MINUTES

SEPTEMBER 20, 2011

BOARD OF ADJUSTMENT **LONG HILL TOWNSHIP**

CALL TO ORDER AND STATEMENT OF COMPLIANCE

The Chairman, Dr. Behr, called the meeting to order at 8:00 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
John Fargnoli, Member
Edwin F. Gerecht, Jr., Member
Maureen Malloy, Member
Felix Ruiz, Member

Michael Pesce, 1st Alternate
Richard Keegan, 2nd Alternate

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

Excused: Christopher Collins, Member

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EXECUTIVE SESSION

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

APPROVAL OF MINUTES

The minutes of September 6, 2011 were approved on motion by Mr. Pesce and seconded by Mr. Gerecht.

Dr. Behr, Mrs. Raimer, Mr. Ruiz and Mr. Keegan abstained as they were not present at that meeting.

ANNOUNCEMENT

Dr. Behr announced that the application of Hamid & Marie Oveissi (App. No. 11-03Z) is carried to October 4, 2011 with no further notice.

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RICHARD & SUSAN SCHUMANN

1 Semerad Road
1932 Long Hill Road
Block 12502, Lots 15 & 16

#09-08Z
Amendment to a Condition of Approval

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

Lucille Grozinski, certified shorthand reporter

(Mr. Gerecht recused himself from the application and left the meeting room).

Mr. Michael Kates, attorney for the applicant, explained that Condition 3 of the Resolution of approval originally granted to his clients states that the "Applicants shall dedicate right-of-way to the Township and the County in accordance with what is depicted on the plans, same to be by legal instruments which are acceptable to the Township Attorney and the appropriate County Officials, as well as by the Board's Engineering Consultant". He said that he went through all of those steps, prepared drafts, and submitted them to the Board's consultants and the Township Attorney, and they were approved. However, he said that he did not speak for Mr. William Kaufman, who was a co-applicant, but when he went back to him and asked him to dedicate that portion of his street frontage to comply with the condition, he objected. He tried to reason with him, however his position was that this was really an application to change the lot lines to accommodate construction on the Schumann's property and, therefore, he did not feel compelled to make a dedication to the County. He said that he tried to explain to him that the dedication was, essentially, harmless and what was intended but he either did not respect his opinion, or did not care. For purposes of the interest of the community, he said that when, as, and if, Mr. Kaufman has a development application before the Board that relates to his property, and he may very well, at that time it is certainly very appropriate to get that dedication. He said that he cannot compel him to do it and have prepared dedication deeds to the municipality and to the County, as the Board requested, and is ready to proceed on it but simply cannot produce for Mr. Kaufman and, on that basis, he is asking for a partial modification of the condition to limit the dedication to his clients' property (Lot 15) and not the adjoining Lot 16.

Mr. Hoffman noted that the Morris County Planning Board, in one of its standard letters of exemption, indicates that it is satisfied or that there are no issues that seem to cause them any difficulty. Assuming that is the County's position, he asked why we needed a sign-off from Mr. Kaufman for his portion of the street frontage of the tract?

Mr. Kates asked Mr. Hoffman if he was talking about the County's original sign-off on the application, or for the modification?

Mr. Hoffman replied that he did not know if they signed off separately on the modification.

Mr. Kates said that he did not think that they have. He said that we can't presume that they have no problem with it because they signed off on the basis of dedications. He felt that it was incumbent upon himself to go back to the County just to touch base with them again to make sure that they understand that he cannot produce the potential road widening as it relates to Lot 16.

Mr. Hoffman asked Mr. Kates if he, or anybody else on behalf of his client, contacted the County and advised them of what he had stated in his outline this evening.

Mr. Kates replied that he had not contacted the County because he felt that it starts here before the Board. He said that it was the Board that was originally concerned about it and the County has essentially exempted out. He said that he will go back to the County but felt that his burden was here to satisfy this Board first on the understanding that he still has to check off with the County, which he said he will do.

Dr. Behr said that, unless there is clear and compelling legal reasons to the contrary, his sense is that it would be appropriate to go along with Mr. Kates' presentation because this was the Board's Resolution and condition and, therefore, it seemed to him that the Board is the first party that needs to deal with this in one way or the other.

Mr. Hoffman replied that that is a reasonable way in which to interpret it, however, he was merely suggesting that there are possibly different perspectives on it and he was exploring whether there was a simpler way.

Mr. Kates said that he did not envision that he would be tied into a ping pong match between the County and town.

Dr. Behr replied that the Board has absolutely no intention of subjecting the applicants to anything unreasonable. He asked Mr. O'Brien if he felt that there were any planning issues that would be triggered were the Board to agree to remove Condition No. 3?

Mr. O'Brien replied, "No".

In response to Dr. Behr, Mr. Hoffman said that if the Board were to agree to Mr. Kates' proposal, a motion or short form of Resolution which notably modifies the previous condition calling for R.O.W. dedication along both of the street frontages (Long Hill Rd. and Semerad Rd.) and excuses the applicant or anybody who abuts the Long Hill Rd. frontage from having to comply with that part of the dedication. It would relieve whoever from the necessity of doing that, for whatever reasons will presumably be advanced.

Mr. Kates provided Mr. Hoffman with a copy of the applicants' plan showing the proposed dedication. He pointed out the applicants' property line as reconfigured by the subdivision. He said that a portion of Semerad Rd. is now (and always was) abutting Lot 16 and that Lot 15 is his clients' property.

Mr. Hoffman said that it is actually a portion of Semerad Rd. that would likewise be excused from having to dedicate.

Mr. Kates agreed and noted that new Lot 15 would be the dedication piece. He said that he had nothing further to add other than that Mr. Schumann is present and available to answer any questions.

Dr. Behr asked the Board members if they had any questions. None responded, therefore, he said that the issue that the Board is deliberating on is a request by Mr. Kates to basically excuse Mr. & Mrs. Schumann from the portion of Condition No. 3 that required them to have the adjoining neighbor dedicate the appropriate piece of his property to the Township and County in accordance with what was depicted on the plans considered by the Board when it granted approval to the applicants on 9/21/10. He said that no change is suggested or contemplated on the Schumann's lot, it is simply an issue of clearing up a matter with a neighbor who simply for his own reasons refuses to do what the Board said would seem to be a logical, sensible thing to do.

Upon further thought, Mr. Hoffman said that the basis for having the R.O.W. dedication, inclusive of the property of which Mr. Kaufman is the principal, is one that was not specifically brought up by the County and that the very issue came about because *our* engineering consultant, as part of his standard review letter, noted that under our Ordinance the property abuts these two roadways and is not fully dedicated at this point in time and there is a necessity, therefore, to have the road widening or get a letter of relief there from.

Mr. Lemanowicz agreed and said that his 6/16/11 report indicated that Sec. 157.1.d states that developments that adjoin or include existing streets that do not conform to the street width requirements shall include the dedication of additional width along one or both sides of said street. If a subdivision is along one side of the street only, one half of the required extra width shall be dedicated.

Mr. Hoffman said that if that provision of the Ordinance were *not* to be complied with, which seems to be the nature of the present request, the applicant could be said or considered to be seeking a waiver from the necessity of meeting that particular provision. In response to Dr. Behr, he said that, if indeed it requires a waiver, it is not of such monument, character, or substance as

to call for additional notice. It is just that it will relieve them from having to meet that particular Ordinance design requirement.

Dr. Behr summarized by saying that Mr. O'Brien had indicated that there were no planning issues. He also noted that the roads in Millington Heights are narrow roads which is part of the character of that part of the Township and that the Board has never contemplated that they be automatically widened in some fashion or another.

Mr. O'Brien added that the Master Plan is against such arbitrary widening.

The Board began its deliberations.

Mrs. Raimer said that she saw no detriment to having Mr. Schumann amend his Resolution so that he would be excused from the condition of requiring his adjoining neighbor to dedicate a portion of his property. In fact, in keeping with the character of that section of Millington, it would be *appropriate* to relieve Mr. Schumann from compliance with Sec. 157.1.d. For those reasons, she said that she would approve the amendment of the Resolution.

Mr. Pesce agreed and felt that the applicants have made their best efforts to comply and it can't happen for good reason, therefore he did not feel that it should be imposed upon them.

Mrs. Malloy, Mr. Ruiz, Mr. Fargnoli, Mr. Keegan, and Dr. Behr agreed.

Mr. Hoffman felt that, in the interest of expediency, a dual aspect to the motion - the excuse of the applicant from any necessity to widen along the bulk of the street frontage (Long Hill Rd. and the portion of Semerad Rd. of which title is in the adjoining property owner's name) – and since there is a passage of time that has taken place, it turns out that even though there has been one extension of the time for filing of the subdivision deed (the normal statutory maximum period being within 190 days), according to the Supplemental Resolution it only carried the approval the end of July. Therefore, he felt that a further extension is needed inclusive of time to perhaps further amend the subdivision deed to specifically exclude this requirement.

Mr. Kates felt that within a period of 90 days from this date he could both amend, get the sign-offs, and get it to the County.

Mr. Hoffman felt that that should be a part of the motion to be adopted by the Board.

Dr. Behr asked for a motion as discussed.

Mr. Pesce made the motion which was seconded by Mr. Ruiz.

A roll call vote was taken. Those in favor: Mrs. Raimer, Mr. Fargnoli, Mrs. Malloy, Mr. Ruiz, Mr. Pesce, Mr. Keegan and Dr. Behr. Those opposed: none.

Mr. Hoffman said that he would intend to have the follow-up Resolution recite this revised action in accordance with the revised version of the plan submitted.

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DAVID & LAURA SCHELHORN **#11-01Z**
15 Ave Maria Court **Use Variance (Height)**
Block 12702, Lot 47.06 **Bulk Variances**

Present: Richard P. Diegnan, Jr., attorney for the applicants
William Hollows, licensed professional engineer
John McDonough, licensed professional planner

Lucille Grozinski, certified court reporter

Proof of service was submitted.

Mr. Richard P. Diegnan, Jr., attorney for the applicant, said that his clients are proposing to construct a kitchen addition which will require an aggregate of 10 variances (8 bulk variances and 2 use variances). He said that 8 variances are existing and 2 are existing and being changed by the nature of the application.

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

Mr. William Hollows, licensed professional engineer, was sworn. He has appeared before the Board on many occasions and was accepted as an expert.

Mr. Hoffman said that at some point there probably should be some discussion on the issue of the use variance relief that is needed. He said that it was stated in the hearing notice that there are 2 types of d (use) variances – for exceeding the floor area ratio (FAR) requirement and for the height of the structure. As to the FAR, he said that he tended to agree that a certain amount of additional square footage is proposed. He said that he was not so certain, however, that the applicants even need relief for the height of the building if the height is not increasing and the height of structure remains what it had been at a time when it was allowed. He said that there is some precedent for saying that they need not even have to seek a further height variance, however he was not sure that he had all of his chronology correct on that.

Mr. Diegnan replied that that is one of the reasons that Mr. McDonough, licensed professional planner, is present this evening. He said that he will make a presentation with respect to the variance relief being sought.

Mr. Hollows presented and described a colored rendering of a "Coverage Plan" he prepared dated 1/5/11, last rev. 4/14/11, consisting of one sheet, which was marked into evidence as **EXHIBIT A-1.**

He said that the subject property is 15 Ave Maria Court and the subdivision that the property was a part of was a density modification subdivision where the size, lot width, and side yard setbacks were reduced in return for a dedication of 5 acres on Basking Ridge Rd. to Long Hill Township for open space. Because of that, the property does not meet the current R-2 zoning bulk requirements which require a minimum lot size of 45,000 S.F. The subject property contains 24,199 S.F. , which is a little over ½ acre. In addition, he said that a lot width of 150' is required, whereas 130.46' is provided. He said that all of the density modification requirements were met, but not those of the R-2 Zone at this time.

He said that the applicants are proposing to construct a 280 S.F. one story addition to the rear of the house for a kitchen expansion. He said that the maximum permitted FAR is 4,452 S.F., they are presently at 5,282 S.F., and are proposing 5,562.S.F. He said that the maximum permitted lot coverage is 20% and, as developed, the lot currently contains a lot coverage of 33.8% which is proposed to be maintained. Even though 280 additional S.F. is proposed to be added, the driveway is proposed to be reduced by 290 S.F. by removing pavement. He also noted that a portion of the existing play area is over the property line at the rear and that portion of encroachment is proposed to be removed.

Mr. Hoffman said that there a couple of ways, with varying consequences, in which that particular issue could be addressed. He said that the encroaching portion of the play area could be removed or one could go further by not only removing the encroaching portion, but also any part of that that is within 10' of the property line *if* it is to be considered a structure of an accessory nature that even has to meet the 10' side offset requirement. He said that he would defer the matter to his planning colleagues.

Mr. Hollows replied that the applicants will definitely remove the encroachment off of the adjacent property. He said that it is a swing set surrounded by railroad ties and wood chips.

Mr. O'Brien stated that an accessory structure requires a 10' setback. In response to Mr. Gerecht, he said that swing sets have been treated as accessory structures in the past.

Mr. Hollows said that the dwelling contains a 3 car garage under situation on the driveway side, so when you go from the garage under to the peak, you come up with 39.7' of building height. As to the rest of the lot, he said that there is a retaining wall along the driveway in the front and back and the rest of the house would meet the building height maximum of 35'. In addition, he said that the driveway is proposed to be moved 1' off of the property line. He said that it cannot be moved in any more than that and, therefore, it cannot comply with the 5' offset requirement because you would not be able to back out of the garage because it would be too tight. He also said that there is an odd situation with the critical area part of the Ordinance. He felt that the Ordinance conflicts with itself because it says in one part that you can put in drywells anywhere with the approval of the Township Engineer and in another part it calls drywells critical items. He said that, when the house was constructed, two drywells were installed – one for the front and one for the back. The roof leaders from the front went to the front drywell and the roof leaders from the back when to the back drywell, and they are not 50' from the house. He said that he believed that they were built, although he did not see them. He said that his firm was originally involved with the original homeowner of the property (in the mid 1980's), but it was a requirement at the time D. Gregg Williamson was the Township Engineer and it came up *after* the Grading/Plot Plan (which were not as detailed as they are today) was submitted and approved and the house was started. He said that he could go through the reports of Mr. O'Brien and Mr. Lemanowicz, but he felt that he had touched on most of the areas of their comments. He noted a drafting error where it indicates that the minimum floor area is required to be 1,500 S.F. and the existing dwelling is way above 1,500 S.F., but the number shown (2,138 S.F.) is really the FAR number. He said that it is a drafting error that would need to be amended if the application is approved.

Mrs. Raimer said that she understood a 280 S.F. increase is proposed, as well as a 290 S.F. reduction on other parts of the property and, for that reason, no additional stormwater management measures were proposed. She asked if the stormwater management measures that are currently on the property are adequate, because this is the perfect opportunity if they are not to enhance what already exists.

Mr. Hollows replied that the Ordinance states that they would have to exceed 400 S.F. of additional impervious coverage before they are put into the category of having to provide some stormwater management. He said that he did not know of any problems in this area specifically, at least not on this side of the road. However, he noted that someone on the other side of the road built a road without a permit some years ago, which was rectified. He said that the system was designed at the time for 3" of rainfall for the house.

Mrs. Raimer replied that we have since experienced natural disasters that are quite more significant than what was predicted and so what we might have thought was appropriate at the time may not necessarily be what is right for the property now. She asked Mr. Hollows if, in his professional opinion, he would advise his client to incorporate additional stormwater measures?

Mr. Hollows replied that he would if he had a problem but he did not know that he has a problem. He said that he has not indicated to him that he has a problem.

Dr. Behr said that he wished to clarify what this Board has done in the past. He said that there are two reasons that you do something. One is that you have a problem that is typically defined by statute or some other reason that *must* be remedied. The other is to ask if there is an enhancement that can be included that will further contribute to the health, safety, and welfare of the people of Long Hill Township. He said that it has been the practice of the Board in the past, which applicants in the past have also willingly complied with, although not *required* to install additional stormwater management, given the horrible flooding condition that the Township faces, *any* improvement in stormwater runoff, if appropriate and feasible, is something that the Board looks upon favorably. He said that the Board understands that it is not required, but that doesn't mean that it is not appropriate.

Mr. Hollows replied that he understood.

Returning to Mrs. Raimer's question, Dr. Behr asked Mr. Hollows to elaborate on when he said that there is "no problem". He said that any additional stormwater runoff from the proposed addition would be satisfactorily handled by a sheet runoff and infiltration in the property as it now stands, or might there be a possibility of adding additional runoff from the property?

Mr. Hollows replied that "there might be". He said that we are talking about 280 S.F., but again we are reducing that so that the net when it is done is the same.

Mr. O'Brien felt that it is a Board decision whether we are talking about 280 S.F. *or* if we are really talking about the 33.8% of lot cover that exists as opposed to the 20% of lot cover that was allowed at the time of the construction of the dwelling. He said that he did not know if the applicant or Mr. Hollows can tell us if the decks and driveway, as currently existing, were part of that approval back in 1989 or so, or if they were added at a later time, and whether or not the drywells that were installed with the original house were built to handle the lot coverage of over 33%, or where they built for the 20% that the building was approved at.

Dr. Behr said that perhaps the applicant can provide more information as to how we came into an area that is zoned for 20% lot coverage to quite a good deal more.

Mr. Diegnan replied that the applicants purchased the property "as is". They have not constructed any additions and no permits were taken out to construct any additions such as an additional deck, or such, to increase the lot coverage. He said that, if it was built over sized, it was not due to the current owners.

Mr. Gerecht said that the Board understood that, but asked if it was approved the way it is, or did some prior owner increase the coverage for which the drywells are not accommodating? He said that the applicant has increase in area in the rear and decrease in the front which, obviously, will change the water flow somewhat. He asked Mr. Diegnan if he was telling the Board that by taking away the blacktop in the front, that will help or decrease water flow onto someone else's property because now you have a grass buffer there? He also asked how, if any, the back kitchen addition is going increase any water flow onto the back yard and, thereby, onto someone else's yard, or if he believed that will not be the case.

Mr. Hollows replied that the requirement he was requested to do was not part of the original plot plan for the house, but something that Mr. Williamson brought up later but was addressed in the requirement for 3" of rainfall over the house. He said that the subject property basically drains all to the front. He agreed that runoff from the rear will find its way down the driveway.

Mr. Gerecht asked if there is sheetflow down the driveway during rainstorms.

Mr. Hollows replied that the driveway slopes towards the street but there is a drain inlet nearby.

Mr. Fargnoli asked what the lot coverage requirement was at the time of the subdivision approval?

Mr. Hollows replied that it was a maximum of 20%.

Mr. Fargnoli asked Mr. Hollows if he would say this is adequate or inadequate if he was designing a stormwater management system there now.

Mr. Hollows replied that they usually design for "a little bit more than 3" of rainfall", so it would be "a little small".

In response to Mr. O'Brien, Mr. Hollows agreed that the 3" would be for the house rather than the entire property. He said that he did not know if they could do something with the driveway per se. He said that they could probably put another drywell adjacent to the existing one in the rear which would pick up 4-4 ½" (rather than 3"), plus the addition.

Mr. Keegan asked for confirmation that the existing drywell does not have the capacity to tie the leaders from the proposed addition into it.

Mr. Hollows replied that another 280 S.F. would be going into it. He said that it wouldn't make the 3" that they had to do in the mid 1980's. He said that it is probably something like 2.9" – it is a small area compared to the rest of the roof area.

In response to Mr. Gerecht, Mr. Hollows said that he did not know if anyone has looked at the existing drywells since they were installed, but he doubted it. He said that there is nothing you can see from the surface. As far as he knew, they were functioning.

Mr. Lemanowicz asked Mr. Hollows if he had seen Mr. O'Brien's photos.

Mr. Hollows asked Mr. Lemanowicz if he was asking if he had misplaced a drain inlet. He said that he knew that there was one somewhere around the front of the lot.

Mr. Lemanowicz said that it is on the left side of the driveway. He said that in Photo #2 on the front page of Mr. O'Brien's photos, on the right side of the driveway there is a pipe coming out of the curb. He asked Mr. Hollows if he knew what it was.

Mr. Hollows replied that he did not. He said that it is close to being right on the property line and he was not even sure it is his clients'. He said that they are not adverse to increasing some stormwater management on the site.

In response to Mr. Lemanowicz, Mr. Hollows guessed that the existing drywells are probably 6' in diameter. He said that there may be some additional capacity that is not being used. He said that he would look through his file to see if he could find details.

Mr. Pesce said that he believed there was a comment by the Environmental Commission suggesting that the playground that has been indicated to be moved ought to be considered impervious surface.

Mr. Hollows said that it was not included in his lot coverage calculation. He felt it is pervious noting that he recently did a job on Vickie's Place which had a much larger play area and, through discussions with this Board, it was not considered to be impervious.

In response to Dr. Behr, Mr. Hollows said that he did not have the height of the front of the dwelling, as viewed from the street. He said that he knew that it was 39.7' and the retaining wall is close to 5' high, so it would be 35' or less.

Mr. Diegnan said that if you look at Mr. O'Brien's Photograph #5, it gives a good illustration of the height and noted that the retaining wall is on the left side.

Dr. Behr said that he understood the visual point that is being made, however it would have been nice to have some exact figures.

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

Mr. John McDonough, licensed professional planner, was sworn. He reviewed his educational and professional background and was accepted as an expert.

He said that he concurred with the list of variances that were put forth by Mr. O'Brien on Pg. 3 of his report dated 6/2/11which were also listed in the Administrative Review prepared by Mrs. Wolfe dated 4/29/11. He said that the application entails two d-variances, one of which is a d-4 variance for F.A.R. to allow for a floor area ratio of 5,562 S.F., whereas 4,451.9 S.F. is allowed under the Zoning Ordinance. He said that the applicants are also seeking a d-6 (height) variance to allow for a height of 39.7', whereas 35' is the maximum allowed by the Zoning Ordinance. He said that the 4.7' over the allowed height equates to approximately 13%. Whenever a height

is over 10% of a height allowance, a d-variance is required. He said that 8 bulk variances are also sought which, according to the applicants' engineer, are all existing conditions. He said that relief is sought for lot width (130.4' versus 150' required); front yard setback (64.9' versus 75' required); side yard setback (19.4' versus 25' required); driveway setback (0' versus 5' required); two critical area setbacks related to the drywells (16.7' versus 50' required and 29' versus 36.1' required); lot area (22,500 S.F. versus 31,500 S.F. required under the cluster provisions or 45,000 S.F. under conventional zoning provisions); and a lot coverage variance (33.8% versus 20% maximum permitted).

As to the positive and negative criteria in connection with the variances being sought, Mr. McDonough said that his analysis started with a look at the surrounding neighborhood. He said that neighborhood compatibility is certainly a key part of any variance application. He said that he put forth some photo exhibits to photo document his findings with respect to the surrounding area and condition of the property. A copy of the 2 pg. photo exhibit entitled " Planning Exhibits for Shelhorn Residence – 15 Ave Maria Court, Long Hill, NJ" was marked into evidence as **EXHIBIT A-2** and additional copies were distributed to the Board members.

Mr. O'Brien said that Mr. McDonough pointed out the relief requested and gave the requirements under the R-2 (residential) Zone. He said that it has been our stand in the past that the density modification standards that were in existence at the time of this development are the applicable standards. He noted that they are listed on Pg. 4 of his report and advised Mr. McDonough that, in the future, those are the standards that he is up against rather than the regular required R-2 standards.

Mr. McDonough replied that he understood. He described the first page of **EXHIBIT A-2** as a birds-eye view which he downloaded from the Bing website. He said that it is of recent vintage (within the last year or so). The subject property is outlined in yellow and depicts a typical residential lot, rectangular in shape, and nicely developed. He said that the centerpiece is an attractive home which is on scale with the other homes on the street. It contains a footprint of approximately 3,000 S.F. and contains a well maintained yard, manicured lawn, and a neat landscape. He said that it is important to note that it is not in a designated flood zone. He also said that he indicated the surrounding properties with numbers on each of the homes. He noted that the neighborhood subdivision was built in the late 1980's-early 1990's under old density modification ordinances. As a result of the changed zoning, virtually every one of the lots contained in the photograph are now undersized/underdimensioned and, therefore, require some form of variance relief if any alterations or changes are made going forward. He felt that it is also noteworthy that 4 of the neighboring homes have had a room extension off of the back of the house which is exactly what the applicants are proposing here. Referring to **EXHIBIT A-2** he said that you can see appendages off of Houses #12, #18, #22, and #19. He said that the applicants are seeking to do something very similar. He noted a deck at the rear of the subject property that wraps around and ends and said that the applicants are essentially proposing to fill that notch between the driveway and the deck with a kitchen addition. He said that the proposed rear addition will be relatively small and only contain one story. He said that it is important to note that they are not proposing to add any more habitable space in terms of another bedroom or accessory apartment and they are not proposing to alter the public face, or street side view of the property, nor will it be visible from any of the neighboring properties, as you can see from the location of the addition and the screening that is around the property. He felt that that is what distinguishes this as a specific or particular piece of property. He noted that any variance needs to relate to a specific piece of property, otherwise it is tantamount to a zone change or a rezone. In that regard, he felt that this is a unique scenario. Referring to the second sheet of the exhibit, he said that it contains photos of the front and rear views of the subject residence, as well as a side view (showing the driveway area to be removed) and the land use adjacent to the proposed addition (which is undeveloped). He described the dwelling as a typical 2 ½ story building, less than 35' high which continues to the left hand and back side. It is only on the right hand side where it drops down for the garage under that the variance situation is created. He said that the small yellow arrow on his Photo #2 depicts the area where the proposed additional will project at the end of the deck which will end at the cantilever where the second story begins. On his Photo #3, he said that the area shown with a yellow dashed line is the area to be removed to create a

"wash" with the proposed rear addition, so that there is a net zero increase in terms of impervious coverage on the property. Photo #4 looks at the land use adjacent to the proposed addition which wraps around to the rear and right hand portion of the property which is Lot 46. Referring back to Pg. 1 of the exhibit, he said that you can get a sense of how Lot 46 wraps around the subject property and that is really the lot that is in the main line of sight with the subject property, and that lot is undeveloped. He said that, importantly, the flanking buildings shown as House #9 screened from view of the proposed addition by virtue of the orientation of the house and also the subject house, and House #19 is screened by a row of evergreens separating it from the subject house.

In terms of the statutory criteria, and starting with the d-4 (F.A.R.) variance justification, he said that Mr. O'Brien is correct in that the statutory test for F.A.R. relief carries a lesser burden than a pure use variance and there is case law on that point. He referred the record to the Randolph Town Center v. Randolph Twp. case which says that the test should focus not so much on the use, per se, but whether the site can accommodate the problems that are associated with the greater floor area. He said that he believed that the positive criteria are satisfied because the application advances one or more purposes of the M.L.U.L. He referred to purpose i – the promotion of a desirable visual environment and said that he felt that, architecturally, the addition will blend with the house and fill a void that is created at the back of the house. He said that purpose a is also advanced – the promotion of the general welfare. Functionally, he said that this will internalize what could be otherwise used for outdoor entertainment space and will enhance the privacy and reduce noise effects on the surrounding neighbors. He said that he also saw purpose m as being advanced – the efficient use of land. He said that the proposal will enhance the efficiency of the kitchen, which he described as the "centerpiece" in a typical home. He said that it will not impact any trees or environmentally sensitive areas. In that regard, he said that there is an inherent benefit or a promotion of the general welfare - the efficient use of land and the purposes of the M.L.U.L. He said that the addition will bring the property up and, in turn, the neighborhood up without causing any visual or functional detriment to the neighborhood as a whole. On the negative side, he believed that the variance can be granted without substantial impairment of the Zone Plan or the Ordinance. Visually, he felt that the additional will be unperceivable from all sides. He said that it is tucked into the least conspicuous spot on the piece of property. He said that, to the north and west, it is blocked by woodlands on Lot 46. To the south, it is blocked by the deck and, to the east on the street side, the addition is completely blocked by the home itself. He said that the addition will not impede the privacy or enjoyment of any of the neighboring properties. Functionally, he said that the proposal creates no additional coverage and he felt that the issue of additional runoff has been adequately by the applicants' engineer and back and forth discussion with the Board. He stressed that it will contain no more bedroom space that could trigger additional population, noting that there is a correlation between bedroom space and school age children and, therefore, it will add no more burden to the school system. He said that it will also create no additional effect on water, sewer, or other utility services which also have a demand based on the number of bedrooms in a home. Finally, he said that it will create no substantially negative effects in terms of glare, noise, odors, heat, or other nuisances on the surrounding properties. He said that the size of the addition is relatively modest and not out of scale with the character of the area and it will certainly not stand out as an overbearing eyesore on the streetscape side or on the surround properties. In terms of the negative criteria, he said that the grant of the variance will not impair the intent and purpose of the Zone Plan and Ordinance, noting that this is a distinct piece of property. He said that the articulated purpose of the Ordinance is to preserve and protect the high quality of the residential areas. He felt that the addition will add to the quality of the house and will not detract from the quality of the neighborhood. Based on the engineering testimony, he said that the site can easily accommodate the proposed additional F.A.R. He said that it is not a McMansion type of expansion by any extent. In that regard, he believed that by looking at the positive and the negative criteria, this is a clear cut case where the positive would outweigh the negative and there is a basis for the F.A.R (d-4) variance.

He said that the next variances are d-6 variances and pertain to the height justifications. In terms of the statutory test, he said that Mr. O'Brien is also correct that in that it carries a lesser burden than a pure use variance. He referred to the Grasso v. Bor. Of Spring Lake Heights case which says that we look at problems that are associated with additional height such as shadow effects,

blocked views, or the like and none of that is happening here. On the positive side, he said that the positive criteria are satisfied because the application advances the purposes of the M.L.U.L. that carry forth from the F.A.R. variance. On the negative side, he said that the height of the addition is limited to only one story. It is two stories lower than the existing peak. He said that the height variance is only for the existing structure and not for the proposed structure and, visually, will be unperceivable from all sides and, again, tucked into the least conspicuous spot on the lot and, similarly, will not create additional population. He said that the purposes of most height controls is to limit density and population. He felt that the statutory test for a d-6 is met, as well.

Looking at the coverage variance justifications, he said that this is a bulk variance (unlike the two d-variances) and the applicants do not need the statutory super majority, just a simple majority of the Board, so it does carry a lesser burden in that regard. He believed that the application satisfies both the c-1 and the c-2 criteria in terms of justification for a coverage variance. He said that the Board needs to find that only one of those standards are met (c-1 *or* c-2), but he felt that a basis can be found on either one. In terms of c-1, he said that the coverage is already over and the applicant is taking steps to mitigate the existing additional coverage, plus the addition, with a new drywell. He felt that this is a practical difficulty that cannot be overcome unless the applicants knocked down a portion of the house which he felt is unfair. He said that the hardship is based on the condition of the property which is a basis under subsection c of the c-1 section of the statute. He said that he also saw a basis under c-2 – the balancing test, which carries down those benefits under the F.A.R. variance. On the other side, he said that he saw no detriments associated with the coverage. He said that the proposed will match the existing, so there is no new coverage coming onto the property. The coverage relates to drainage and he said that those drainage problems have been addressed.

With regard to the critical area variance justifications, he said that the statutory test is a standard bulk variance that requires a simple majority. He said that he also saw c-1 or c-2 as the basis here. In terms of c-1, he said that this is a practical difficulty in that those structures are already there which cannot be overcome unless the applicant moves the drywell to another corner of the property. He did not think that is warranted in this case and felt that it is a basis for a variance under subsection c of the statute.

Lastly, with regard to c-2, the benefits outweigh the detriments. He said that he carried forth those benefits of the F.A.R. and saw no detriments associated with the setback to the drywells. He said that there are no engineering or planning reasons why that would cause any negative effect on the existing and, what appear to be, well functioning drywells. He said that he knows the property and when he was there 2 weeks ago in the aftermath of Hurricane Irene, it did not have any drainage problems and the drywells appeared to be well functioning.

In terms of the other variance justifications that are really existing conditions that are not being worsened by the application, he said that they are not unlike the existing conditions that would trigger variances for any other house on the street and they are a result of the prior zoning which has been changed. Grouping all of that together, he said that it was his conclusion that this application passes all statutory tests for variance relief. He said that the justifications relate to a specific piece of property and can be granted under good planning principles. He felt that the addition has been well planned for a good location on the property and he believed that the grant of the relief will not be precedent setting or cause any sort of rezoning issues impairing the intent and purpose of the Zone Plan and Ordinance and that the statutory criteria under the M.L.U.L. are met and the variance relief is warranted.

He said that he has read the reports of Mr. Lemanowicz and Mr. O'Brien and believed that he has addressed everything. If not, he said that he would be happy to field questions.

Mrs. Malloy asked Mr. McDonough what the condition of the property was after Hurricane Irene in terms of the stormwater runoff.

Mr. McDonough replied that it was dry. He said that he walked the entire property with Mr. Schelhorn.

In response to Mr. Fargnoli, Mr. McDonough said that Lot 46 is undeveloped, although he did not know if it is restricted as open space. He believed that it is a developable lot.

Mr. O'Brien said that it is private property and there are discussions as to what may be occurring on that property at some point in the future. He said that the owners came to the Application Review Committee last week with a proposal to subdivide that property into 3 new lots, the backs of which would be against the backs of the homes on Ave Maria Ct. He said that there is a main house facing Basking Ridge Rd. and they were discussing running a private road back for several homes. He said that that site contains approximately 5+ acres.

Mr. Lemanowicz said that Mr. McDonough had discussed an existing front yard setback and quoted the Survey by Murphy & Hollows which indicates 64.9'. However, submitted as part of the application was another Survey by Benjamin & Wizorek, Inc. that seems to confirm the 64.9' off the southeastern corner of the house, but also shows that that was not the shortest distance from the house to the R.O.W. – that is actually off of the corner to the south of the front door and the Benjamin & Wizorek, Inc. Survey has it as 62.5'. He said that neither one of those numbers are changing, it is just a matter that the 64.9' does not appear to be the minimum front yard distance for the property.

Mr. McDonough said that he concurred and believed that it is also in Mr. O'Brien's report, as well.

Mr. Lemanowicz said that the other issue he had in his report of 5/27/11 was that the architectural plans do not appear to be drawn to scale and they are not dimensioned. So, there is no way to confirm the floor area and that is where a variance is being requested here. As an example, looking at the 8 ½" x 11" floor plans, apparently prepared by Mr. Schelhorn, the first page shows a 16' x 19' foyer centered in the front of the house. To the rear of that, is an 18' x 19' dining room which dimensionally should be larger but graphically is smaller. He said that he had a lot of concerns here and did not know what was included in the floor area calculations. The only dimension that is provided is on the second floor and the dimension is 26'1" and the room is labeled as 26' even and the dimensions take it from the inside wall, where is supposed to be taken from the outside wall. He said that he did not have a lot of confidence in the floor area that we were given.

Mr. Hollows said that the number he came up with on the F.A.R. came from the original architectural plans by Alexander Bol, architect, in Berkeley Heights. He said that he had the title block and building data information from the cover sheet of the architectural plans which comes up with the 5,282 S.F. for the floor area for the first and second floor. He said that he could provide it to Mrs. Wolfe for the file. He said that they are the plans that were submitted for a building permit.

In response to Mr. Lemanowicz, Mr. Hollows said that the architectural plans go back to the 1980's and were what was submitted for the building permit at the time. He said that we all know that the building is larger than what was allowed and the applicants are presently trying to add a 10' x 10' kitchen addition. He said that he was able to find in his file from the survey work his firm had done – they had carried elevations – and at the front of the house by the front steps, the height of the building is 32.5' and at the southerly side, which is the side where the wood deck is (and contains a great room) the elevation was 33'. He said that that is a smaller portion of the house, but it is the main ridge.

In response to Dr. Behr, Mr. Hollows said that, if the Board were to approve the application and he was to make revisions to the drawing, he would add the spot elevation at the front so that we could right the ridge elevation as in here, and add spot elevations. He said that it is really at the corners of the building when they located the building when they took elevations. He said that he would be happy to make such additions to the plans, if approved, since there are a few other housekeeping things to take care of. He said that he had a feeling that they will put a drywell or two on the site.

Dr. Behr asked Mr. Lemanowicz if he was satisfied that we have sufficient reliable data about the coverage of what is proposed to be able to rule on the application.

Mr. Lemanowicz replied that the only issue he had was with the building size. He said that, over time, he has seen architects compute floor areas in lots of different ways. He said that some include closets and some don't and some include garages and some don't. As far as the building area, he said that he did not have a lot of confidence in that. He said that he could probably scale it off to see if it comes close and compute it for purposes of drainage because a few square feet in drainage isn't that big of a deal, but for the floor area he felt that we are shy of firm information.

Dr. Behr said that it has become the practice of the Board that, *if it is possible* to conclude a hearing in a single meeting, that is the commitment of the Board. He questioned if we have a problem, given the uncertainty of the dimensions which Mr. Lemanowicz referred to, that would cause the Board to have to carry this application.

Mr. Lemanowicz replied, "For drainage, no". He said that, if the Board chooses to give some direction as to how much more stormwater control it wants, he and Mr. Hollows can work that out. He said that his concern is on the floor area issue.

Mr. Hoffman questioned whether there is even a need for a height variance since the only new building height is going to be a single story.

Mr. Lemanowicz replied that they are adding floor area to a building that is an excess.

Dr. Behr said that there are two things – one is the height and the other is the F.A.R. He said that Mr. Hoffman's question was if a height variance is needed. He said that the Board has got the ability to respond to what is on the table in front of us which is the request for relief from the height variance. He felt that we have the data to do that. In terms of F.A.R., he said that there are two issues. The first is that there some confusion as to what is the actual size of the building right now, because some of the data that we have does not seem to be as reliable as we might want it to be. He said that what the applicants are seeking to do is get relief to allow for the construction of a 10' x 28' addition (280 S.F.). He said that it is at least conceivable that whatever problems exist with accurate dimensions could be resolved in terms of working out any stormwater management issues, should the Board so decide to approve the application.

Mr. Lemanowicz replied that he did not have an issue with working out the stormwater as a condition.

Mr. Diegnan said that Mr. Hollows has submitted an architectural drawing that does reflect a square footage on the house. He said that he assumed that the architect is licensed and would have that number within a professional range of accuracy. He said that they do know the exact size of what is proposed to be added to provide some reasonable level of certainty that that number is good. He said that a F.A.R. variance is needed no matter what.

In response to Dr. Behr, Mr. O'Brien said that while the architect's numbers are a helpful guide to us, they are not signed and sealed and the gentleman is not here to be questioned. He said that how much reliance you put on that is up to the reliance you give to the name and to the numbers. He felt that the issue that is in front of the Board now is what numbers are important to the Board's deliberations to move on tonight. He said that the F.A.R. numbers are important because a variance is required and those numbers should be known not only for the record and for deliberations, but for future efforts. However, they sort of stand alone so that whatever the F.A.R. is, is what it is. It doesn't lead to something else as part of this application. So, either the number is the 5, 282 S.F. or 5,262 S.F. or whatever it may be. It is a number that can be found and put down on a piece of paper. He said that the lot coverage number is important because that leads you to another action and because you are discussing stormwater measures and how much coverage there is on the property compared to how much coverage is allowed and there are certain numbers in front of the Board that have been signed and sealed by the witness who is in front of the Board who can be cross examined. If you have confidence in that testimony, he said that you have a lot coverage number. From that, the next step is whether or not you do

something about stormwater measures that you may wish to see on this lot due to the excess of lot coverage. Between the two issues, he said that the lot coverage one is one that must be settled, however he felt that there is something in front of the Board that it can use. F.A.R., because it is not going anywhere else – it is just by itself, if we can get those numbers with certainty from some authority after a part of the deliberations or whatever, they are there for the record for us and for future use, but in terms of deliberations this evening, he felt that it is the lot coverage numbers that are most important and the Board has those.

Dr. Behr added that, as we consider the F.A.R. variance, the burden of the proof for the applicant is to show that the site will accommodate the problems associated with a floor area larger than that permitted by the Ordinance and we certainly have heard testimony about that – that it is not necessarily bound by and error of 4 or 5 one way or the other.

Mr. O'Brien said that, whatever the size of the box of the house is today, is the size it has been since 2004 when the Schelhorn's bought it and will be the size in the foreseeable future with the addition of what is front of the Board which is 10' x 28'.

In response to Mr. Keegan, Mr. O'Brien said that the paving of a driveway requires a permit.

In response to Mr. Pesce, Dr. Behr said that he would like to get a recommendation from the Board Engineer as to what enhanced stormwater management he thinks will be feasible or appropriate. He asked Mr. Hollows if he had a recommendation to the Board for what he felt would be feasible and appropriate to add in terms of stormwater management.

Mr. Hollows said that they would look to add on to the one in the back so that they definitely have the addition taken care of.

Mr. Pesce asked if that would bring it up to current stormwater management standards.

Mr. Hollows replied that he would have to look. He said that they may have to look into both of them.

Mr. Pesce said that, given there is a potential for future development, his feeling was that it would have to be brought up to standards.

Mr. Hollow said that the future development is uphill of the subject property. He said that they need to take care of their runoff so it doesn't reach the subject property.

Mr. Fargnoli replied that he understood, however water runoff is a big issue these days. He said that, in his opinion, it would have to be up to current standards for a lot that size and nothing less.

Mr. Lemanowicz said that there are already two drywells feeding off the roof and there is a huge impervious coverage of the driveway. He asked if it would be that much more of a problem to put a trench drain across the driveway, put a drywell to the south of the driveway, and overflow it to that existing inlet?

Mr. Hollows replied that they must be careful because there are a lot of utilities in that area. He said that there is a sewer line, water line and a gas line and the meters are also there. He said that he could look to do something like that.

Mr. Lemanowicz noted that the property has some slope to it and adding a rain garden would be tough.

Mr. O'Brien noted that the typical rain garden is for the 400 S.F.-1,000 S.F. overage of the 20% number. Whereas, right now that are at 33.8% and they are supposed to be at 20%, so it is a big difference.

Mr. Lemanowicz said that, with all of the utilities going to the front of the property and being as they are already disturbing earth in the northwest corner, he said that it would seem best to disturb a little more up there than deal with that drywell.

Mr. Hollows said that he had a letter in his file and Mr. Murphy had based it on 3" of rainfall over the roof of the house. It had nothing to do with the overall coverage. He explained that you collect the water on the roof area – the footprint of the house and take the volume of rainfall over that square footage and that is the volume you look for to put in the drywells.

Dr. Behr asked Mr. Lemanowicz if he had a recommendation and, if so, what it might be.

Mr. Lemanowicz said that being that we like to control all of the impervious coverage now and the area of the house, when you compare it to the total area of impervious coverage, the lot coverage is 33.8% where the building coverage is 12.62%, so the actual impervious is double the house size. So, going by that proportion, he said that it would seem that you would have to double the drywell size. He said that we don't know what they are, but generally they are either 6' or 8' in diameter. He noted that Mr. Hollows had indicated that he had the actual numbers, so going by a direct proportion, that is where it would be.

Dr. Behr said that we do not have those figures tonight.

Mr. Hollows said that he actually looked in the file and there is just a letter saying the size. It is an 8' diameter drywell and he assumed that it is 6' deep, however there were not calculations per se and he did not know if there was a little extra in each one of them. He said that this would definitely be the area to put something in to get the back and, if they have to be doubled, he would put one next to the one in the front because it is away from the utilities and over detain the one from the house to make sure you've got everything from the house. He said that there is storm drainage in the street, so maybe it comes down and goes a little bit further, but it would get captured when it comes down the driveway.

Dr. Behr asked if he was talking about two additional drywells?

Mr. Hollows replied that, based upon what Mr. Lemanowicz has said, we are trying to capture some additional runoff from the driveway by over-detaining from the house. He said that the driveway is actually a little bit bigger than the house.

Mr. Lemanowicz said that the reality is that the drywells work when you put water in them. If we have 4 drywells on the house and then put 8 drywells on the house, if there is not enough surface area going to the drywells, unless you get a hurricane, then you actually do something with them. He felt that at least one should be added which could be put off the back and they could work with the roof leaders and make sure that everything gets to that. He felt that when you get too many of them, it is overkill unless you could catch the water at the bottom of the driveway and catch all that impervious area, but he did not see that as a possibility because of the utilities going through there. He said that there is really no place to put it.

Mr. Hoffman said that his understanding is that *all* of the professionals (the Board's and the applicants') as to the variance relief that is needed, as Mr. O'Brien has outlined in his report and the justification is up to the Board to determine if the criteria are satisfied. Beyond that, he confessed to not having a total picture of every nuance that has been discussed or considered this evening. If a Resolution were needed relative to what we currently have in the record, he said that he would want to first be supplied with a detailed, item by item, listing from both Mr. O'Brien and Mr. Lemanowicz as to each condition or change that they believe would reflect the items that were discussed by the Board.

Mr. Lemanowicz said that there is one possibility of putting a drywell under the driveway at the northeast corner of the house which would basically catch half of the upper half of the driveway. With the construction, he said that he was not sure how well the driveway will stand up. By putting a drywell at the front right (northeast) corner of the house and piping the addition to the rear drywell, there was testimony that the property drains from back to front. So, if the rear

drywell *does* go over, it goes to the new drywell. So, in essence, it has to travel a little bit further but, if that drywell *is* overloaded, it gets to the new one – plus, if it doesn't need the extra drywell capacity, it's left for the driveway. He felt that it would accomplish more to locate the additional drywell partly down the driveway itself, rather than to the rear of the house.

Mr. O'Brien said that you can see from the photographs that the rear of the house drains to the driveway and then down the driveway.

Mr. Lemanowicz added that it would also help icing conditions in the winter.

In response to Mrs. Raimer, Mr. Hollows said that the intent would be to capture the water from a portion of the driveway and anything that may come over that.

Mr. Lemanowicz said that a simple grate could be added. As to the depth, he said that he would have to work that out since he was a little concerned with the nearby retaining wall. He did not want it to get so large and deep that the soil underneath the retaining wall starts to move. He said that it would probably be a 6' diameter pushed off to the northern property line a bit.

Dr. Behr said that, if the Board were to grant the application, this is something that conditioned upon it being agreeable to Mr. Lemanowicz after discussing it with Mr. Hollows.

Mr. Gerecht questioned if it would another variance since it would not be 50' from the property line.

Mr. O'Brien agreed that it would, however, if the Board were to request it as a condition, that would be included in the notice that was given.

Mr. Lemanowicz added that, placing one in the back corner, would have exacerbated a variance.

Mr. Diegnan stated that the notice that was served did include the statutory language as to any other relief/variances that the Board may deem necessary.

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

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Mr. Diegnan gave his summation. He said that he has spoken to Mr. Schelhorn and he is amenable to working with Mr. Lemanowicz with regard to the stormwater issues and will take the appropriate measures to mitigate the issues that were discussed tonight as part of a condition of any approval. He said that the Board has heard extensive testimony from Mr. McDonough and Mr. Hollows regarding the proposal. He felt that Mr. McDonough has put forth the positive and negative criteria to justify the requested variances. In summary, he said that he believed that this is a good project for the neighborhood. He felt that it is important for people to maintain and continue to enhance the value of their property and that this addition will be good for the neighborhood and, therefore, good for the town. He requested the Board to carefully consider the things that were presented tonight and approve the application.

Mr. Gerecht said that he was very impressed with Mr. McDonough's presentation and felt that it gave the Board clear cut issues to look at. Looking at the project itself, he said that he would say that if we didn't have the density modification that exists, we probably would not have as many variances. In and of itself, he felt that it is a very modest addition, but because of the way the property is situated and the amount of reduced land that the house is on, it does create the need for the requested variances. He said that if you look at the maximum height and the height issue, the applicant is not increasing the height, it is already there and is an issue that was addressed. He did not believe that it is any different than a lot of the other houses in the area, therefore he did not believe it to be a big problem. He said that he felt the same way about the floor area. He said that the issue here is also the fact that the size of the lot is smaller and the addition itself is not overpowering – it is small, in the rear, and only one story. He said that it is not in view of the

front of the house or in view of any of the neighbors. Although it may have a potential impact on some of the future neighbors, that is not something that can be considered now. He said that the front yard setback and side yard setbacks are pre-existing. He said that the lot coverage is an issue but, when you have density modification, the house would have to be a lot smaller to comply. He noted that some of the driveway will be removed and noted the existence of the drywells. He liked the idea of putting the new drywell in the location which Mr. Lemanowicz had suggested because that would help to catch any of the overflow from the back yard and large part of the driveway. He believed that the negative and positive criteria were adequately addressed and he did not see a negative impact upon the neighborhood. He noted that from the photos presented there are other houses in the neighborhood that have had additions constructed onto them and, therefore, it seemed to him to be a trend in the neighborhood. He said that the scheme of the front of the house will not change that would alter the look of the house from the streetscape. He assumed that any architectural plans will take into account the cantilever at the back of the house using the proper method. He felt that the positive criteria was adequately addressed by Mr. McDonough and he said that he was impressed by the way he detailed and addressed the different requirements that were contained in Mr. O'Brien's report. For the neighborhood, in general, he felt that the proposal will have a neutral effect. He said that he would vote in favor of the application.

Mr. Fargnoli said that the applicant purchased the house in 2004 with, basically, the existing lot coverage of 33% which leaves an impediment to him as to doing any additions or changes which he viewed as somewhat of a hardship. He also felt that the proposed 280 S.F. addition is not significant and is offset by the proposed decrease of 290 S.F. in the driveway. He felt that the biggest issue is the stormwater runoff and he said that he would like to see the applicant and his engineer work with Mr. Lemanowicz and get it as close to current standards, if not exceed it as much as possible. He did not have a problem with the F.A.R. and felt that the benefits of the proposal outweigh any detriments. He said that he would vote in favor of the application.

Mr. Gerecht said that he wished to add to his comments the issue of removing the existing playground encroachment.

Mr. Ruiz said that the 33.8% lot coverage bothered him as to how it went from 20% to 33.8%. However, he thanked the applicants for not making the matter worse. He felt that the situation will be improved taking into consideration Mr. Lemanowicz's recommendations. He concurred with the comments made by his fellow colleagues and acknowledged that there is a hardship in this case. He also said that the Board has learned that the property to the rear of the subject property may be coming up for some kind of development and, hopefully, the situation can be made right there too. He said that he would vote in favor of the application.

Mrs. Malloy also agreed with her colleagues and said that she was in favor of the application. She felt that the applicants purchased their home with the intention of having a nice structure for their family and to enjoy their life in their neighborhood. She said that she was very moved by Mr. McDonough's presentation and his listing of the negative and positive criteria. She felt that the applicants are doing what they can to remediate any stormwater issues that inherently exist with the property as it was purchased. She did not feel that the proposal will negatively impact the neighborhood and felt that it is in line with existing homes in the area. If anything, she felt that it will serve as an improvement, not only to the applicants, but for the neighborhood as a whole. She said that she did not see any impact in terms of stormwater runoff with the idea of a third drywell, noting that the applicants did not experience any problems with a recent major hurricane where most of the town *was* affected, noting that the two existing drywells seemed to be able to handle it. She felt that the addition of the third drywell with a 280 S.F. addition to the home will be more than adequate. She felt that the existing play area encroachment should be removed, but not the entire play area itself since the applicants have children that are young enough to use it. She said that she would vote in favor of the application.

Mrs. Raimer said that, for the reasons offered by Mr. McDonough, she felt that he had done a fabulous job of defining and summarizing a situation where we often don't get the benefit of a planner doing such a thorough job. For the reasons he offered as to why the Board should support the application, she said that she would agree. She felt that the fact that the Board had to

get at least 4 members asking the same question in 4 different ways in order to get Mr. Hollows to concede that there may be some ways that storrmwater could be better addressed was disappointing, but recovered nicely by the attorney and his client when they agreed to add some other stormwater measures. She said that she appreciated that and would condition her approval on the additional stormwater measures to be taken and the adjustment of the play set to the extent that it is moved far enough away from the lot line (which she believed to be 10').

Mr. Pesce said that he agreed and also supported the application. He felt that the proposed addition is a modest one done in an inconspicuous way which will be in keeping with the other homes in the area once it is constructed. Although the Schelhorn's did not create the stormwater management issue or the excess coverage issue, he said that they have been good enough to look to solve or at least mitigate it. He felt that, at the end of the day, it will actually serve as an improvement over the existing condition.

Mr. Keegan said that his concerns are the lot coverage percentage, as well as the F.A.R. He believed that the existing structure is adequate with both a sizeable kitchen and dining area. He appreciated the drainage capacity which will be increased, however he had concerns that it is very easy to increase a driveway size (although he acknowledged that it will be decreased in this instance), however he felt that it is something that can be done even accidentally and then we are bumping up the lot coverage even higher. He also felt that there *will* be some visibility from House #19. Although there is some evergreen coverage there, he said that trees come down all the time as evidenced recently by the weather. He believed that the second story, if not already, will have some visibility at some point. That being said, he said that they do have a similar style addition and so there would not be much to complain about. With all those factors taken into consideration and the current usability of the house, he said that he did not think he would support the application.

Dr. Behr said that he agreed with the majority of the Board members in believing that the applicants have sufficiently demonstrated that the site will accommodate whatever problems might arise from the increase in F.A.R. and the increase in height. He believed that the applicants have more than adequately demonstrated that in granting this application the positives would *far outweigh* any negatives and that, if approved, there would be absolutely no detriment to the Zone Plan or the purpose and intent of the Ordinance. He said that he would vote in favor of the application. He also said that he wished to second what was said by other members of the Board that the applicants were very well served by their planner.

Mrs. Raimer added that she felt that, in addition, they were very well served by their attorney.

Dr. Behr agreed.

Mrs. Raimer said that it was an unusual practice that we had all of those opportunities over the summer to proceed with the hearing and she felt that it was a conscious strategy on Mr. Diegan's part to delay until there were enough members present. She commended him for getting the results that he had hoped for. She said that she really thought the application would have to be carried to a second hearing and that it wouldn't be fruitless for him to come in over the summer, however Mr. Diegnan proved us wrong.

Mr. Diegnan thanked Mrs. Raimer.

Dr. Behr said that, along with other Board members, he would certainly condition the approval on the proper relocation of the playground area and the installation of the additional stormwater management as discussed.

Mr. O'Brien read a list of possible conditions for the Board to consider which included:

- Relocate the swing set to 10' away from the property line.
- Provide new F.A.R. numbers.
- Driveway setback to be increased by 5' at the eastern end and 1' at the western end.

- Add drywell and grate drain at the northeast corner of the house, across the driveway to meet current standards.
- No additional exterior lighting.
- A new variance for additional driveway drywell to be granted.
- Staff to review the architectural plans for the cantilever treatment.

Mr. Hoffman suggested a motion, based upon the sentiment of the majority of the Board members, to approve the requested use and bulk variances, the terms of such approval to be spelled out in detail in a follow up Resolution.

Such motion was made by Mr. Gerecht and seconded by Mrs. Raimer.

Mr. Lemanowicz said that the current regulation is 4" of rain off the impervious surfaces. He was not sure if one drywell is going to do that here and he did not know how many more they can fit, so he felt that we might want to "soften up" a bit on that condition.

Dr. Behr said that the applicants have indicated that they will do what is reasonable and feasible to additionally mitigate runoff. At this point, he said that the Board will leave it up to Mr. Lemanowicz and Mr. Hollows to work out. He felt confident that the two of them will find the right answer for this situation.

Mr. Hoffman said that he was intending to phrase it in general format such as "Revise or add to drainage/stormwater management measures as discussed at the hearing and as may be found acceptable by the Board's engineer".

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

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DISCUSSION
PROFESSIONAL REVIEW ESCROW TO BE COLLECTED RE: APPEAL OF ZONING OFFICER'S DETERMINATION BY WILLIAM E. S. KAUFMAN – CASE #05-11Z – 596 MEYERSVILLE RD. – BL 14701, L 27

Present: William E. S. Kaufman

Lucille Grozinski, certified shorthand reporter

Mr. William E. S. Kaufman, was sworn.

Mr. Hoffman stated that while he did not object to Mr. Kaufman being sworn, his understanding was that this is a preliminary procedural discussion, not the substantive appeal itself that has been filed. He said that the issue that brings the discussion here this evening is what is the amount of escrow to be deposited as was requested by the Board Administrator and, apparently, Mr. Kaufman has some views on that. He felt that that is the sole issue for consideration this evening.

Dr. Behr agreed. He asked Mr. Kaufman if he would like to be the lead speaker and tell the Board why he is present.

Mr. Kaufman said that he would be glad to and was excited that he was being given the opportunity to speak. He said that this procedure is stemming from a series of incidences that seemed to be "snowballed" with a particular piece of property. He said that he is the owner of 596 Meyersville Rd., Gillette. At some point over the course of this year a series of events occurred. He said that a structure was erected on the property without a permit. There was dialogue between himself and the Building Dept. and Thomas Delia, Zoning Officer, as to what the nature of the structure was and what its purpose was. He said that it was intended to be

moved to another location and, consequently, for circumstances beyond his control it is no longer going to be moved and so he moved to apply for an official permit for the structure. He said that the structure has no roof or walls and that it is essentially like a swing set but it happens to be a "solar arbor". He said that there was some confusion as to what it is and he was then directed to the Application Review Committee (A.R.C.) of the Planning Board. He said that he spoke briefly with Mr. O'Brien and a couple of the Board members on that subcommittee. He said he described the nature of the structure and at that time he felt that they all concurred that it was an accessory structure and that he would move to just simply permit – it wasn't in violation of any bulk requirements, stormwater, or any other type of zoning or planning issues. He said that it was simply an accessory use to the primary. Consequently to the action, he said that Mr. Delia denied the Zoning Permit application, although he said he does not have an official statutory reason that he felt it is *not* an accessory structure and did not agree with the A.R.C.'s decision, so he applied for an appeal under the current Ordinance. He said that he thought that the cost for an appeal is $500.00 and he spoke with Mrs. Wolfe and she indicated that she would need $2,000.00 to review this and he felt that he needed to step back and take a look at what we are talking about. He said that it is like somebody putting up a swing set and now he was into several thousand dollars to have a Board, a planner, attorney, and a report. He said that he was looking to the Board for some direction – to perhaps maybe withdraw the application and reapply again to Mr. Delia with a full and complete new application if perhaps there is some confusion as to what the actual application is because there was some discussion as to whether it is a temporary structure or a permanent one. He said that he would be happy to reapply if that makes the situation easier and avoids this Board altogether. He said that, in his opinion, it is within the jurisdiction of the Zoning Officer and not this Board to review a simple accessory structure that meets all of the zoning criteria and bulk requirements of the Ordinance. He was sure that it is under some discretion for him to send it to a Board, but he felt it seemed onerous on an applicant to have to go through all of these proceedings for something that doesn't affect really anybody or anything or any health, safety, welfare, occupancy or planning issues other than as an accessory structure. He said that that was his overview and that he is present to just to listen to the recommendation of the Board and that he would be happy to follow along and do what needs to be done post facto since he did understand that it is bolted to the ground with four bolts so, technically, it is erected and could come down in a matter of minutes. He said that it is not a building per se, but it is up and not permitted currently and so it is subject to a series of things that go along with unpermitted structures, so he would like to resolve it as quickly and painlessly as possible at the pleasure of the Board.

Mr. Hoffman said that he had an idea, especially in light of Mr. Kaufman's express desire (which he was sure the Board joins in), of resolving whatever the issue(s) may be as quickly and expeditiously as possible. He said that perhaps the proceeding could be amended so as to not merely or solely include an appeal, which is an interpretation on a point of law of a given provision of the Ordinance, but so as to also seek in the alternative relief if, and only if, it should be determined that the Board were inclined to uphold the Zoning Officer, it could at that moment move directly forward to the next step of alternative relief for a variance rather than have to first go through one set of hearings with notice, have a disposition of it, and then start from scratch with a second set of hearings. He said that this could cut out considerable discussion. He said that he was not touching on the issue of the dollars, which is something he does not get involved with other than, along with his colleagues, being compensated for their services. He felt that it can only work to everyone's, and notably the applicant's/appellant's, advantage in this case if there was this back-up type of variance relief included as part of the package if, and only if, it were deemed necessary rather than having to go through two separate entire proceedings.

Dr. Behr asked Mr. O'Brien if he understood correctly that this structure is designed to provide solar energy.

Mr. Kaufman replied, "Yes".

Dr. Behr said that the question was directed to Mr. O'Brien. Secondly, he asked Mr. Kaufman if it was his current intention to use this facility to provide solar energy for another building or buildings that are on the site?

Mr. Kaufman replied, "Yes".

Dr. Behr said that, in that case, what the applicant is currently proposing is simply to erect or get approval for a solar energy structure that would be, in that case, an accessory structure to the other buildings on the lot. He asked if his understanding was correct.

Mr. Kaufman replied, "That's correct".

Dr. Behr asked Mr. O'Brien, were such a thing requested by Mr. Kaufman, would he say that that would qualify as a legitimate accessory structure – if the purpose is to provide electrical current to other buildings on the site.

Mr. Hoffman asked if Mr. O'Brien would need, or prefer, to have additional information or data before rendering his opinion.

Mrs. Raimer said that what has been noticed is a procedural question and the procedural question is what has been paid or what is expected to be paid of Mr. Kaufman and to discuss the merits of his request or any potential application, she felt would be outside of the Board's jurisdiction at this very moment.

Mr. Fargnoli agreed.

Mrs. Raimer felt that what the Board has got to decide is the question that Mr. Kaufman brought before the Board and that is if he is obligated to pay what is statutorily required or what has been requested of him, which is beyond what is statutorily required but what has been the pattern and practice of this Board based upon prior experience so that the Board professionals may be compensated.

Dr. Behr said that his point was that he was not entirely sure why this is an issue that this Board should be dealing with at all.

Mr. O'Brien replied that it was because Mr. Kaufman has applied for a Zoning Permit. The Zoning Officer denied the Zoning Permit. The Zoning Permit request was for an accessory structure and the Zoning Officer said that it is *not* an accessory structure and has directed the applicant to seek a use variance. He said that Mr. Kaufman is here first to appeal the decision of the Zoning Officer and is saying that the Zoning Officer's decision is wrong and that he is going to show the Board that he is wrong. However, to get there, he has got to have a hearing in front of this Board. He said that the reason he is here tonight is because he disputes the amount of escrows and fees that are being requested of the applicant because he says they are different from the fees and the escrows that are listed in the Ordinance.

Dr. Behr said that he stood corrected.

Mr. O'Brien said that tonight the Board is being asked to look at those fees and escrows and whether or not this agency has a right to ask for more than what is called for in the Ordinance. After that decision is made, he said that presumably Mr. Kaufman will proceed with his appeal of the decision of the Zoning Officer which is one of the powers of the Zoning Board of Adjustment – that you can hear an appeal of his interpretation and decision and can overrule him or sustain him, based upon the evidence in front you. He said that there are two issues and the one in front of the Board tonight is the fees and escrows.

Dr. Behr thanked Mr. O'Brien and apologized.

Mr. Pesce said that it seemed to him to be a legal question. He said that we have an Ordinance that says we have a right to collect "x" and we've got a practice that causes us to collect "4 x", for all of the right reasons, he believed. He asked if we have the right to enforce a practice at variance with the Ordinance, because we are trying to protect everybody.

Mr. O'Brien replied that, even though it is a legal question, it is an interpretation that this Board, and only this Board, has the authority to make. He said that we are talking about initial deposits and escrows.

Mr. Lemanowicz said that an escrow is not a hard number. He said that he did not have the fee schedule, however the fee schedules that he has seen – a fee is a fee. It is *the* number and is not refundable whereas an escrow number is an initial deposit. It doesn't guarantee that that will be the end of it nor does it guarantee you will get some of it back. What he understood was happening here is that Mrs. Wolfe has anticipated that that initial deposit is not going to be enough by virtue of the age of the fee schedule and that we are simply trying to save another step in collecting more because we know that, by experience, that is not going to be enough.

In response to Mr. Gerecht, Mr. Lemanowicz agreed that, if an applicant were to submit the required $500.00, we would have the right, a short time later to say that additional escrow must be posted.

Dr. Behr said that the application fee has a very specific designation in order to accomplish a couple of different things and the escrow monies have a different purpose to them. He asked Mrs. Wolfe to elaborate in this instance.

Mrs. Wolfe explained that there is a $100.00 application fee for an appeal that is *non-refundable* and is intended to cover all of the in-house processing of the application, including her attendance at the meeting(s), from beginning to end no matter how many meetings the appeal may take. She said that the escrow fee is intended to cover any charges which are incurred by the Board professionals (Mr. Hoffman, Mr. Lemanowicz, and Mr. O'Brien) at their hourly rate for however long the appeal may take. In the case of *any* application, she said that there are normally site visits by the Board Engineer and Planner, their written reports, attendance at the meeting(s) by all three professionals, and the preparation of a Resolution by the Board Attorney at the end of the process, one way or the other. She said that she did not feel that $500.00 would go very far at their hourly/meeting rates.

In response to Mr. Fargnoli, Mrs. Wolfe said that the standard practice she has been following whenever there is a situation whereby a required escrow is only $500.00 (which includes cases when applicants are only applying for a bulk variance or multiple bulk variances), she explains at the bottom of the Administrative Review which she prepares that, although the required escrow is $500.00, she requests $2,000.00 to cover what she anticipates the costs would most likely be, and they could even be *more* than that. She said that she *does* know that $500.00 would not cover all anticipated billings. She agreed that the $2,000.00 figure is an *estimated* one. She said that Mr. Lemanowicz is correct, if there is not enough money in an escrow account, the Finance Department will request replenishment. If there is money leftover at the end, the applicant(s) are entitled to get the balance returned to them.

Dr. Behr said that he believed that $500.00 *doesn't even come close* to covering to covering the normal and regular anticipated expenditures of a hearing and the time that the Board's consultants have to put in in order for simply something to be heard.

Mrs. Wolfe agreed.

Mrs. Raimer asked Mr. O'Brien if the statute indicates what latitude the Board might have to charge escrow fees beyond the $500.00, or does it limit it to $500.00 without any other explanation or description of necessary fees.

Mr. O'Brien said that it describes the escrows as an "escrow deposit" and it states in Sec. 181.1 that "Every applicant before the approving authority at the time of the filing of the application shall pay the fees set forth below" and what is set forth below is a $100.00 (application fee under Sec. 181.1e(2) for appeals or interpretations) and a $500.00 escrow deposit.

Mr. Gerecht said that a deposit means that it could be increased or one could subsequently be asked for more.

Mrs. Raimer disagreed. She said that it says that a $500.00 deposit is required. It does not say that it may include, but not be limited to, it says a $500.00 deposit.

Mr. Gerecht asked if the Ordinance addresses additional fees over the deposit.

Mrs. Wolfe did not have a copy of the Ordinance with her but said that she was sure that additional funds required *is* addressed elsewhere in the Ordinance.

Mr. O'Brien referred to Sec. 182.5 entitled "Additional Escrow Funds Required" which states that "Additional escrow funds may be required when the escrow has been depleted to twenty (20) percent of the original escrow amount."

Mr. Gerecht said that that basically says that the $500.00 is just an *initial* amount and so what we have been doing as a practice is to say that $500.00 isn't going to get you out of the starting gate because it may be a little low and so we have asked for additional funds up front to ensure that we have enough money.

Mrs. Wolfe agreed.

Mrs. Raimer said that these were different ordinances that were drafted at a different time and she understood that the Planning Board took as its mission to revise them, however that did not materialize yet. She did not feel that it gives us the latitude, yet, to say that we can charge more until the escrow has been depleted to 20% of its original amount. She felt that it is a terrible practice, inefficient, and ineffective and we can't go forward that way, but did not feel that we have any choice unless that language is changed. She asked Mr. O'Brien if he agreed.

Mr. O'Brien replied, "Yes". He said that the Planning Board has directed Mr. Lemanowicz, Mrs. Wolfe and himself to look at it and come up with suggestions.

Mr. Fargnoli said that the $500.00 isn't going to go far and as soon as the consultants start working on the appeal, the applicant will have to be asked for more money. He said that 20% of $500.00 is $100.00 and so, within a week or two, the applicant will be asked for more money anyway.

Mr. Kaufman said that he had a question more than a statement. He asked, if his appeal becomes an application, is it required that all of the Board's professionals do a thorough review, report and a site visit in order for the Board to have legal understanding whether or not it should simply be the jurisdictional decision of the Zoning Officer, as opposed to creating a case out of it simply because of the simplicity of the matter and the fact that there are no bulk requirements and the Zoning Officer did not issue a violation of any sort – he simply said that it was not, in his opinion, an accessory structure. He said that he did not know that that says it is a use variance, a bulk variance – there is no legal indication to him, as the applicant. He said that he had no guidance in this matter other than "I went to see the Planner and we all concurred with the Planning Board that it is an accessory structure". He said that nothing has changed since then because the structure is actually there. He said that it simply should be a matter of "Okay, I get it, I don't know why it's here but let's kick it back and move it on". He said that, if it goes beyond that, okay, it's a hearing and let's pay for it. He said that it just seems onerous for something – to have one individual make a decision that is simply just wastes everybody's time – no disrespect to anyone here, working on things that are far less important than real subdivisions and real planning matters and issues that would be of concern to the municipality. He said that he was thinking that this is *much* more ado over nothing and he would like to just find a way – the best legal channel for us to – and that is why he asked if the Board might recommend that he reapply simply because there might have been a misunderstanding as to what the intent of the structure was with – the previous… He said that he did not understand, *or* maybe just have Mr. O'Brien answer the question so then he would have some guidance even though it is unofficial as to whether or not his is really going anywhere.

Dr. Behr said that, if he understood Mr. Kaufman properly, the point he is raising is that the issue that needs to be decided is one that would not normally require any kind of engineering testimony.

Mr. Kaufman replied that he did not believe so.

Therefore, Dr. Behr said that Mr. Kaufman's question is that, if the Board Engineer's insights and testimony are not required in order to resolve the issue, why should he pay for them?

Mr. Kaufman said that it is a question really – or why should it amount to $2,000.00+ worth of expense?

Dr. Behr said that the $2,000.00 is a little bit different because, if you don't spend the $2,000.00, you get it back. He said that he was hoping that this Board has demonstrated that we are not of the practice of wasting applicant's money. He asked Mr. Kaufman if he had accurately summarized the point he was making?

Mr. Kaufman replied that he felt that it was very accurate. He said that it is really a question if there is obvious criteria and evidence in a simple plan that the Board can review – the Board reviews plans every day – it doesn't require any special engineering degree or license to determine that a structure produces solar energy and it is accessory and inherently beneficial. He said that those are things he believed that Mr. Hoffman could validate without any engineering testimony. He said that if there was to be a question as to violations……

Mr. Fargnoli suggesting getting g back on track and sticking to the issue of the escrow fee to be charged.

Dr. Behr said that he wanted to accurately see if he could summarize the point that Mr. Kaufman has been raising. He said that what he was hearing Mr. Kaufman say is that he is not objecting to paying fees, he is objecting to have to pay fees for professional services provided by the Board that he feels are not needed. He asked Mr. Kaufman if that was correct.

Mr. Kaufman replied, "That's correct".

Dr. Behr said that that is the issue.

Mr. Kaufman said that it is a question, he believed, rather than a statement. He said that he is asking the question, is it really necessary to go through that exercise if there were a full blown application when something is simple…..

Mr. Pesce asked Dr. Behr, if that were the criteria, who makes that judgment and when?

Dr. Behr replied that he did not know the answer to the factual matter.

Mr. Pesce said that it was his sense that Mrs. Wolfe is the one who gets the application. Is she now going to determine if we need an engineer, planner, or attorney on a particular application?

Dr. Behr replied that, as a normal course, we just say that we don't know what we need which is why we need all three. He said that sometimes you need all three sometimes to determine that you need all three. Although we have not yet dealt with the fact that a very specific application of an interpretative nature may or may not require the presence of all of our consultants. He said that that is the issue that he saw that the Board has in front of it.

Mr. O'Brien said that he wished to correct a statement that Mr. Kaufman had made and it was that he believed that a summons was issued to Mr. Kaufman for this item and he believed that it was for an illegal use in the Zone?

Mr. Kaufman replied, "No". He said that it was for an unpermitted structure. In response to Mr. O'Brien, he confirmed that a summons was issued to him.

Mr. O'Brien asked if it was a current court matter.

Mr. Kaufman replied that the court has been working with him to resolve the matter in the Planning Department.

Mr. O'Brien said that Mr. Kaufman had made a statement that no summons on this.

Mr. Kaufman asked where he said that?

Mrs. Raimer said that he had said that no violation was issued.

Mr. Gerecht said that it is a summons.

Mr. Kaufman said that he meant that no *zoning violation* was issue. He apologized and said that that was not what he meant by no violation and that it was semantics.

Mrs. Raimer said that Dr. Behr's question was do we need to pay for an engineer when we are not sure we are going to need one if it is just an interpretation. But what Mr. Hoffman had opened up was, if we are going to listen to an interpretation and it should turn out to be that it *does* require a variance, then you want the applicant to be well positioned to have his application heard and, if that's case, then you would be going back to the drawing board looking to find out if you need the engineer, planner, and whatever other ancillary services. But if it is just a strict interpretation and then perhaps you don't need all of those services if it is just a strict interpretation, but then you can't say if the Board should decide that there should be a variance, that it could be heard that night. It would have to be a separate occasion – a separate hearing, separately noticed, more fees, different fees…. She said that Mr. Kaufman's question is that he wants to avoid the engineer's fee if it is just an interpretation.

Mr. Hoffman said that it is throwing the applicant's question back into the applicant's lap as far as how far and how quickly the whole process should be conducted.

Mrs. Raimer guessed that how expeditious the process *could* be is a matter for the applicant to decide, knowing what the options are.

Mr. Hoffman said that, as Board Attorney, he was leery about offering any advice of his own interpretation on what arguably is a point of law since he is one of the beneficiaries of the funds that are posted and he did not want to be charged or chargeable with saying it is too high, too low, etc. He said that he ultimately bears as much risk as anyone since he is the last professional in line in terms of the services performed. He said that, typically, at least for applications, there are site visits, written reports (which Mr. O'Brien and Mr. Lemanowicz are much more involved in rather than himself), his principal effort is in preparing the follow up Resolution memorializing whatever decision is made by the Board. For better or worse, he said that that is the way it has worked and he would prefer to see additional monies posted to cover expenses of that nature and those of his colleagues, but it is not for him to say whether that number should be "x, y, or z, or anything else". He said that he would take his chances and see how it works out if that will serve to express his view.

Mrs. Raimer said that, in order to stay focused on what we have before us – the procedural question as to whether or not Mr. Kaufman, if he were to file his appeal, have to pay more than $500.00 + a $100.00 application fee, plus a $100.00 notice fee, or should he be paying $2,000.00 or some other figure to cover expenses. She questioned whether the Board should narrowly interpret it and go with strictly what is in the Ordinance, then the $500.00 and two $100.00 fees would be all that Mr. Kaufman would be charged, but then once it is before the Board, it cannot take an action based upon Sec. 182.5 until adequate additional funds have been deposited. Hypothetically, she said that if we were to go forward with the $700.00 that is included in the Ordinance and, if Mr. Kaufman were to appear before the Board and the clock starts running and the Board Planner starts talking, we can't take an action because as the night is running on, the fees have been depleted. She said that it puts the Board and the applicant is this terrible position of where do we go from here?

Mr. Kaufman asked if it is the practice of the Board to stop an application in the middle with the clock running?

Mrs. Raimer replied, "No". She replied that what will happen is that you will have your hearing and you will have to get charged for somebody's time and then the Board would not be able to do an action. She said that you don't write a check at the moment, although she guessed you could.

Mr. Lemanowicz said that the issue is that with only $400.00 to spend, you might not even *get* to a hearing.

Mr. Gerecht agreed and said that you would have to replenish it.

Mr. Fargnoli said that that is the point.

Mr. Kaufman said that his question is really where is he to stand as an applicant when the Ordinance says something very specific, which is understandably in the Ordinance and he realized it is probably outdated and hasn't been updated. But as an applicant, he said that he did not have another vehicle in which to gauge the decision that he is making to actually make an appeal process.

Mr. Fargnoli asked Mr. Kaufman if he had talked to his attorney about it?

Mr. Hoffman replied that, if he did, that would be confidential attorney/client discussion.

Mr. Gerecht replied that Mr. Kaufman can violate it if he wants, but the attorney cannot.

Mr. Kaufman said that his next point is that he didn't have a specific ruling from the Zoning Department telling him what specific variances he should be requesting so, therefore, he can't build a legal team because he did not have enough information. He said that he was simply asking the Board, can we either kick it back to the Zoning Officer for a more specific ruling, or let him provide a limited amount of information and if the Board thinks it is going to go beyond $500.00, send him back and he will come back next month. He said that he did not feel like exchanging all this…….he said that we have already wasted too much time – your time.

Mr. Fargnoli asked Mr. Kaufman what the Zoning Officer had said his violation was.

Mr. O'Brien replied, "A use not permitted in the Zone". He said that Mr. Kaufman's attorney's, on April 27th, asked for discovery and so he presumed that by now, 4 months later, they have all of the documents that have been generated in this process.

Dr. Behr asked if the Zoning Officer had said that the solar energy structure was not permitted as an accessory structure in the Zone.

Mr. O'Brien replied that he did not know that. He said that the only thing he knew was a copy of an e-mail where he said that the summons was for a use not permitted in the Zone.

Mr. Lemanowicz felt that the issue might be is that the structure may be an accessory structure but that structure's use is a power generated facility and a power generated facility is not a permitted use in the Zone.

Mr. Kaufman said that it is not in writing anywhere and wasn't given to him so he did not know how that summation is actually determined.

Dr. Behr said that Mr. Kaufman is asking if he can withdraw it and resubmit it.

Mrs. Raimer asked what he would be withdrawing?

Mr. Kaufman said that there is an application for a Zoning Permit which was the recommendation of the Application Review Committee. He said that the result of that was a

letter or an e-mail, in the abstract, not an official letter that states specifically what variances or what violations, just not that it's not a permitted use. He said that he did not have any specifics as to what he meant by that. Is it the accessory structure? Is it the solar power, which is inherently beneficial by statute?

Mr. Fargnoli asked Mr. Kaufman if he had talked to the Zoning Officer.

Mr. Kaufman replied that he had and he said that he did not agree with the Planner's interpretation. He said that he asked him for more specifics and then he called Mrs. Wolfe.

Mr. O'Brien said that the summons had to cite a section of the Ordinance.

Mr. Kaufman replied that the summons is a completely different matter.

(Indiscernible. Several people speaking at one time).

Dr. Behr asked one person to speak at a time. He asked Mr. Kaufman to continue.

Mr. Kaufman said that when he said "non-permitted", he meant to say building permit. He said that the summons was specifically for a structure that was erected without a building permit. He said that it is not that it is non-permitted, it is just that it didn't have a building permit which is a separate issue altogether and has nothing to do with zoning.

Mr. Fargnoli expressed confusion and asked if the Board could just rule on the fee issue. He said that he did not know how to resolve the other issue.

Mrs. Raimer said that the applicant is also asking if he could withdraw his appeal and that is his prerogative and not for the Board to decide.

Mr. Pesce wondered if there is not another alternative to try to help in that regard. He said that he gathered that Mr. Kaufman has appealed from a determination of the Zoning Officer. He asked if the Board of Adjustment has the right, as a body, to hear that appeal and ask the Zoning Officer for the basis of his decision.

Several Board members answered, "Yes".

Mr. Pesce felt that that is something the Board ought to do, in addition to ruling on the fee question.

Dr. Behr replied that that is for later. But in the interest of saving time, he suggested that the Board rule on whether it has the right to request sufficient money of an applicant to properly hear the matter that is brought before the Board.

Mr. Gerecht added, "Even though it might be more than the numbers put into the Ordinance".

Mr. O'Brien said that the question in front of the Board is whether or not this Township agency has the right to request more than the Ordinance requires for an escrow deposit?

Dr. Behr said that, if he read the Ordinance properly, does the Ordinance not allow us to increase the amount of escrow to cover such costs as may be incurred by an action of the Board, such as a hearing?

Mr. O'Brien replied that there is no language to that effect in the Ordinance. He said that there is language that says when an escrow deposit is depleted to 20% of the original amount, then the Township and its agents, in this case the Finance Department, will go to the applicant and request additional escrow funds.

Mr. Fargnoli said that, as a practical matter, $500.00 would not be sufficient. He felt that to do that is a waste of everybody's time. It is that simple. However, he said that if he doesn't want to do it, he guessed he doesn't have to.

Dr. Behr said that he wanted to hear Mr. O'Brien's opinion and to see if Mr. Hoffman had anything else to add, after which he said he would call for a motion.

Mr. O'Brien said that he felt that the Ordinance is very clear. He said that you can ask for these amounts in the beginning and, as they are depleted, you can ask for more. He said that past practice has been a different matter and no applicant has raised a question and it has not been a question before this Board up until now.

Dr. Behr said that, if we collect what is called for in the Ordinance, the applicant needs to recognize that by insisting that we follow that, he places himself in considerable financial jeopardy because, if it looks as if we need to have a hearing, he will have to pay more money and he did not know if we could even hold a hearing unless the escrow were increased to cover the cost of at least a hearing.

Mr. O'Brien added that that is not a matter for this Board to decide or even worry about. It is something done by the Finance Department.

Dr. Behr confirmed that we have the right to charge what the Ordinance calls for, but questioned if we have the right to exceed that.

Mr. Fargnoli felt that, as long as (an applicant) consents, we can exceed it.

Mr. Pesce made a motion to continue our past practice of collecting $2,000.00 as an up front escrow fee, unless objected to by the applicant, in which case we will collect only those escrow deposits called for in the Ordinance but the Township shall bill timely for any additional funds necessary once those funds are depleted down to 20% and we shall condition any hearing on the application on the full satisfaction of any outstanding fees. Mr. Gerecht seconded the motion.

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

Mrs. Wolfe stated that Mr. Kaufman has filed an appeal and it was not clear to her whether the Board would prefer a court reporter to be present. If so, there is an additional $375.00 charge and, if not, there isn't. She asked for the Board's guidance.

Mr. Hoffman said that if there is a reasonable likelihood that further proceedings might ensue, irrespective of how the Board decides the initial questions that come before it, then he would recommend that a court reporter be in attendance and in a position to prepare a detailed verbatim transcript of the proceedings.

Mr. Gerecht and Mr. Fargnoli agreed that that is an excellent idea.

Mr. O'Brien said that the $375.00 amount is for an entire evening and would be pro-rated amongst other applications being considered the same evening.

Mrs. Wolfe agreed *only* if there are other cases being heard, but not if there are no other applications scheduled. However, according to the Ordinance, she said that she would need to collect the $375.00 up front.

The meeting adjourned at 11:05 P.M.

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DAWN V. WOLFE
Planning & Zoning Administrator