is located 30' from behind the garage. It is approximately 2'-2 ½' at the step and then rises to 4'.

Dr. Behr asked Mr. Gazzale what was originally approved.

Mr. Gazzale replied that it was a single wall. The existing grade in the location of that wall is approximately at elevation 224. The back of the home is at elevation 216, which would have resulted in an 8' high wall (rather than 14'-15' as he previously estimated), as originally approved. The terracing provides a much less harsh appearance. The distance between the back of the garage and the original 8' wall would have been closer to 30', which is very similar to the location of the wall as it was built now.

In response to Mr. Haydu, Mr. Gazzale said that wall exceeding 6' in height, and approaching 8', would certainly require a guide rail, fencing, or some other restraining device to be constructed along the top. It would also limit further access into the back yard. He said that it is apparent from the photographs that it is much more attractive than a single vertical wall would be. He said that, while the top of an 8' wall could have been landscaped, the option of landscaping in the area between the two walls would have been lost.

Mr. Hoffman said that there has been some dialogue as to whether what has been built relates to 2 walls or 3 walls, as distinguished from 1 large wall. He asked which it is?

Mr. Gazzale replied that it is a total of 3 terraced walls, with an overall height of about 14'

Mr. Haydu asked if the design of the walls, as they are presently constructed, took into account water flow, the distribution of water, and stress releases off of t he wall?

Mr. Gazzale replied that he had not involvement in the design of the wall. He recalled hearing at a prior meeting that the wall was investigated for stability since it exceeded 4' in height. To his knowledge, the results of that investigation indicate that the wall was properly constructed. He said that, from a layman's point of view, it *appears* to have been properly constructed. He said that there do not appear to be any weak or sagging areas, therefore the integrity of the wall appears to be in tact.

Mr. Haydu said that, at the time of the last hearing, he submitted on behalf of the applicant a supplemental report and findings of Titan Engineers which was dated 12/16/09. He said that he is prepared to make that same submission, or (and he asked Mr. Hoffman, if he could simply use the exhibits that had previously been submitted and carry those forward into this application.

Mr. Hoffman said that he did not feel the way that the counsel for the applicant does as to accepting carte blanche the previous structural engineering testimony. He read Paragraph 8 of the prior Resolution which refers to and summarizes testimony of Nicholas Wong, a structural engineer. He said that what we had were different findings that the Mr. Wong had reached, first raising a question as to the adequacy of a portion of the wall system and then retracting that and saying that he felt it met all of the standards. He said that Mr. Gerecht commented upon the fact that Mr. Wong did not testify during the hearings and said that, "It may be beneficial to have some answers and give and take from Titan Engineering in order to determine exactly how they did their work and what their procedures were. A bare report such as this may not be able to give us that information". Further emphasizing the importance of having actual live testimony, he said that Mr. Gerecht stated that, "We have two conflicting reports. One says that there is the potential for a problem and one says there is no problem. When that occurs, it is best to have the person present who did the test". He said that the Board made the following comment in the Resolution, "The Board agrees with these astute observations on the part of one of its members. Under the circumstances it became crucial for the applicant's structural engineer to appear before the agency and be subject to cross examination. In choosing not to present his structural engineer as a witness during the proceedings, Mr. Dreyer committed a major procedural error insofar as proving he was entitled to the relief sought by him". He said that, frankly, unless there has been some change in testimony or some other new reason to deviate from the position that was expressed as to the importance of having the ability to question or cross examine the actual structural engineer, that is the position that the Board has taken until this point. He said that the only other thought that occurred to him as a possible escape or relief valve on this issue is if Mr. Lemanowicz, who is our own consulting engineer, upon his review of the documents, reports, and data can state an opinion that, for whatever reason or reasons, the structural integrity of the

wall is safe and adequate in his professional view, then maybe we could forestall or avoid the necessity for additional proofs.

Mr. Haydu said that he wished to respond to what has been stated and was not disagreeing with what has been stated, but he felt it was incomplete in the recitation. He said that, what had happened is the original report from Titan Engineers was submitted which indicated that the third wall had a failure. He said that he then went out and provided a supplemental report of findings dated 10/30/09 indicating that his reanalysis proved that the wall was, in fact, stable. It then became an issue of the Board wanting additional field test results from Titan Engineers, which were produced in a rather comprehensive report dated 12/16/09 and submitted to the Board. It was his understanding and recollection that Mr. Lemanowicz had the ability to and did, in fact, review those findings and was not in disagreement with those findings.

Mr. Hoffman said that the basic point is, as a matter of fact, we have never had actual testimony before this Board by any structural engineer. He said that the present proceeding is for the Board to render its judgment.

Mr. Haydu said that, in his notes and preparation, it was clear to him. He said that he will ask Mr. Lemanowicz, with the Board's consent and approval, to address the issues of the wall because his notes indicated that he had, in fact, agreed with the findings of Titan Engineers.

Mr. Lemanowicz said that his recollection is that there was an issue of some conflicting results. He said that his letter dated 1/24/11 addressed that the report from Titan Engineers was not made a part of this application. He said that this is a new application because of the denial of the original. He asked Mr. Hoffman how the evidence from the first application into this one can be properly transferred.

Mr. Hoffman said that he felt that was putting the cart before the horse as to the procedural question. He said that, if the substantive testimony, including the engineering structural issues was presented adequately the first time around, then we can incorporate it by reference by taking it from the earlier Resolution for the first application. But if there was something lacking that the Board felt was needed in terms of tying together the proofs on this issue in a sufficient manner, he questioned whether in that context we should be borrowing or taking inadequate testimony and making it part of this record. He said that the procedural or administrative acts are simple, the substantive issue is the one that should give direction here.

Dr. Behr said that he believed that the only thing that can be carried forth from the preceding meeting based on the Resolution which Mr. Hoffman had referred to was that the Board wasn't satisfied that it had sufficient evidence to rule that the upper wall was safe.

Mr. Hoffman replied that he felt that was a reasonable reading of what he had just recited.

Dr. Behr asked Mr. Lemanowicz if he could add anything to the Board's understanding that would cause it to be more confident that the wall in question is safe?

Mr. Lemanowicz recalled that there was a discrepancy and he brought it to the attention of the engineer from Titan Engineers and he explained it as the first report was based on some assumptions that were found to be overly conservative. After the field work was done, the parameters were adjusted and that is why the wall came into conformance. He said that that was based upon a conversation that he had with Titan Engineers and *not* testimony before the Board.

Dr. Behr asked Mr. Haydu if he had a structural engineer ready to appear before the Board this evening?

Mr. Haydu replied that he did not have one for this evening, but he certainly would ask to have the matter continued so that he could bring him in. He said that he felt that, based upon the notes in his file, quite confident that the issue of the structural integrity of the walls had been addressed at the original hearing and was no longer an issue going forward.

Dr. Behr replied that that was not the case for the Board. From what Mr. Hoffman quoted, he said that the information the Board had, upon which it made its decision, reflected the fact that there was no witness the Board could cross examine or speak with to satisfy the concern of the safety of the upper wall.

Mr. Haydu said that he would be happy to order a transcript of the last meeting because his notes were very specific on that point and very specific on the point that, once Mr. Lemanowicz had an opportunity to review this rather extensive engineering profile and findings, he then became satisfied that the wall was, in fact, acceptable.

Dr. Behr said that he was a little concerned. He said that the Board denied the prior version of this application and one of the major reasons it was denied was that we did not have the opportunity to cross examine a witness and get actual testimony on the safety of the third (upper) wall. He said that that is what the Resolution says.

Mr. Haydu replied that he felt that that was *one* of the issues. He said that the issue the application was denied on was, from his recollection, the issue of coverage which was the primary issue. He acknowledged that he had received a copy of the Resolution but said that that doesn't change what the underlying testimony was at that time. He said that he was not going to beat a dead horse and that he was happy to bring Mr. Wong in if the Board wishes to question him. He said that he was under the impression that Mr. Lemanowicz had an opportunity to review this and was satisfied with the findings in that most recent detailed report of 12/16/09. He said that he will offer that report again this evening to be marked into the applicant's case, again allowing Mr. Lemanowicz the opportunity to review the report. He said that he will bring Mr. Wong in and have him testify.

Dr. Behr said that Mr. Haydu was right in that this was not the only reason for the denial and, at the time, the lot coverage issue was a very important concern for the Board. He said that Mr. Dreyer has since gone to some pains to address the lot coverage issue. He said that he had a feeling as to what the Board will need in terms of evidence to fully and comfortably rule on the application.

Mr. Lemanowicz said that his recollection is that he was okay with the final version of the report, however what he felt the Board is concerned about is that he was carrying information from the applicant's engineer to the Board, where the applicant's engineer should have done that himself. He said that he did not think it is a matter of what he decided for himself, and he believed that he *was* satisfied with it, but he thought that what Dr. Behr is trying to say is that the Board did not have a chance.

Mr. Haydu said that he understood what Mr. Lemanowicz was saying and he was happy that his recollection is consistent with his notes – that once he had reviewed the findings, he was okay with them, because that is the crux of what he was saying.

Dr. Behr said that, if the Board's engineer, says that at this point, based upon all of his knowledge of the wall as it exists and the data that he has available to him, that he is satisfied that the wall is safe, it certainly lies within the power of the Board to take Mr. Lemanowicz's testimony, as Board Engineer, and say that we are satisfied in hearing that and would not require the applicant's structural engineer to appear.

Mr. Lemanowicz replied that it was not his place to deem the wall safe – that is for the applicant's engineer. He said that he was simply saying that he was not taking any exception to his position.

Dr. Behr asked the Board members if they had any questions.

Mr. Ruiz said that he remembered that, lot coverage being a main factor, that he personally did not vote for the application and the wall was a major concern of his at that particular time. He said that it still is a major concern now.

Mr. Gerecht commended the applicant for removing the patio, and asked how the (new) grassed area will be used?

Mr. Gazzale said that he may put a table and chairs on it and would be subject to the same uses as any other grassy area of the property. He said that the existing bricks in the retaining wall connecting places for the walkways that go up will consist of mulch and plantings. The area of the driveway to be removed will be backfilled with dirt and grassed.

In response to Mr. O'Brien, Mr. Gazzale agreed that the 157 S.F. of the encroaching driveway to the east are *not* included in the lot coverage table. He also agreed that the front retaining walls which abut Valley View Rd. are actually constructed in the R.O.W.

Mr. Hoffman stated that the Board cannot grant a variance to permit an encroachment into the public R.O.W.

The meeting was opened to the public for questions. There being none, the meeting was closed to the public.

Mr. Lemanowicz said that his recollection was that, in doing the grading, the trees that were removed were between the walls and the rear property line. He was not clear on the discussion this evening on the adjoining properties. He asked if there was some sort of agreement that those trees are not going to come down to benefit this property?

Mr. Gazzale replied, "No".

In response to Mr. Gerecht, Mr. Haydu said that the walls that were planted between the walls may seem somewhat small in the photos when they were planted, but they are intended to grow larger.

Mr. Gerecht asked if the roots from the trees were taken into account as they grow larger and how they may affect the wall in future.

Mr. Gazzale replied that it would depend upon the depth of the roots and whether or not the tree is planted behind the geo-grid, if there is any geo-grid.

Mr. Gerecht reemphasized the need for testimony from a structural engineer.

Mr. Haydu said that he would be happy to produce Mr. Wong for testimony.

Mr. O'Brien said that the double staggered row of evergreens along the R.O.W. were put in place to shield the home that is a lower elevation, below Valley View Rd.

Mr. Haydu said that the purpose of him pointing that out was just to show what the area looked like and that it is a rural area encouraging trees and shrubs and natural environments.

Mr. Gerecht said that he just wanted to clarify, for the record, that those trees were not installed by Mr. Dreyer.

In response to Mrs. Malloy, Mr. Gazzale said that he has essentially removed every impervious feature on the property that is not part of the house or serves as access that would provide reasonable access to a homeowner or emergency vehicle. Everything else is going, so it is more a function of the number of the percentage of coverage and that is what they are trying to approach. The additional drywell is an attempt to mitigate runoff. He said that, if they were to take out any more, you couldn't get to the house – you would eliminate the driveway or it would narrowed to the point of becoming unusable. He said that they cannot get to the 20% in any reasonable, usable manner, therefore they are offsetting the problem by mitigating it with a drywell.

Also in response to Mrs. Malloy, Mr. Gazzale said that leaving the patio would increase the coverage by 2% (back up to almost 24%).

Mrs. Malloy noted that the additional drywell is compensating for an additional 2,300 S.F.

Mr. Gazzale said that, in the prior application, they had also mitigated the overage and that was insufficient in the decision that the Board made, so now they are trying to take out every bit of impervious coverage that is not directly related to the home to get as close as possible to the 20% permitted, which is the plan presently before the Board.

Dr. Behr said that Mr. Haydu will be given a chance to summarize his position on the res judicata issue. He said that ample testimony was presented on what the applicant has done to reduce the impervious coverage and to also mitigate for the excess of 2.87% over what is permitted. He felt that there was sufficient desire on the part of the Board that it be given the opportunity to speak directly with Mr. Wong regarding the security of the upper wall because it is a critical safety issue.

Mr. Hoffman felt that it makes sense to deal with the res judicata issue now because, from a hypothetical standpoint, if the Board were *not* to be satisfied that this is a significantly different plan, that ends our dealing with the matter and there is no point in bringing Mr. Wong in. He said that the other issues may be left to the general conclusion, whenever that will take place.

Mr. Haydu said that, putting the res judicata issue into a nutshell, he said that if you look at the Cox analysis of res judicata it really boils down to whether or not there is sufficient adequate substantial change from the first application to the second application. He said that here he is presenting a situation where, depending upon which numbers you apply, the original application and this application would differ to the extent of 6.95%. Between the modified original application and this application, there would still be a difference of nearly 4% in reduction of overall impervious coverage. One of the main cases on the subject is Russell v. Board of Adjustment of Tenafly in which they had a similar situation. They reduced lot coverage from 18% to 12% and the court felt that that was a substantive change that warrants dealing with the matter as a new issue. He said that he felt that those parameters are absolutely consistent with what is being done in this case and the fact of the matter is that his client is basically stripping this property as far as they can strip it without ruining its functionability and denying reasonable ingress and egress and reasonable access for emergency vehicles and people that are going to actually occupy the home. He felt that they have done everything they can to reduce lot coverage and he felt that the proposed reduction is clearly within the parameters of the Russell case which is cited at 31 N.J.58, 67 (1959). He acknowledged that there were some other issues that involved setback in that case, but the case was very specific in that it dealt with the impervious coverage issue. He said that he also included in his memorandum some additional cases that are supportive of the position he was taking but, without getting overly detailed, he felt that the factual analysis is such that they did not pare this application down 1% and expect that the Board would treat this as a new application. He said that they stripped it as far as they could strip it leaving the house in a functional way so that it is a safe environment for people to operate cars, enter the house, and have adequate walkways for that purpose. He said that they kept the elements that need to be kept for any home and have gotten rid of the excesses as best as they could. For those reasons, he felt that this application is and should be treated as a new application and res judicata should *not* apply to this matter and he felt that the case law supports that analysis.

Mr. Hoffman noted that he agreed with Mr. Haydu insofar as his citation or reference to the Russell case. He said that it is an older decision, but it is recognized to be one of the polestars of the law when it comes to determining the res judicata issue. He said that it is good law and has been frequently cited.

Dr. Behr polled the Board to determine if the members were convinced that this is a sufficiently new application and should be treated as such and *not* have the doctrine of res judicata apply here.

Mr. Collins, Mr. Gerecht, Mrs. Malloy, Mr. Ruiz, and Dr. Behr all indicated that they were convinced that this is a sufficiently new application and that res judicata does *not* apply in this instance.

Dr. Behr confirmed that the application will be carried to a future date when Mr. Wong is available to appear before the Board.

Mr. Haydu said that he understood what the Board was saying and was not trying to be argumentative, but was trying to recite what his recollection and notes told him had occurred.

Mr. Hoffman said that the Board has made it clear that it wants to hear and have the opportunity to question the applicant's structural engineer. Whether or not it needs an additional report is something that cannot be determined until we hear from the structural engineer.

In response to Dr. Behr, Mr. Haydu said that Titan Engineers produced two reports. The first is dated 10/30/09 and the supplemental report (which was the field findings) is dated 12/16/09. He said that both of the reports were previously submitted in the earlier hearing. However, he said that he would be happy to submit them again should the file not contain the earlier submissions.

Mr. Hoffman said that Mrs. Wolfe can obtain and circulate them.

Dr. Behr said that it is possible to continue the application to the next meeting. This would allow the Board members time to look at the reports, provide an opportunity to ask Mr. Wong questions, and give them the information needed in order to make a ruling.

Mr. Haydu signed a consent to extension of time for the Board's decision to 5/18/11. He then turned over copies of Mr. Wong's reports to Mrs. Wolfe so that she may copy and distribute them to the Board members.

Dr. Behr announced that this application is carried to 5/17/11 with no further notice. He said that an educational session will following the hearing.

The meeting adjourned at 9:45 P.M.

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DAWN V. WOLFE
Planning & Zoning Administrator