ORGANIZATIONAL MEETING
MINUTES

Tuesday, January 3, 2012

BOARD OF ADJUSTMENT **LONG HILL TOWNSHIP**

CALL TO ORDER AND STATEMENT OF COMPLIANCE

Mrs. Dawn Wolfe, Planning & Zoning Administrator, called the meeting to order at 8:08 P.M. She then made a statement that adequate notice of this meeting had been made by e-mail to the Echoes-Sentinel and Courier News and had been posted at Town Hall and filed with the Municipal Clerk on Wednesday, December 8, 2011.

PLEDGE OF ALLEGIANCE

OATH OF OFFICE

Mrs. Wolfe administered the Oath of Office to reappointed members John Fargnoli and Felix Ruiz.

ROLL CALL

On a call of the roll the following were present:

Christopher Collins, Member
John Fargnoli, Member
Edwin F. Gerecht, Jr. Member
Maureen Malloy, Member
Sandi Raimer, Member
Felix Ruiz, Member

Michael Pesce, 1st Alternate

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

Excused: Thomas Behr, Member
Richard Keegan, 2nd Alternate

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MOMENT OF SILENCE

A moment of silence was had for the late William M. Cox, Esq., author of New Jersey Zoning & Land Use Administration from 1966-2010. Mr. Cox was well known for his excellence in the field of land use law while exemplifying the highest standards of ethics. His contributions significantly enhanced the integrity of local government and he will be remembered in his field for years to come.

ELECTION OF CHAIRMAN

Mrs. Wolfe opened the Nominations for Board of Adjustment Chairman for the year 2012. Mr. Gerecht nominated Dr. Behr. Mrs. Raimer seconded the nomination and the Board unanimously reappointed Dr. Behr to the Chairmanship.

ELECTION OF VICE CHAIRMAN

Mr. Fargnoli nominated Mrs. Raimer as Board of Adjustment Vice Chairman for the year 2012. Mr. Collins seconded the nomination and the Board unanimously reappointed Mrs. Raimer to the Vice-Chairmanship.

PREPARATION OF ANNUAL REPORT ON VARIANCES HEARD BY ZONING BOARD

It was agreed that the Planning & Zoning Administrator will prepare the Annual Report on Variances Heard by the Zoning Board, as required by NJSA 40:55D-70.1. Copies of the report and Resolution, when adopted by the Board of Adjustment, will be forwarded to the Township Committee and the Planning Board.

Mr. Gerecht made a motion to adopt the following Resolution which was seconded by Mr. Pagano. All were in favor.

PLANNING & ZONING ADMINISTRATOR'S APPOINTMENT

Mrs. Raimer read the following Resolution.

BE IT RESOLVED by the Zoning Board of Adjustment of Long Hill Township that Dawn V. Wolfe be reappointed Planning & Zoning Administrator until the Organizational Meeting of January 2012. The Planning & Zoning Administrator will hold office hours at Town Hall, 915 Valley Road, Gillette, N.J., Mondays, Tuesdays and Thursdays 8:30 A.M. to 4:30 P.M., Wednesdays 8:30 A.M. to 6:30 P.M. and Fridays 8:30 A.M. to 2:30 P.M.

Mr. Gerecht made a motion to adopt it which was seconded by Mr. Collins. All members present were in favor.

Mrs. Wolfe thanked the Board members and said that she enjoyed working with all of them.

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Mr. Pesce made a motion to adopt the following three Resolutions of appointment for the Board Attorney, Planning Consultant, and Engineer, which was seconded by Mr. Gerecht. All were in favor:

ATTORNEY'S APPOINTMENT

WHEREAS, the Long Hill Township Board of Adjustment requires professional legal services which shall include but not be limited to attendance at meetings, preparation of administrative documents and correspondence, legal research, consultation with the Board Members, Administrator, and other municipal personnel, as well as with legal representatives of applicants, and miscellaneous legal services (except for litigation and certain other types of services such as (a) Any litigation handled for the Board; (b) Any extensive or major redrafting of Township ordinances; (c) Drafting of resolutions; (d) Review of easements, deeds, agreements or documentation pertaining to formation of a planned development, condominium, homeowners' association, or the like; (e) Other matters requiring attendance at conferences, work sessions, etc., out of the office; and providing advice as a non-fair open contract pursuant to the provisions of N.J.S.A. 19:44A-20.5); and

WHEREAS, the anticipated term of this contract is (1) year; and

WHEREAS, the Law Firm of Bernstein & Hoffman has submitted a proposal dated December 6, 2011 indicating that they will provide the legal services at a rate of Five Hundred and Fifty

($550.00) Dollars per meeting and an hourly rate of $158.00 for legal services not embraced within the basic arrangement as outlined above in Items (a) – (e); and

WHEREAS, the Law Firm of Bernstein & Hoffman has completed and submitted a Business Entity Disclosure Certification which certifies that the Law Firm of Bernstein & Hoffman has not made any reportable contributions to a political or candidate committee in the Township of Long Hill in the previous one year, and that the contract will prohibit the Law Firm of Bernstein & Hoffman from making any reportable contributions through the term of the contract; and

WHEREAS, in addition, this contract is for professional services and may be awarded without public bidding pursuant to N.J.S.A. 40A:11-5(1)(a)(i); and

WHEREAS, the Township Chief Financial Officer, in accordance with N.J.A.C. 5:34-5.1, has certified in writing to the Township Committee the availability of adequate funds to pay the maximum amount of the contract;

NOW, THEREFORE BE IT RESOLVED, by the Board of Adjustment of the Township of Long Hill, in the County of Morris, State of New Jersey as follows:

1. A professional services contract with Bernstein & Hoffman, Attorneys at Law, 2253 South Avenue, Suite 8, Scotch Plains, N.J. 07076 is hereby authorized.

2. The Board Chairman and Planning & Zoning Administrator are authorized to sign a professional service contract with Bernstein & Hoffman, in accordance with the following terms and conditions:

A. Term:	A period not to exceed 12 months
B. Rate:	$550.00 per meeting and $158.00 per hour for other legal services as stated in Items (a) – (e) above
C. Services:	The firm shall provide professional legal services.

3. The Planning & Zoning Administrator, in accordance with the provisions of N.J.S.A. 40A:11-5(1)(a)(i), is directed to publish a notice once in the Echoes-Sentinel stating the nature, duration, service and amount of this contract.

4. The Planning & Zoning Administrator shall make copies of this resolution available for public inspection at the Municipal Building, 915 Valley Road, Gillette, New Jersey, during regular business hours.

5. This contract shall be charged to 12-01-21-185-185-236. The certification of available funds by the Township Chief Financial Officer shall be attached to the original resolution and shall be maintained in the files of the Planning & Zoning Administrator.

6. The Business Disclosure Entity Certification and the Determination of Value shall be placed on file with this Resolution.

Mr. Hoffman said that it was his pleasure to serve the Board for another year.

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PLANNING CONSULTANT'S APPOINTMENT

WHEREAS, the Long Hill Township Board of Adjustment requires professional planning services which shall include but not be limited to attendance at Board Meetings; field work, research and writing; and any other task assigned by the Board of Adjustment; and providing advice as a non-fair open contract pursuant to the provisions of N.J.S.A. 19:44A-20.5; and

WHEREAS, the anticipated term of this contract is (1) year; and

WHEREAS, the Firm of Shamrock Enterprises, Ltd. has submitted a proposal dated November 21, 2011 indicating they will provide the planning services at a rate of Five Hundred and Fifty ($550.00) Dollars per full Board meeting and an hourly rate of $125.00 for all other planning services, including field work, research and writing; and any other task assigned by the Board; and

WHEREAS, the firm of Shamrock Enterprises, Ltd. has completed and submitted a Business Entity Disclosure Certification which certifies that the Firm of Shamrock Enterprises, Ltd. has not made any reportable contributions to a political or candidate committee in the Township of Long Hill in the previous one year, and that the contract will prohibit the Firm of Shamrock Enterprises, Ltd. from making any reportable contributions through the term of the contract; and

WHEREAS, in addition, this contract is for professional services and may be awarded without public bidding pursuant to N.J.S.A. 40:11-5(1)(a)(i); and

WHEREAS, the Township Chief Financial Officer, in accordance with N.J.A.C. 5:34-5.1, has certified in writing to the Township Committee the availability of adequate funds to pay the maximum amount of the contract;

NOW, THEREFORE BE IT RESOLVED by the Board of Adjustment of the Township of Long Hill, in the County of Morris, State of New Jersey, as follows:

1. A professional services contract with Shamrock Enterprises, Ltd., Madison House, 866 Madison Ave., Rahway, N.J. 07065 is hereby authorized.

2. The Board Chairman and Planning & Zoning Administrator are authorized to sign a professional service contract with Shamrock Enterprises, Ltd., in accordance with the following terms and conditions:

   A. Term: A period not to exceed 12 months
   B. Rate: $550.00 per Board meeting and $125.00 per hour for all other work including field work, research and writing and any other task assigned by the Board
   C. Services: The firm shall provide professional planning services

3. The Planning & Zoning Administrator, in accordance with the provisions of N.J.S.A. 40A:11-5(1)(a)(i), is directed to publish a notice once in the Echoes-Sentinel stating the nature, duration, service and amount of this contract.

4. The Planning & Zoning Administrator shall make copies of this resolution available for public inspection at the Municipal Building, 915 Valley Road, Gillette, New Jersey during regular business hours.

5. This contract shall be charged to 12-01-21-185-185-238. This certification of available funds by the Township Chief Financial Officer shall be attached to the original resolution and shall be maintained in the files of the Planning & Zoning Administrator.

6. The Business Disclosure Entity Certification and the Determination of Value shall be placed on file with this Resolution.

Mr. O'Brien said that it was his pleasure to serve the Board

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ENGINEER'S APPOINTMENT

WHEREAS, the Long Hill Township Board of Adjustment requires certain technical and/or professional services hereinafter described as Engineering Consulting Services which shall include but not be limited to the following: serve as the general engineering consultant to the Board of Adjustment; attend all meetings of the Board of Adjustment as requested; advise the Board of Adjustment on all engineering matters under their jurisdiction; the Consultant shall be available for consultation by telephone at all reasonable times; represent the Board of Adjustment as its Professional Engineer pursuant to N.J.S.A. 40:55D-24; review site and subdivision plans, as requested; prepare special reports, plans, studies, applications, and similar work, as requested; testify on behalf of the Board of Adjustment before Commissions, Agencies, or Courts of the State of New Jersey, as requested; and perform any other related engineering work, as requested; and

WHEREAS, the anticipated term of this contract is (1) year; and

WHEREAS, Remington, Vernick, & Arango Engineers., has submitted a proposal dated December 6, 2011 indicating they will provide engineering services at a rate of One Hundred Eighty Three Dollars and Thirty Three Cents ($183.33) per hour to attend night meetings. An hourly rate of One Hundred and Twenty Five Dollars ($125.00) will be billed for engineering services for all other work including field work, research writing, and any other task assigned by the Board; and

WHEREAS, the firm of Remington, Vernick & Arango Engineers has completed and submitted a Business Entity Disclosure Certification which certifies that the Firm of Remington, Vernick & Arango Engineers has not made any reportable contributions to a political or candidate committee in the Township of Long Hill in the previous one year, and that the contract will prohibit the Firm of Remington, Vernick & Arango Engineers from making any reportable contributions throughout the term of the contract; and

WHEREAS, in addition, this contract is for professional services and may be awarded without public bidding pursuant to N.J.S.A. 40A:11-5(1)(a)(i); and

WHEREAS, the Township Chief Financial Officer in accordance with N.J.A.C. 5:34-5.1 h as certified in writing to the Township Committee the availability of adequate funds to pay the maximum amount of the contract;

NOW, THEREFORE, BE IT RESOLVED, by the Board of Adjustment of the Township of Long Hill, in the County of Morris, State of New Jersey as follows:

1. A professional services contract with Remington, Vernick & Arango Engineers, 300 Penhorn Avenue, 3rd Floor, Secaucus, NJ 07094 is hereby authorized.
2. The Board Chairman and Planning & Zoning Administrator are authorized to sign a professional service contract with Maser Consulting, P.A., in accordance with the following terms and conditions:
   A. Term: A period not to exceed 12 months.
   B. Rate: $183.33 per hour to attend night meetings; and $125.00 per hour for other engineering services as stated above.
   C. Services: The Firm shall provide professional engineering services.
3. The Planning & Zoning Administrator in accordance with the provisions of N.J.S.A. 40A:11-5(1)(a)(i), is directed to publish a notice once in the Echoes-Sentinel stating the nature, duration, service and amount of this contract.
4. The Planning & Zoning Administrator shall make copies of this Resolution available for public inspection at the Municipal Building, 915 Valley Road, Gillette, New Jersey during regular business hours.
5. This contract shall be charged to 12-01-21-185-185-237. The certificate of

available funds by the Township Chief Financial Officer shall be attached to the original Resolution and shall be maintained in the files of the Planning & Zoning Administrator.

6. The Business Disclosure Entity Certification and the Determination of Value shall be placed on file with this Resolution.

Mr. Lemanowicz expressed his appreciation and said that he looked forwarded to working with everyone in 2012.

Looking forward to 2012, Mrs. Raimer acknowledged that the Board has a lot of challenges financially and expressed appreciation to the Board's professionals for keeping the rates of their services as they have been for past years.

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Mr. Pesce made a motion to waive the readings of the following items up to and including "Meetings – Executive and Regular" which was seconded by Mr. Gerecht. All were in favor.

CALENDAR ORDER OF BUSINESS

BE IT RESOLVED by the Zoning Board of Adjustment of Long Hill Township that the Calendar Order of Business shall be mailed or given to each member of the Board on or before the Friday before each designated meeting.

Pursuant to the requirements of Section 13 of the Open Public Meetings Act, agendas for Regular and Special Meetings of the Board of Adjustment will be posted at Town Hall as required.

NOTICE OF PUBLICATION

BE IT RESOLVED by the Zoning Board of Adjustment of Long Hill Township that the following newspapers are designated to receive Notices as required by the Open Public Meetings Law:

1) Courier News
2) Echoes-Sentinel

All notices required by the provisions of the Open Public Meetings Law shall be furnished the newspapers designated for such purposes.

NOTICE OF MEETINGS

BE IT RESOLVED by the Zoning Board of Adjustment of Long Hill Township, pursuant to the authority of Section 14 of the Open Public Meetings Law that the sum of $20.00 annually is hereby fixed as a reasonable sum to be prepaid the Planning & Zoning Administrator by any person desiring notice of all Meetings to cover the cost of providing said notice. All requests to be made to the Planning & Zoning Administrator.

MINUTES

BE IT RESOLVED by the Zoning Board of Adjustment of Long Hill Township:

1) The minutes of the regular public meetings shall be sent to the Board of Adjustment members and that a copy of said minutes be posted at the Town Hall. By this procedure and/or unanimous agreement of the Board Members, the reading of said minutes shall be waived. Copies will be sent to the Board of Adjustment Attorney, the Township Engineer, the Township Planning Consultant, and the Township Library. Copies will also be made available to the public upon request. The charge for such copies of Minutes will be as determined by Township Ordinance.

2) A recording will be made of all Public Meetings and will be retained for two years or until after the conclusion of the appeal time or the conclusion of any litigation, whichever is later. Members of the public may listen to any tape by contacting the Planning & Zoning Administrator and establishing a mutually convenient time and place for the review. Arrangements for transcripts can be made through the Planning & Zoning Administrator.

3) The cost of providing copies of audio recordings of meetings to any person desiring the same shall be in accordance with the annual fees established by the Township committee for copies of public records..

MEMBERSHIP – NEW JERSEY PLANNING OFFICIALS

BE IT RESOLVED by the Zoning Board of Adjustment of Long Hill Township that the Board approves the application for membership for 2012 in the New Jersey Planning Officials at the established annual fee for 2012.

MEETING CUT-OFF

BE IT RESOLVED by the Zoning Board of Adjustment of Long Hill Township that, as a matter of procedure, it is the intention of the Board of Adjustment not to continue any matter past 11:00 P.M. at any regular or special meeting of the Board unless a motion is passed by the members then present to extend the meeting to a later specified cut-off time. Further, that this notice shall be made part of published operating procedures for applications to this Board and shall be announced at the opening of each meeting.

MEETINGS (EXECUTIVE AND REGULAR) FOR 2012

BE IT RESOLVED by the Zoning Board of Adjustment of Long Hill Township that meetings, in general, will be held on the first and third Tuesdays of each month with the following exceptions: in July, the Board will only meet on the third Tuesday, and in August and December, the Board will only meet on the first Tuesdays. Unless otherwise scheduled, all meetings will begin at 8:00 P.M. (or immediately following an executive session if deemed necessary) in Town Hall, 915 Valley Rd., Gillette, N.J. Following is the Regular Meeting Schedule. If deemed necessary, Executive Session meetings of the Zoning Board of Adjustment will be held in Town Hall, 915 Valley Rd., Gillette, N.J. on the same dates as listed below at 8:00 P.M. *prior* to the regular meeting.

2012 BOARD OF ADJUSTMENT CALENDAR

January 3, 2012 – Organizational Meeting – 8:00 PM
January 17
February 7
February 21
March 6
March 20
April 3
April 17
May 1
May 15
June 5
June 19
July 17
August 7
September 4
September 18
October 2
October 16
November 6
November 20
December 4

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Mrs. Raimer said that she knew that Dr. Behr and Mrs. Wolfe went to great effort to work with what little money they had to try and make the 2012 Proposed Budget work. She noted that there is no padding anywhere.

Mr. Gerecht made a motion to adopt the following Budget for 2012 for submission to the Township Committee which was seconded by Mr. Ruiz. All were in favor.

2012 BUDGET

BE IT RESOLVED BY THE Zoning Board of Adjustment of Long Hill Township that the following Budget for 2012 is approved for submission to the Township Committee:

ACCT. NO.	ITEM	BUDGETED 2011	BUDGETED 2012
21-185-185-101 & 101	Salary/Wages	$ 34,552.00	$ 35,233.04
21-185-185-201	Miscellaneous	50.00	50.00
21-185-185-203	Office Supplies	600.00	600.00
21-185-185-205	Postage	- 0 -	- 0 –
21-185-185-206	Printing	350.00	350.00
21-185-185-209	Conventions/Conferences.	350.00	350.00
21-185-185-211	Equipment/Service Agreements	150.00	150.00
21-185-185-213	Legal Advertising	150.00	150.00
21-185-185-214	Publications	425.00	425.00
21-185-185-219	Dues/Membership	200.00	200.00
21-185-185-227	Shorthand Reporter	- 0 -	- 0 –
21-185-185-236	Legal	500.00	500.00
21-185-185-237	Engineering	- 0 -	200.00
21-185-185-238	Planning Consultant	300.00	300.00
21-185-185-271	Education/Training	150.00	150.00
		$ 37,777.00	$ 38,658.04

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PUBLIC HEARING
RESTORE MEYERSVILLE, LLC **#05-11Z**
(WILLIAM E. S. KAUFMAN) **Appeal of Zoning Officer's**
596 Meyersville Road **Determination**
Block 14701, Lot 27

Present: William E. S. Kaufman

R. J. O'Connell, certified shorthand reporter

Mrs. Raimer said that the last time Mr. Kaufman had appeared before the Board was Oct. 4, 2011 at which time there was a discussion about escrow fees and the payment of the statutorily required $500.00 or the $2,000.00 amount that we, as a matter of pattern or practice, request of applicants. After some discussion, it was concluded that Mr. Kaufman would feel more comfortable paying the amount that was statutorily required rather than the amount that we customarily ask applicants pay. She said that the amount is different than what is statutorily required because we have found that, over time, applications tend to cost about that much before they are concluded. At this point, she said that there is $500.00 in escrow and the fees that have been incurred so far have exceeded the $500.00 in escrow. She said that those fees are approximately $960.00 *greater* than the $500.00 that was submitted. She believed that the fees incurred to date amount to approximately $1,460.00, which do not include any costs associated with tonight's meeting, and she wanted to be sure that Mr. Kaufman was aware of that and to help him understand *why* he was requested to post the greater amount, rather than the $500.00.

Mr. Kaufman thanked Mrs. Raimer.

Mrs. Raimer said that we are here tonight to talk about the decision that was rendered on June 22, 2011 by the Township Code Enforcement Officer, Thomas V. Delia. She said that, on rare occasion, the Board is asked to decide an appeal of a Zoning Officer's decision. She said that the Board's job tonight is to determine whether or not it thinks that Mr. Delia made the right decision on June 22, 2011 based upon the facts that he had before him. She said that she would like to see this kept chronological so that it stays organized and she felt that the best way to start would be

for Mr. Kaufman to tell the Board the basis for his request for a Zoning Permit and how it came to be that a decision needed to be rendered on June 22, 2011.

Mr. Hoffman believed that there is, or should have been, notice served and published in the newspaper at least 10 days prior to today. He said that he was asked to review the *form* a proposed notice and, ultimately, after some correspondence back and forth there was a document prepared and submitted which, in his opinion, was adequate insofar as the substance of the notice.

In response to Mr. Hoffman, Mrs. Wolfe confirmed that proof of service was submitted.

In that case, Mr. Hoffman felt that, procedurally, the appeal is properly before the Board to hear, consider, and ultimately decide.

Mr. Kaufman said that, without going into the *entire* history, because he did not know that that was entirely necessary to do from a chronological respect from beginning to end, but as another recap, he said that he *knew* we discussed this at the last hearing, and he gave a brief overview as to what was happening with respect to this structure and to the property. He said that he would give a *general* review and then we can get into more detail if the Board has questions. He wanted to get to the issue at hand which is an appeal of the Zoning Officer's decision that the structure doesn't actually meet the definition of an accessory structure. He said that that is the biggest item that we have before us and that was what he was asking the Board to overturn.

Mrs. Raimer said that is accessory structure based upon the use that was proposed at that time.

Mr. Kaufman replied that there are two issues that are distinctly different from a zoning perspective. The first is, is it an accessory structure and second is that of use. He said that the structure we are talking about is indeed, as everyone is aware at this point, is an aluminum solar frame that holds solar energy panels. He said that the structure was intended to go up and come down in a very short period of time at its original inception. He said that there is correspondence going back and forth between Mr. Delia and himself and it has since changed due to a number of other factors. He said that they decided after a few weeks that it was *not* going to be taken down and would remain a permanent structure. At that point, he said that he discussed with Mr. Delia the options of obtaining a Zoning Permit. He said that he was instructed to go before the Application Review Committee (A.R.C.) of the Planning Board, which he did. He said that there were some members there, including Mr. O'Brien, that reviewed the site plan and "we" determined (he believed unanimously), and Mr. O'Brien even sent a memo that said that "we" felt it was, in fact, an accessory structure. Just to be clear, and in fairness to Mr. O'Brien's decision, he said that there has been a lot of discussion about the idea of training facilities and training apparatus' and everything and he said that his instruction was not very clear when they discussed it. He said that when he first discussed it, it was about erecting the structure *one* time and that one time would be enough to train because it wasn't a place of business where people are going to come and take it up, put it down, take it up, and put it down. He said that that was not ever the intent. When he mentioned the words training facility, it was to go up so that the guys, when they put it on the other site, understood what they were doing and it didn't take terribly long to do on another site. Once it was up, he said that the training exercise concluded and it was now a structure that was in place. He said that that was part of his dialogue with Mr. Delia and he felt that that was one of the bases on his second point in his letter that it is not a permitted use to be a training facility. He said that it is not a facility – it is just a structure that had to be built once and it was, in fact, going to be taken down and put somewhere else and that was the extent of the training.

Following the A.R.C. meeting, he went back to Mr. Delia and explained to him that he was seeking a Zoning Permit and that led him to the June 22, 2011 denial letter. He knew there was additional correspondence and, as a matter of disclosure and discovery, he felt that the Board was privy to all of the information and that is where we stand today. He said that he got caught up in the escrow issue because, to him, it was just a matter of going back to look at the Ordinance,

have Mr. Delia review it (which he did not feel should take more than 15 minutes) and then he wondered why do we need to spend $3,000.00 and have all kinds of reports and planning issues made. He said that we no longer have the issue of use on the table, in his opinion, because it isn't temporary by any nature – it is a permanent structure and it is certainly an accessory and it's subordinate by all definitions, including case law within the State and Cox and other places where anything that is a subordinate use to a primary use is, in fact, accessory, provided that it is not primary. He felt that the issue of use, in terms of it being a training aid, was really not of clarification and he felt that that is really the most important issue on the use side of things. In terms of a structure, he said that Mr. Hoffman provided us with several definitions in his letter of December 28, 2011, both from the Long Hill Ordinance, as well as from the Moskowitz and Lindbloom authority on definitions that appear commonly in land use applications. In terms of the definitions within the Ordinance itself, he said that there is no definition of *accessory structure*, however in this case under the General Terms, it appears that the words *structure* and *building* are "sort of" used interchangeably in terms of their intent, so if you look at the definition under *accessory building* in Sec. 110 of the Ordinance – a subordinate building/structure on the same lot with a primary building, or a portion of the main building, occupied or devoted (he then noted that this is not an occupy able structure, obviously, but it has a purpose, therefore it's devoted) exclusively to an accessory use. He said that, if you go to the next definition right below that, it explains what an accessory use is – it says a use naturally and normally incidental and subordinate to the primary use of the premises. He submitted to the Board that electrical power and electricity is subordinate to *every* building in Long Hill Township no matter *what* the use is. He said that it is not producing in any way shape or form, *more* power than would ever be consumed on that site – whether it be residential or commercial in any way – it is always going to be subordinate, therefore it is accessory just by definition. Referring to Pg. 7 of Mr. Hoffman's excerpts from Cox/Koenig's New Jersey Zoning & Land Use Administration (2011 Edit.), he said there are other examples of how, under the comments about N.J. case law, that is commonly, habitually, and by long practice as being established or reasonably associated with the primary use. He said that, again, it is another piece of the definition that talks about it being reasonably associated with the primary use and not necessarily directly subordinate and later on in the same description, that definition also talks about planning impacts and how, if the proposed accessory uses are, in fact, significantly less than the principal use. He submitted that there really are no planning issues here whatsoever – this is a completely grid-type community and there is no solar array or anything else going on here, in fact just a few hundred yards to the east on Long Hill Rd. there is a residential structure with a series of solar panels mounted in the back yard that, in his opinion, are identical in terms of its use and subordinate use to what we are talking about here within the same municipality. He did not have any details as to the Block and Lot number of that property and did not do a lot of research on it - he was using it as a point of reference.

In Chapter 10 of Moskowitz, with respect to accessory structures and uses, he said that it goes on to define what an inherently beneficial use is with respect to accessory structures providing alternative energy sources as they are defined in Sec. 40:55D-7. He said that this is significant only in the fact that this happens to be a renewable energy source and it kind of bundles the words together and we can infer from it that this is an accessory structure providing alternative energy – it is *exactly* that. He said that it fits this definition almost verbatim in Moskowitz and he felt that those were pretty clear indications that what we are talking about is, in fact, accessory and it is an accessory structure to this particular property. He said that there are no other conditions or other things that he felt he needed to get into at this point, because he said he was just trying to get beyond these two primary concerns or points that Mr. Delia made in his denial when he said that it does not fit the definition of an accessory structure under Sec. 110. He said that he then went on to cite the two definitions which he just recited and secondly that the purposes of a construction aid. At the risk of getting too far over his head in terms of legal precedence, he said that there is some N.J. case law regarding what he called "a fish is a fish" , regardless of what we want to call it, and he did not want to go down that path here because he said he was not prepared to argue that, but he thought that common sense would say that something is what it is, regardless of what we call it. He said that he can't go out there and tell everybody – couldn't tell Mr. Delia that this is just a clothesline – that they are going to hang clothes on it. He said that it has a purpose and is, in fact, a solar arbor and it is accessory in terms of its use and its structure and it is providing solar energy to those primary uses which is a

mixed use facility residential and retail/resale and storage, which has been approved from a previous 2006 Bd. of Adj. Resolution from a previous owner. He said that that was his summary and that he would be happy to get into more detail and discussions on this, but this is where we are today in terms of what he thought needs to be resolved.

Mrs. Raimer said that she appreciated Mr. Kaufman's analysis. She wanted to stay focused on the narrow issue of whether or not Mr. Delia made the right decision based upon the information that was available to him at that time. It was her understanding in looking at the written record that the proposal was to erect a temporary solar structure. Referring to Mr. Kaufman's Application Review Committee (A.R.C.) information, she said that she was not sure if he completed it or it was completed by a Township Official.

Mrs. Wolfe said that the information she received was as it was provided to her. She asked Mr. Kaufman if *he* had completed the A.R.C. application.

Mr. Kaufman replied that he did not have a copy in front of him.

Mrs. Raimer offered to show him the copy she had. She noted that it was a standard form from the Township entitled "Application Review Committee Information" where this is some pedigree information and then the general proposal which states "Erect a temporary solar structure for demonstration purposes, testing and fitting of components until the proto-type may be relocated to another municipality pending approval by the governing body." She did not see a date on it.

Mr. Thomas Delia, Zoning Officer, handed Mr. Kaufman a copy of his completed A.R.C. application.

Mrs. Raimer asked Mr. Kaufman if he had completed the A.R.C. application or if someone in the Township completed it for him. She said that this is what she had in her record and this is what she was looking at to help support Mr. Delia's decision. She asked Mr. Kaufman if he was suggesting that this was not what she should be looking at.

Mr. Kaufman replied, "No" and said that what he was suggesting was dialogue……and to be perfectly frank he said that he had no idea there were such implications to the word "temporary". He said that the application was filled out by a subordinate within his firm. He said that he and Mr. Delia had a dialogue, although brief, and there were several members from his firm and from the construction firm and they were talking about this through with the least amount of resistance and they *thought* they were just applying for a permit and then, once they were moved on, they gave some description without having a lot of counsel to the word "temporary". He said that it turns out there are a lot of implications to the word "temporary" and there is no such thing going on here any longer. He felt that that was clarified at the last hearing and he said that there is not a temporary structure and it is, in fact, a permanent structure. The idea that it was at one point going to go up and go down in a matter of a couple of days or a couple of weeks went by the wayside within the first -----maybe by January or February, it was probably in mid-March ---- once that hearing in Berkeley Heights happened it was no longer coming down and Mr. Delia took further action to have him move through the process. He felt that the notion of it being temporary was an error on his part in terms of what its implications meant and he felt that that was clarified at the last hearing. He again went back to the idea that it still is what it is, in terms of it being a structure and it is permanent and it has all of the same implications regardless of whether he wanted to call it a swing set or something else.

In response to Mr. Fargnoli, Mr. Kaufman said that, before they got into any dialogue at all with the Township, the (solar arbor) was just supposed to go up and come down. But, the idea of it being some kind of a staged demonstration construction project for training and everything, he felt that it was just a misunderstanding because they were talking about building it and, as it got built once, it was a training aid. He said that that was really the whole idea – that this thing was going to go up and down in a very short amount of time. Once it got into the process and they realized that it was going to need to stay, he said that they reacted within hours of getting information and correspondence to Mr. Delia to move forward to get the proper permitting of the structure handled.

Mrs. Raimer asked Mr. Kaufman to point her to what Mr. Delia had for the basis of his decision that was in writing that suggested a different proposed use for the structure.

Mr. Hoffman interjected and said that, somewhat belatedly, because we are hearing what he believed to be more than a just legal argument and, in fact, this overlaps with the factual presentation and testimony, he felt that to be on the safe side Mr. Kaufman should be sworn insofar as this appeal proceeding is concerned.

Mr. Kaufman was sworn. He reaffirmed whatever he had stated in this proceeding prior to being sworn.

Mr. Hoffman said that it might be appropriate for someone to have Mr. Delia also sworn and to testify, among other things, whether at the time he rendered his 6/22/11 written determination concerning this property whether he understood the facility and structure to be permanent or temporary because we are hearing now from Mr. Kaufman that, separate from what his original intent may have been, he clearly at some point subsequently came to the understanding that this would be a permanent type of facility on the site. He felt that the Board should hear from Mr. Delia whether, at the time he rendered his decision, he understood the duration or longevity of this facility to be. Hopefully, he said that they were both dealing with the same understanding and, if not, we will address whatever the consequences will be.

Mrs. Raimer replied that she would like Mr. Delia to answer a question, however she did not want everything to hinge on the word “temporary”. She said that there was a lot more to this general proposal than the word “temporary”. While “temporary” could factor in, she said that there was also the rest of the wording here “for demonstration purposes, testing & fitting of components until the proto-type may be relocated”. She said that she wanted him to look at the whole definition when he answers the question and also to answer the question that Mr. Hoffman posed.

Mr. Thomas Delia, Zoning Official, was sworn. He said that he has served in that capacity for the last 7 years and agreed that his duties include matters such as evaluation of particular proposed uses of property and what the zoning consequences of such proposals would be in terms of permissibility and compliance with the Ordinance, noncompliance, and issues of that sort.

In response to Mr. Hoffman, Mr. Delia said that on 2/17/11, he received a phone call pertaining to a large structure that was built behind 596 Meyersville Rd. He said that he went out to investigate and found a large framed structure, the type of which he had never seen before. He took several photos of it and noted that there was debris scattered around it and pushed up in different areas. There were no soil erosion control measures taken, nor were there any construction placards. At that point, he said that he put a Stop Work Order on the project because he did not know what the construction being done there was. The following day, he said he received a phone call from the property owner and he explained that it was going to be a proto-type solar panel unit that was going to be placed in a parking lot at the Union Center Bank on Springfield Ave./Plainfield Ave. in Berkeley Heights. He said that Mr. Kaufman explained that it would be gone in 2-3 weeks and he allowed him that time to have the item removed and he said that a letter would be drafted and mailed. He said that he agreed to it and then confirmed with the Construction Official of the Township of Berkeley Heights that there was an application filed that was going to be going before them regarding this same matter. By 3/30/11, he said that he had received no information from the applicant and no action was taken. By 4/19/11, there was still no action taken with regard to removing the arbor or coming in to get a Zoning Application. Two summonses were then issued. One was issued for a use violation and the other was issued for expanding a nonconforming use. He said that several letters went back and forth from Mr. Kaufman’s attorney regarding discovery and he also received a letter from Mrs. Wolfe regarding the application to the A.R.C. He said that he had an application for a Zoning Permit in front of him that was not dated, but was from Restore Meyersville, LLC, which was the application that triggered his 6/22/11 denial letter. He said that the first letter he had received was 3/15/11 and it was pertaining to the 2/17/11 letter regarding a phone conversation he had with Mr. Kaufman. He said that he had stated that some of the debris had been removed and

he was moving forward on the building. He said that he also had a letter given to him by the Construction Official that he had received on 2/22/11 advising him that a solar arbor had been erected on the premises. It stated that it was a pre-engineered arbor and was temporarily fastened to a concrete slab with the purpose being that of a construction training aid. It stated that no permanent alterations were made to the site and that the area of the impervious courtyard that was disturbed would be returned to its previous state upon the dismantling or removal of the arbor. It also stated that no bulk setbacks, stormwater management, roof areas, etc. were adversely affected as a result of the temporary installation that is located between 3 surrounding existing buildings and it has no roof or side walls. He said that he then received the 3/15/11 letter and, from that point, no other action was taken until the summonses were issued on 5/4/11.

In response to Mr. O'Brien, Mr. Delia said that the summonses were written for failure to meet permitted uses in a B-1-20 Zone and the other was for the failure to meet the certificate of a nonconforming use. He said that he received a Zoning Application from Restore Meyersville, LLC, which was undated and not stamped "received", although he estimated that it was received on 6/20/11 or 6/21/11. He said that the explanation section of the application was not completed, therefore he was working off of the information that he already had and the information that he had received from Mrs. Wolfe from the A.R.C. as to what the structure was going to be. He said that he was still working under the impression that it was going to be a temporary solar arbor unit as a training aid and that it was going to be erected and then taken back down again. Based upon that understanding, he acknowledged that he still denied it even though the Ordinance does include a specific provision that essentially says that uses that may be non-permitted may nevertheless be allowed in the judgment, determination, and discretion of the governing body if they deem it to be an acceptable temporary use.

Mr. O'Brien said that the matter before the Board this evening is that Mr. Delia has found that this structure that was erected by Restore Meyersville was not a permitted use in the B-1-20 Zone and did not meet the Resolution by this Board for a certificate of nonconforming use. He said that the Board must determine if Mr. Delia was correct, or wrong. Is this a permitted or a non-permitted use in the B 1-20 Zone, or does this meet or not meet the certificate of nonconformity that was issued for this property by this Board?

Mr. Kaufman felt that there was a point that is relevant that is missing from all of this. He said that there seems to have been some lapse of time in the process from when he went before the A.R.C. and when this application was denied. During that time, he said that there was more dialogue than was written and there is no record of it between staff members at his office, Mr. Delia, and his conversations with the A.R.C. He said that, clearly, he had managed to clear up the issue that this is no longer a one or two week project which is what he originally discussed with Mr. Delia, as they are now 6-8 months later into the process. He said that assumptions should not have been made based upon previous applications if this is now going for a full permitting – that was the whole direction given to him by Mr. Delia to begin with. He said that he also wrote a letter a week after he received the denial letter requesting a specific reason for the denial to which he still said he has no specific parts other than that it doesn't meet the definition of an accessory structure. He said that, as an applicant, he wouldn't even have enough tools in which to remedy this through a Board of Adjustment application for a variance because there is no specific section of the Ordinance that is stated that he is in violation of other than that it doesn't meet a definition, in which case he felt that he has shown that he did not have that. He said that he wanted to make sure that the Board had a copy of his 7/8/11 letter and that it is part of the record.

Mr. Hoffman said that the way in works in terms of interpretation of the Ordinance in Long Hill and most other towns that he is familiar with is that the burden is always on an applicant to demonstrate that he has a proposed use or structure that fits within the definition or listing of what is allowed. If the applicant doesn't carry that burden, the clause that appears elsewhere at some point in the Ordinance is that if it is not shown to be permitted then it is deemed automatically, or from that point forward, to be non-permitted. He deferred to Mr. O'Brien for an additional comment on that issue of interpretation.

Mr. O'Brien said that the matter in front of the Board is not whether this is an accessory structure or not. He said that that has nothing to do with anything tonight because, as Mr. Delia has just testified before us, his finding was that this structure is not allowed in the Zone and is not allowed on this property by virtue of its prior approvals. He said that that is the only reason we are here this evening. He said that Mr. Kaufman is here this evening to appeal that decision of the Zoning Officer and is saying to the Board that Mr. Delia is wrong because of the reasons he wishes to put on the record. He said that it is up to this Board to decide whether Mr. Delia issued that violation correctly under our Ordinance or not – whether it is temporary or accessory means nothing at this point. He said that Mr. Kaufman, through the M.L.U.L. is appealing Mr. Delia's decision, so it is up to Mr. Kaufman to show that Mr. Delia's finding that the use is not permitted in the Zone and the use is not permitted on this property is incorrect.

Mr. Hoffman added that, based upon Mr. Delia's testimony and statement on the record this evening, that he found the use to be not allowed or permitted, even if it were as he assumed at the point that we are discussing (during the spring of last year), even if he found it to be only temporary, he would have denied it then certainly something of a greater longevity – a permanent type of structure, would likewise not carry the day of being deemed or established to be permitted. He said that there is a heavier burden if anything to demonstrate that a usage that is proposed to be *permanent* would be allowed than there would be a burden to show that the use is only temporary. He said that he felt that the Township Officer is telling us unequivocally that he would have denied this, and *did* intend on denying it, even though he understood or believed it to only be temporary.

Mr. Delia replied that that is correct.

Mr. O'Brien said that, even though it was initially stated it was temporary, actually Mr. Delia gave the applicant time to remove it without issuing any citation and yet 9 months later it is still there.

Mr. Delia agreed.

Mr. Kaufman disagreed and said that that is not exactly how it happened. He said that they had a dialogue in which case he informed Mr. Delia that it isn't going away and asked what he was to do next. He said that they then took the next step which was to go see Mr. O'Brien and the A.R.C.

Mr. O'Brien interjected and said that on May 24th Mr. Kaufman said "Erect temporary solar structure" to the A.R.C., and that is what the A.R.C. application states.

Mr. Kaufman said that, during that meeting, we did not discuss anything of a temporary nature other than the fact that they had a structure up that needed to be permitted and that it was an accessory structure. He felt that it was clear at that point, notwithstanding the nomenclature of the word "temporary" in the application. He said that it is really semantics at this point and it "is what it is. He said that a "fish is a fish whether it stinks from the head down or from the bottom up, right?" He said that the issue before us is that this structure has a specific use and a specific purpose and if he called it a clothes hanger, someone is going to call him on the carpet and say that it is not a clothes hanger Mr. Kaufman, it is something else.

Mr. Pesce replied that he understood that "a fish is a fish", but said that if you once called it a "bear", he felt that that is relevant. It seemed to him that Mr. Kaufman once called it a "bear" and, to him, the idea that temporary was just some interpretational word. He felt that "temporary" means the same thing to everybody. It was clear to him that Mr. Kaufman's intention changed and it was not clear to him *when* it changed and he was not clear as to what the relevance of the Berkeley Heights decision was. He felt that there was an assumption here that we know things that at least he didn't. He asked what happened in Berkeley Heights that seems to have had a bearing on what ultimately happened.

Mr. Kaufman replied that this is the crux of the whole matter and is why he felt that "we are a little de-railed". He said that initially this structure was really just being put up so that when it

was to be moved to a final resting place, not in that location, it was just being put up to make sure that they knew how to put it together – that was really what it was all about. Consequently, he said that there was a complication that it's final resting place in Berkeley Heights and it was not approved to go in that location and, rather than to appeal that location and push it through over there, they decided to leave it where it was and that is when the dialogue started with Mr. Delia. He said that plans change and he is not in control of everything. He said that that was their intent and it didn't happen that way – it was a matter of a few weeks and they had a discussion about it and his staff had a discussion about it, and he had a discussion about it with Mr. Delia and asked what he needed to do now. He said that, certainly, he could have taken it down and, in hindsight, he probably should have taken it down and left the parts lie there and then come in and reestablish an application. He said that that seemed a little crazy and unnecessary and he felt that they could have gotten through this – it was not like it was a building. He said that it is just a few pieces of aluminum bolted down to some concrete, so we are not talking about a whole series of habitat and stormwater and all kinds of other things that could be affected. He said that they thought it was the simplest path to go to Mr. Delia as the Zoning Officer and find a clear path to resolve this and that process has not waivered or changed. He said that, unfortunately, there are still some words in there that leave that because his staff was originally under the impression and it has caused confusion in all of this whole matter and he thought that they clarified that at the last hearing that, in fact, it is staying and he thought they talked about it at the A.R.C. that way – that it was a structure supplying solar power and they didn't discuss it as a training aid or anything else as far as he could remember at that meeting and he did not think it was recorded, but he said that maybe Mr. O'Brien can recall. He felt that they were pretty clear that this is a solar structure and it was intended to go somewhere else and, in a matter of weeks, those plans changed and they were just trying to get this through the channels to get it done the proper way and now we are going back on "Well, you said it was temporary". He said that he *did* because that was for a very short period of time. He said that this has now been 10 months of beyond that and he knew that he was trying to get his "legal ducks in order here" but the truth of the matter is that this is a structure that is supplying electrical power to a use that was permitted in 2006 in a Resolution by this Board – an existing nonconforming mixed use for both retail and business and residential at the subject property that was granted by the Board of Adjustment on April 5, 2005. He said that they haven't changed any of that, they just added an accessory use to that in a structure that meets all of the definition and criteria of accessory and that is what he is appealing. He thought that it seemed pretty obvious to him as a professional architect and landowner that that is what we are talking about here.

Mr. Gerecht asked Mr. Kaufman what is the difference between what he did there as opposed to putting it on the roof of a building? He asked if it was a similar type of thing when it comes to solar power and how does it differ?

Mr. Kaufman replied that it is not different at all – it is the exact same technology as you would see on a roof. It is photovoltaic cells and the structure is designed just to shed snow and water as opposed to a roof structure where you put the solar panels all together and they become collectors of snow and ice. He said that this one is designed like a trellis, is transparent to the elements, and is a ground mounted system as opposed to a roof mounted system. He said that it is no different and the technology is exactly the same.

In response to Mr. Gerecht, he said that the overall dimensions of the structure from a plan view are 36' x 36' square, plus or minus a few inches. He said that it is bolted to the ground and the cement slab (which was engineered to support that structure) is around 6 ½' square. He said that there was a cement structure (foundation) in the exact same spot that was part of an old building/shed that was less than 100 S.F.

Mr. Pesce said that he understood that the Board is here to determine whether Mr. Delia's determination that it was not a permitted use was right or wrong. He asked Mr. O'Brien if he understood correctly that Mr. Kaufman is arguing that it becomes a permitted use because it is *accessory* to a permitted use? He asked if that was his argument to overcome the problem and, if that is right, does it overcome the problem if the Board factually finds that to be the case?

Mr. O'Brien replied that Mr. Kaufman should summarize his own argument and then the question of use goes to the Ordinance and whether or not it is listed as a permitted use in the Ordinance, and a solar arbor is not listed as a permitted use in the Ordinance.

Mr. Hoffman replied, "Maybe, maybe not". He added that it is not specifically listed in those words, but he said that his view is that if, for all or some of the reasons that we've heard so far from the different participants in this appeal proceeding, we remove from the equation or the subject matter of what we are deciding as part of this appeal, the contention that this facility is only to be temporary and let it be accepted as a basic premise what we are hearing from both the appellant and the Zoning Officer that this is to be evaluated as a proposed *permanent* usage, then the question is taking that proposal and comparing it, as he thought Mr. O'Brien was suggesting, to what is and is not allowed under the Ordinance is the task that is the one that becomes the essential determination and focus of this appeal. He said that if we look at the Ordinance for the B-1-20 Zone, as one would normally carry out their evaluation of a proposal, we find a listing of permitted primary uses, permitted accessory uses, and permitted conditional uses.

Mr. O'Brien said that it is Sec. 122.5 of the Ordinance.

Mr. Pesce asked Mr. Hoffman, even if it is an accessory structure or use, must it be an explicitly permitted accessory structure or use under our Ordinance?

Mr. Hoffman said that you will find that in carrying out that essential exercise under Sec. 122.5, we have for the B-1-5 and B-1-20 Zones of the Township, subparagraph (b) "Permitted Accessory Uses" and subparagraph (c) "Permitted Conditional Uses", so focusing back under this evaluation or exercise under the permitted accessory uses, there are a total of 5 of them. The first 4 are of 1 category of specificity. They include Item 1 (signs), Item 2 (parking facilities), Item 3 (satellite earth station antennas), and Item 4 (live entertainment at restaurants and existing bars) and Item 5 (other accessory uses customarily incidental to a permitted primary use). He said that we clearly have to focus upon and concentrate our efforts over Item 5. Unlike the first 4 items which are listed and are concrete and are hard factual types of facilities that are clearly understood to be allowed by virtue of their being listed, he said that we have a somewhat amorphous test or subjective one under subparagraph 5. He said that it calls for an evaluation or determination to be made by whoever is reading and interpreting the Ordinance as to whether the proposal that is under consideration is normal, customary, or usual (as opposed to perhaps rarely or infrequently) and has to be incidental or subordinate to a primary use. He said that one example of a subordinate use might be a garage on a residential lot or, perhaps, a swimming pool, as something that is quite frequently found. He noted that garages are *required* to exist in the residential zones of the Township for vehicles and are considered not a primary use, but a secondary usage – something that goes along with whatever may be primary. He said that the question then narrows itself down to is a solar panel something which is both "customarily" found as incidental to provide heating or energy for a residence, for example, and something that normally goes along with a permitted primary use. He said that that's a determination that's a little "hazier" but which is a judgmental one which the players involved in this proceeding have to reach a decision on. Having removed the temporary aspect of it as a perhaps different or easy way to resolve this whole thing and focusing as the Board necessarily now has to on determining whether this is a permitted accessory use becomes one that the Board has render a decision on. He said that perhaps another way to put it is that the Board members should find, as a matter of legal interpretation, whether they agree with or disagree with the Zoning Officer's ruling when *he* found it to not be a permitted accessory use – whether they feel that that was a reasonable and appropriate decision or whether they feel that that is off base.

Mr. Gerecht asked Mr. Hoffman if he had found any case law that would help the Board, or if he was aware of any cases that have been brought up that may address some of these unusual types of uses other than the fundamental ones such as garages, etc. He asked him if he had found any other cases that may have addressed either solar, or other structures similar to that?

Mr. Hoffman replied that he had *not* found any, but that is not to say that there might not be some out there either reported or unreported. He felt that there has to be some flexibility in terms of rendering a decision, that is to say what might be customary today and found in a normal

evaluation of proposed uses of property to be customarily incidental would perhaps be quite different than what might have been customary and incidental 25 or 50 years ago, or perhaps 25-50 years into the future.

Mr. Gerecht asked Mr. Hoffman if he had found any cases that have outlined any type of analysis that you should go through to try to determine what may be considered a naturally occurring subordinate use?

Mr. Hoffman replied, "No", but he said that if he were a sitting Board member tonight he would be interested in hearing testimony, for example, from whoever has first hand factual knowledge as to whether there's been an increase in this type of facility, or something quite similar to it in Long Hill Township or elsewhere. He said that he knew as a matter of fact that the Board can take administrative notice of this that there is a voluminous array of solar panels of perhaps a different configuration but, nevertheless, many, many of them recently (in the past year or so) that have erected on the front lawn area of what was previously referred to as Bell Laboratories in New Providence and Berkeley Heights and those types of structures may be quite relevant or not relevant in the member's judgment.

Mr. Collins said that he would bring up Cox in what Mr. Hoffman gave as Sec. 10-6 referring exactly to the discussion of the garage that he had brought up which states that "There are other uses, however, which are not capable of standing by themselves as principal uses. For example, a one car garage could not be built upon a vacant residence lot since a one car garage is never considered a principal use…..". He said that a solar array can stand by itself, so it is not necessarily an accessory to a structure since it can be there by itself as a primary use.

Mr. Hoffman replied that Mr. Kaufman, for one, argued that his contention that it is a permitted use and an accessory one is because you have got to heat and energize a house in some fashion and this is just a modern and highly more technical way of doing that task.

Mr. Kaufman said that this is not a grid tied system. He said that what you are referring to might be possible in an area where you are building a solar array that is acting as a power plant. He said t hat this is not the case in this particular type of technology and it doesn't work that way. He said that you *must* tie into an existing structure or an existing use that has more demand. There is no positive – even though New Jersey is a net metering state, you are allowed to actually produce more power than you actually consume. It doesn't actually work that way, he said that you must reverse feed through a meter that is already registered with the utility, so your scenario cannot actually work.

Mr. Collins replied that it still *can.* It has to have a source to go through.

Mr. Kaufman said that then the argument would be just like trying to put a garage structure up and saying that its primary purpose is storing cars. That would then be a primary use. He did not think that it would be any different. In this case, he said that it is clearly a subordinate use to the primary and he felt that that is what the whole premise of this exercise is for. He said that it is *not* the primary use – it doesn't produce an excess amount of energy and is subordinate to the house and the residence and business that it is there – it is not a primary and it cannot stand on its own.

Mrs. Raimer felt that there was some disagreement as to what question the Board is deciding. She said that she came here thinking that the Board was deciding the narrow issue of whether or not the Zoning Enforcement Officer made the correct decision when he considered that a temporary construction training aid was not appropriate in that Zone or on that property. She said that now we are talking about the different question that is a very interesting one and has a different answer. As a Board, she said that we need to decide if we are looking at the narrow question of what was before Mr. Delia and whether or not he made the right decision based on what was before him, or are we deciding the bigger issue about solar panels and whether they are accessory to an accessory structure or an accessory use or whatever the accessory language may be. She said that it is a whole different discussion.

Mrs. Malloy said that, to her, we are talking about what Mr. Hoffman had said before – the interpretation of the Ordinance and she felt that that is ancillary to the point Mrs. Raimer was bringing up. She said that it is not the actual point of what we are here to discuss – that is something to be done at another point. She said that, if it is a matter of the Board getting together at another point and discussing the Ordinance and whether or not we need to be flexible for structures that could be possibly built in the future, because people are going to more green energy and they are relying more on solar structures that need to be erected in their yards and not necessarily attached to their homes in order to provide a source of energy – then maybe that is something that we should discuss at another point, but she felt that we may be getting off beat.

Mrs. Raimer said that that was exactly her point. She felt that if Mr. Delia had before him the question of would a solar panel or solar structure be appropriate on a site like this, it is a different question than what was before him when he rendered his June 22, 2011 decision.

Mr. Fargnoli agreed. He said that he came here prepared to talk about the narrow issue. He said that, if we are going to talk about solar panels, he had more questions and wanted to look into it more. He said that his impression was that the Board members were here to decide if Mr. Delia had rendered the appropriate decision or not. He said that questions such as whether this is a standard solar panel, how many places has it been used, how does it compare to other solar panels, why didn't you place it in some other place in the area – these are all other questions that he did not come here to discuss.

Mr. Gerecht said that, from what he understood, Mr. Delia was asked if he would have still denied it if it was a permanent structure and he said "Yes" because he didn't feel that it was appropriate for that property, so there is some basis for that because he didn't just base his denial on whether it was temporary or not, he based it on the fact that he didn't believe it should be there to begin with (either temporary or permanent) from what he just testified.

Mr. Fargnoli said that the proper procedures and process weren't gone through. He said that, if this came before the Board, we would ask questions such as why didn't you put it in the back of the property, why this particular design, is it tied into the grid, or how does its efficiency compare to other projects ?

Mr. Gerecht replied that, in that case, Mr. Fargnoli is right and felt that it is hard to separate the two.

Mr. Fargnoli said that it isn't and that it is done all the time. Whether it was going to be temporary or permanent, he said that nothing was said here in the beginning and he did not see anything in the documentation that this was a solar panel to tie into it – this wasn't the intended purposes and he said it was temporary.

Mr. Gerecht said that he just wanted to be sure that we are looking at it in the correct way.

Mr. Fargnoli said that he did not have enough information to make a decision based on the fact that it is there now, and are solar panels good? He said that that isn't enough to make a full decision on whether it was right or wrong.

Mr. Gerecht asked Mr. Hoffman, if tonight the Board were to decide in favor of the decision that Mr. Delia made, then would that leave the applicant the choice of coming before the Board with a full application to permit that?

Mr. Hoffman replied, "Yes". He said that the applicant would, notwithstanding a ruling of denial which would have been then affirmed by this Board, then still have the option or right to seek a variance from this Board. He said that the proceeding this evening does not include by any means the affirmative and negative variance criteria. He said that this is a ruling on a point of law – is such and such a proposal something which *is* or *is not* allowed as a matter of right as a secondary usage on this piece of property in this Zone. That is the issue.

Mr. Pesce added, or is it did Mr. Delia rule correctly at the time that he ruled based upon what he then knew? He said that he was not sure that those two questions are the same. He felt that Mrs. Raimer made the point that they are *not* the same.

Mr. Fargnoli said that this is a narrow question, not a broad question.

Mr. Hoffman said that when Mr. Delia acknowledged that his ruling would have been the same whether this is temporary or permanent, he felt that he has steadfastly adhered to the position that this is not allowed, whether he rendered that decision a year ago, whether he were to render such an opinion or determination for the first time this evening – his reading or understanding is that he would and still is of the view that this is not permitted, but that doesn't deprive a property owner of the right (which he always has) to seek a variance for it.

Mr. Pesce asked, if we don't reach the question tonight of whether or not this is a permitted accessory use, when does that issue get addressed?

Mr. Collins said that it would be a use variance but, in the future, to avoid it from coming back here, it would be the Planning Board.

Mr. Hoffman said that, if the Planning Board amends or clarifies the language in the Ordinance so as to clearly make the proposal of this appellant permitted or non-permitted – whatever their outcome or clarification by way of amendment to the Ordinance is, there is always a right of a party that it is not enamored of that decision, whether it be the appellant or a neighbor depending upon how it comes out, to seek a variance or a different determination. He said that you can't deprive a party of their legal right to seek a variance.

Mr. Kaufman said that he felt it important to try to vet through all of the issues here. He felt that it is also important from his perspective to go back to "What is the issue?" He said that the issue for which he is before the Board today is really quite simple. He said that there is a letter from Mr. Delia that specifically says that the solar arbor does not fit the definition of *accessory structure* under Sec. 110. He said that the second issue says also, not meaning as an individual issue, as stated in his letter of February 17, 2011, that the purpose of the device was a construction aid. He said that he makes no mention of the word *temporary* anywhere and he did not know why he wouldn't have put that in there if it was so vital to his decision, so he thought that Mr. Hoffman was correct that the word *temporary* is not relevant in this particular denial because it is not even *in* this denial. What *is* in the denial is that it not an accessory structure, and he maintained that it *is* by every definition that he could find, whether it be in Moskowitz or the Township Ordinance, and that he felt that we have gone through this that it is not to be used as a construction aid and, to him, that section should also be stricken from the denial because the Board now has enough information. He said that it is *not* a construction aid and he has testified that it is *not* for construction aid purposes and he felt that those two issues are the *only* things that we really should be discussing unless Mr. Hoffman says that there is some other legal reason to divert into what type of panels they are and everything else. He said that he really did not think that that has any relevancy whatsoever.

Mr. Hoffman asked Mr. Kaufman if he felt that his proposal fits within whatever is intended (or the scope) of Subparagraph 5 of Paragraph (b) of the cited section of the Ordinance?

Mr. Kaufman replied that that was exactly correct and thanked Mr. Hoffman.

Mr. Hoffman asked Mr. Kaufman why, precisely, in his view the proposal is one that is normal or customarily incidental to what is commonly found for accessory structures in the municipality.

Mr. Kaufman replied that there are several reasons. The first being that every structure we are talking about, regardless of use, has a demand for electrical energy. Whether that energy is coming from the grid, or whether you are producing it on site, it is the same energy. Therefore, he said that it is incidental to *everything*, including the building we are in today. So that, by its own nature – everyone has the right to get their energy from wherever they want, whether they

generate it on site or whether they buy it from the utility. If you choose not to buy it from a utility, then you have to generate it on site.

Mr. Hoffman said that, if we take as a given that every property has a right to get its energy source somewhere, if that fundamental assumption gives rise to a legal right to get the energy however one goes about doing it, does that mean that every property owner in the Township could erect a miniature or miniscule nuclear plant on each of their lots?

Mr. Kaufman said that he would submit that, based on the fact that Moskowitz has a definition of renewable energy being an accessory use that is inherently beneficial, and he did not know if nuclear power comes under that or not, and also because there is N.J. Statute and law that defines renewable energy as inherently beneficial, he felt that those two criteria would give precedent over some other nuclear power plant. He said that he supposed though, given Mr. Hoffman's argument of hypothetical, provided that that nuclear power plant was a subordinate amount of power to that primary, then it would be an accessory use. He said that it is far fetched because, obviously, the power of nuclear generates gig watts of power, but why not a small windmill or a thermal hot water heating structure that you can't fit on your roof because there are too many trees around it? He said that these are the same types of energy devices and he felt it is very important for the Board to recognize that we are moving towards a new world of different types of energy. Provided that these structures don't become the primary use for those particular properties, in which case they become the power plant (like the nuclear power plant that Mr. Hoffman had mentioned), then they will be subordinate to the primary use in every case.

Mr. Hoffman said that, as he understood it, Mr. Kaufman's position is the fact that he may be on the cutting edge of technology in terms of how this particular lot is going to be furnished with its energy should not deprive him of the right to qualify as a permitted secondary usage.

Mr. Kaufman replied that that was correct.

Mr. O'Brien asked Mr. Kaufman which structure the solar arbor generates power for.

Mr. Kaufman replied that the entire lot is on one meter, so it generates power for all. He added that it primarily goes back to the house and the other buildings only have lighting in them and no other demands.

Mr. O'Brien asked Mr. Kaufman if he recalled if any electrical permits were taken out for the electrical work that was done?

Mr. Kaufman replied, "No permits yet because we are still in the process of trying to get through the zoning process, so it won't go to any of those bodies until they are approved by the Zoning Official".

Mr. O'Brien noted that Mr. Kaufman had stated that the size of the arbor was 36'x 36'.

Mr. Kaufman agreed that that was correct.

Mr. O'Brien asked Mr. Kaufman if he was aware of any other 36' x 36' solar arbors within Long Hill Township?

Mr. Kaufman replied, "No".

Mr. Pesce asked Mr. Kaufman what limitations there would be on an accessory use under his interpretation? He asked him, so long as he didn't run afoul of setbacks, could he cover his entire back yard with a solar panel?

Mr. Kaufman replied that he couldn't because he would run into other issues. He suggested seeing just what the factual limitations are and said that he had them listed. He said that Sec. 134 of the Ordinance defines accessory structures. He said that Sec. 134.1 says that all accessory structures must be located upon the same lot as a principal building to which they are related. He

said that Sec. 134-2 states that no accessory structure shall exceed 20' in height, which this does not, except that accessory buildings that contain apartments, etc…..and this obviously doesn't contain apartments. He said that accessory structures shall be at least 10' from any principal building situated on the same lot and shall be at least 6' from any other accessory structure. He said that there is *a lot* of critieria that he felt would prohibit some of the other conditions that we are talking about. Referring to Sec. 134.4 states that no accessory structure shall be located in a front yard, nor within 10' of any side or rear yard, so that very much limits what you can do on other lots. He said that Sec. 134.5 states that no accessory structure shall be erected in that portion of the lot forward of the front line of a principal building, or the minimum front yard setback, whichever is greater, so that even further protects the municipality against accessory structures just being forward of any building regardless of whether it is in the front yard or not. He said that Sec. 134.6 states that accessory structures required for the construction of a principal building or a structure may be erected on a lot without a principal building by permission of the Construction Official, so that basically says that he *could* build this with special permission without any other primary use there, with special permission from the Construction Official. He said that those criteria already in the Ordinance limit very much so what can be done and it is not possible to flood the whole yard or make it so big that it is overwhelming.

In response to Mr. Fargnoli, Mr. Kaufman said that he *believed* that the height of the array is about 14', although he did not have the exact dimensions in front of him.

Mr. Collins felt that we keep "going around the mulberry bush" here. He said that, if we want to call for a vote for what we are actually determining here, and then we can actually call a vote based on that, which he felt it is appropriate. But he said that what he kept hearing is that this fine was issued based on the fact that it was a temporary structure, there was project that was going to move forward in Berkeley Heights that ultimately *didn't* move forward and, based on all of that information, there was a fine issued. He said that if that is not the narrow issue, then he was missing something. He said that, if we have a whole other issue that we need to discuss at another meeting, then so be it, but that is the information that he is basing his decision on. If that is *not* what we are voting on, he said that he needs to understand what we *are* voting on.

Mr. Fargnoli said that he thought that that *is* what we are voting on and so the other questions really aren't relevant at this time.

Mr. Kaufman addressed Mr. Hoffman and said that he would not agree with that at all.

Mr. Hoffman requested Mr. Kaufman to focus his direction to the Board and not to him.

Mr. Kaufman said that he did not believe that it is about the issue of whether it is temporary or not temporary. He said that we have discussed it and there is a specific…..

Mr. Collins interjected that a fine was issued.

Mr. Kaufman said that he was not appealing a fine, he was appealing a decision to deny a Zoning Permit and that it has nothing to do with a fine.

Mr. Collins said that it was based on a temporary structure.

Mr. Kaufman disagreed and said that he read exactly from Mr. Delia's letter of 6/22/11 and it does not mention the word "temporary". He said that it was never intended to be part of his denial. He said that it is very clear and Mr. Delia even stated that it doesn't matter that it is temporary.

Mr. Collins replied that any document that the Board has from him indicates that it is a temporary structure also for a training project.

Mr. Kaufman said that he had already discussed that he had an early dialogue about what the intent was and it went by the wayside very quickly and he moved to the process of filing for a Zoning Permit.

Mr. Collins said that there is testimony from Mr. O'Brien as late as May saying that there was still discussion that (Mr. Kaufman) had a temporary structure.

Mr. Kaufman replied that there was no discussion and Mr. O'Brien was citing an application with no date on it and it was part of an older application. He said that he met with Mr. O'Brien and they never discussed temporary at all. He said that the fact of the matter is that this is an appeal to a Zoning Officer's decision based on his letter of denial and it has nothing to do with whether it is a temporary structure.

Mr. Fargnoli said that the (A.R.C.) application is dated 5/6/11 and, therefore, what Mr. Kaufman said *wasn't* dated, *was* dated.

Mr. Kaufman replied that he did not have it in front of him and didn't see the date on it. He said that the point of the matter is, regardless of whether or not the dialogue that he had with Mr. Delia included the word "temporary" or not, it is irrelevant. He said that his denial of the application on 6/22/11 does not mention "temporary" because it is not relevant. He said that that was his assumption as the applicant and that he had nothing else to go on. He said that the other things prior to that, the discussions on how we are going to reach an approval, were between his office and staff and Mr. Delia. He said that the thought their stories were identical and said that both of them discussed pretty much exactly how it went on and that he didn't think there was a dispute between them. He said that it really comes down to that Mr. Delia doesn't believe that the solar arbor meets the definition of an accessory structure and he did. He felt that he has given the Board a lot of information with respect to that and he said that he didn't think the decision is based on this at all.

Mr. Collins felt that the whole decision is based on the fact that Mr. Kaufman told Mr. Delia that he was going to be taking the structure down and he was being a "nice guy" in working with him and allowing him to take some time to do that and then month after month it never got taken down and, ultimately, Mr. Kaufman decided to change how he was going to be using the property. He asked if that was incorrect, because that was the testimony he heard this evening.

Mr. Kaufman replied that, again, all that pre-dated the official application for the permit. He said that all that was a dialogue that he and Mr. Delia had in working with each other in trying to figure out a way to resolve it. He said that, once he realized it was going to stay, then the application went in and he said that we need to get this permitted properly and inspected, etc. and he agreed and said let's do that and then he immediately went to that action, went to the A.R.C. and he spoke with Mr. O'Brien and he sent a memo saying that he felt it was an accessory structure and that he should move to have a Zoning Permit issued and that is when the letter came out. He said that that is exactly what happened and he did not think that there is any dispute over that. He said that we are caught up on this and he understood that the Board isn't privy to all of those conversations over a several month period, but that is essentially what happened. He said that we discussed it and also discussed a resolution and moved to resolving it through the channels of the permitting process and now he is appealing that decision based on the fact that he thought it was incorrect. He said that he has shown some examples and good reasons why it is an accessory structure and that is what the Board has to decide on – is it an accessory structure or not? He said that, as Mrs. Raimer said earlier, it is really that simple and what is at hand here.

Mrs. Raimer asked Mr. Delia what submissions from Mr. Kaufman he was looking at the time he made his decision? She asked if it was the letters that he had described in his earlier testimony and if he was referring back to earlier conversations he had had with Mr. Kaufman. She said that only Mr. Kaufman had mentioned those conversations and she really had not heard about them from Mr. Delia. She asked Mr. Delia if it was his understanding from Mr. Kaufman that the solar panels were going to be used, not just as fixtures as solar panels, but as training aids? She asked Mr. Delia what his understanding was that it was going to be used for.

Mr. Delia replied that, at the time he reviewed the Zoning Application, he was under the impression that it was going to be a temporary use as a training aid.

Mrs. Raimer asked Mr. Delia if he was looking at it as a training aid, not a solar panel in the way that a solar panel is typically used?

Mr. Delia replied that he was interpreting it from the Zoning Application to be used as a training aid.

Mrs. Raimer asked Mr. Delia if he felt it would be a completely different application if Mr. Kaufman was coming before him saying that he would like to erect this solar arbor for the purpose of creating alternative heat energy for the adjoining home?

Mr. Delia replied that he would look at it as a different application, but as it being a commercial site still under Sec. 162. He said that, no matter how we steer this, site plan approval is needed for that property….for that piece of equipment/structure, "however we peel this".

In response to Mr. Collins, Mr. Delia agreed that in another residential zone up the hill, you wouldn't need site plan approval for that. He agreed that we are comparing the property that Mr. Kaufman brought up as a residential property, but he did not believe that in a residential zone a 36' x 36' 14' high arbor……

Mr. Collins said that it is going to be an accessory, non-roofed structure.

Mr. Delia agreed. However, he added that no matter how we do this, in a commercial zone under Sec. 162 site plan approval would definitely be needed.

Mr. O'Brien said that, in fact, it would require minor site plan approval.

Mr. Hoffman said that, whether or not it needs site plan approval, at least according to the hearing notice as he revised it and as he believed was concurred by the appellant, was not the question. He said that lots of uses are allowed and nevertheless require a site plan approval by the Planning Board. The question is whether this usage, as a secondary type of operation or facility is or is not allowed. Whether it is permitted or not is the primary focus of what he believed is before this Board as the subject of the appeal.

Mr. O'Brien added, whether it is permitted speaks to that part of the Ordinance that Mr. Hoffman cited under Accessory Uses which is uses customarily incidental to a permitted primary use. He said that uses and structures are two different things. A use is an activity and a structure is an accumulation of materials – of things. However, an accessory use rests on an accessory structure and whether or not that is permitted in a zone, in terms of bulk as Mr. Hoffman pointed out, would also have to be answered.

Mr. Collins asked Mr. Hoffman, if it was clearly determined that this *is* a permitted structure, but there was no site plan approval, could the exact same fine be issued?

Mr. Hoffman replied that he was not familiar with the penalty application practices of the Township.

Mr. Kaufman said that no fine has been issued in any case here and he wanted to put that on the record. He said that this is simply the process of an appeal and, in terms of site plan approval, he thought that perhaps what Mr. Delia thought when he suggested that he go before the A.R.C. (the precursor before going before the Planning Board for site plan approval), in which case that subcommittee instructed Mr. Delia that they didn't feel that site plan approval was necessary because it was an accessory structure, and to issue a Zoning Permit.

Mr. O'Brien replied, "That is not true".

Mr. Collins added that, under a commercial property, it is required. He said that he used to be on the site plan committee and it is simply a necessity.

Mr. O'Brien repeated,"Mr. Kaufman, that is not true". He said that the A.R.C. did not tell him that site plan approval was not necessary.

Mr. Kaufman said that he did not mean to put words in (Mr. O'Brien's) mouth and that this is all about trying to understand exactly what that meant.

Mr. O'Brien said that the A.R.C. came to a conclusion that this appeared to be an accessory structure given the information that was given to us. At that point, he said that there was a lot of information that was *not* given to us, such as its size. He said that the fact that Mr. Kaufman was in a court appearance with the Township at that point over a legal matter was not put before the A.R.C. at all.

Mr. Kaufman asked Mr. O'Brien if he hadn't reviewed plans during that meeting with the size, shape and height, which is how they determined the setback and overall height together? He said that they had a full set of permit plans that Mr. Delia was privy to, as well. He said that he did not want to get into that. He said that we have to decide whether the summary makes sense to the Board that this is an accessory structure or not. He said that there are a lot of other dialogues here and he appreciated that we are all interested in that, but trying to stay on point here, this is an appeal of a decision that this structure *is* or *is not* an accessory structure or an accessory use.

Mr. Hoffman said that the Ordinance talks about more than just whether or not it serves a subordinate or accessory function in a sense that it is incidental or goes along with something else that would be the primary function, it talks in terms of those accessory structures or uses which are "customarily incidental" to a permitted primary use. He asked Mr. Kaufman, if there are only one or two of these in town, if he felt that he had met his burden of showing that it's not only accessory or subordinate to some primary function on the property, that he has nevertheless established that it is a *common* or *customary* incidental? He said that those criteria have to be built into the definition do they not Mr. Kaufman?

Mr. Kaufman replied, if you are asking me if I have done a survey of every solar panel that has been erected in Long Hill Township, he did not have that information handy, but he *could* say that in terms of meeting the definition of customarily common, this is a common practice in *every* municipality. He did not believe that there is a municipality now in the State of New Jersey that does not have some form of renewable energy in the form of accessory application similar to what we are talking about here. He said that the fact that this one happens to be in Long Hill Township and there is not a precedent in Long Hill Township, he thought was less important to himself as an applicant because it is a new thing – relatively new in the last few years and he felt that we are seeing that this is a nationwide spread movement and it is not something that we are just doing in one little isolated incident here in town and, if nothing else, drive on the highways or down the road and see solar panels on utility poles all over the place. He said that this is a technology that is before us now and it is coming in great precedent and great volume and he did not know how many other accessory structures were built in the town and he did not know if that is a requirement. If it is, he suspected that that survey could be done through the public records for Zoning Applications. He said that common sense tells him that this is a very widely spread technology and it is being used all over the country and certainly all over the State in tremendous form – so much so that N.J. State Legislation has determined by statute that this is an inherently beneficial use.

Mr. Hoffman said that that is an excellent argument as to why any such proposal should be given favorable consideration *in a variance application*, is it not?

Mr. Kaufman replied, "That is correct, I would believe it is".

Mr. Pesce said that it has been suggested, he thought, no matter what we determine tonight, site plan approval is required. He asked, if this process started differently and Mr. Kaufman had applied for site plan approval first, would the Planning Board have had the ability to determine that this was a permitted accessory use as part of their site plan consideration?

Mr. O'Brien replied that the Zoning Official would have issued a Zoning Permit based upon the application before the Board and the Zoning Official would have determined whether or not the use was allowed. If it was, it would have gone to the Planning Board for site plan approval. If the use was *not* allowed, a Zoning Permit would be denied and it would come to the Zoning Board of Adjustment, presuming the applicant wished to pursue it for a use variance.

Mr. Pesce asked, if we affirmed the denial by Mr. Delia, it cuts off the ability for the applicant to go to the Planning Board by way of site plan, because the issue of accessory use will have been eliminated?

Mr. O'Brien replied that the issue of allowed or not allowed use would have been decided, because that is the issue in front of you.

Mr. Pesce said that he was struggling with the fact that, if we don't reach that question of whether or not it is a permitted accessory use, he felt that we are depriving the property owner of ever reaching that issue in a meaningful way. He said that he was not sure how it gets reached and by who. He said that he agreed with all of his colleagues that were concerned as to how we got here, but he was concerned that if we don't reach that issue, when does it get reached?

Mr. O'Brien replied that that is the issue that is front of the Board this evening – the determination of whether or not this is an allowed accessory use, or not.

Mr. Hoffman added, and whether or not it's a customary one is part of the definition – not only whether it is accessory, but whether it is a commonly found or customary type of accessory use.

Mr. O'Brien asked Mr. Delia if his office issues permits for all solar installations in the community.

Mr. Delia replied, "That is correct". He added, "With all of the stars aligned, if you will". He said that someone will come to him first with a Zoning Application and say that they would like to build this item at this location and ask if it fits the Township's bulk requirements and whether it fits its uses, etc., and then he will render a decision from that point. He said that what he meant by "When all of the stars are aligned", he meant come to me first before you put a shovel in the ground and he will tell you what you need to do and where you need to go and then 6 months down the road you're going to have a permit in hand and do your project the way you want to – you'll have permits and permission from the Township whether it be via a Zoning Board of Adjustment hearing or Planning Board hearing, but it must come to him first. When it doesn't, and that step is missed, and something is built with no permission from his office or from the Construction Office, he said that this is when we get into the falling and falling and falling and continuously creating a problem. He said that if someone comes to him first, he can review that application for its merits and then render a decision.

Mr. Hoffman asked Mr. Delia what are the criteria or factors that he takes into account in reaching a decision in his office as to the merits or lack of merits of such a proposal?

Mr. Delia replied that he would go through the Zoning Ordinance and look at the definitions and uses – if it's a commercial or residential property, and steer it in that direction. If it is a commercial property, site plan approval would be needed, etc.

In response to Mr. O'Brien, Mr. Delia said that he has not had a solar application come before his desk in the 7 years he has been employed in his position. He said that residential rooftop solar panels do not come before him – they may go directly to the Construction Office. If it was a commercial structure, he said that he would have immediately steered the applicant for a minor site plan approval.

Mr. Hoffman asked Mr. Delia if it was his understanding that the proposal of this applicant is one that would meet the test of being accessory or incidental to some other primary use?

Mr. Delia replied, "Yes".

Mr. Hoffman said that the question left is not whether it qualifies as incidental, subordinate, or accessory, but whether instead whether or not it is customary.

Mr. Delia replied, "Correct'. He said that it would be customary had it been brought to him and presented to him in that manner. He said that, if an applicant comes to him and requests to erect a solar arbor to generate power for a particular house, he would look at that and render the merits of it and rule on whether it is permitted, if the use was permitted, if it met all of the bulk criteria, etc. Since Mr. Kaufman did not furnish him with that data and information upon which to determine whether or not it is customary, he agreed that he took the safe and conservative course of action and denied it because he hadn't proven what he had to prove.

In response to Mr. Gerecht, Mr. Delia confirmed that the subject property is considered to be commercial.

Mr. O'Brien noted that no matter what happens on this property, site plan approval is required.

Mrs. Raimer asked Mr. Delia, if Mr. Kaufman withdrew his prior application and submitted a new application and supported it in the way he was suggesting, if he would approve it?

Mr. Hoffman said that he would have to look at it carefully to see whether he had, among other things, established through data and proofs that he demonstrated that it is customary and not something totally out of the blue and that he would be interested in seeing that.

Mr. Delia replied, "Correct".

Mr. O'Brien said that that was part of the initial problem – the fact that there were conflicting statements in the beginning.

Again, Mr. Delia agreed.

Mrs. Raimer said that, if the Board were to affirm Mr. Delia's decision, we would put Mr. Kaufman in the position of having to apply for a variance. She said that if Mr. Delia was to revisit this application, if the current one were to be withdrawn, under different circumstances with different supporting information, he may come to a different result and the Board may never see it. It would just go straight to the Site Plan Review Committee?

Mr. Delia replied, "That could be – that is a possibility, yes".

Mr. Hoffman said that whether or not he would then establish as being customary, he asked Mr. Delia if he would limit his evaluation or assessment of that determination then being asked of him to properties exclusively within the geographical boundaries of Long Hill Township, or if he felt it would be within his province or purview to take into account other area uses and in nearby communities as part of his function – that that would be a permissible factor to throw into the pot?

Mr. Delia replied that he would do that and call other towns and speak to zoning officers that he knew to see how they feel about this. He said that he would also ask the professionals their opinions on this matter as well and would use *all* of that information to base his own opinion.

Mrs. Raimer said that the issue based on the information before Mr. Delia at the time of his ruling, was he correct, is one issue which the Board could consider and it is based on the information before Mr. Delia *at that time*, or if a new request were to be submitted with different supporting information, Mr. Delia *could possibly* come back to Mr. Kaufman with a different decision eliminating the need for this Board to even have to…..

Mr. Hoffman interrupted and added, when based upon additional data furnished to Mr. Delia.

Mr. O'Brien thought that Mrs. Raimer was suggesting that that would require that this matter be withdrawn from the Board.

Mrs. Raimer said that the decision as to whether or not this matter should be withdrawn from the Board to give Mr. Kaufman that benefit is not necessarily for this Board to make. She felt that it is a decision for Mr. Kaufman to make, based upon this discussion.

Mr. Hoffman agreed. He asked Mr. Kaufman if he wanted to think about it.

Mr. Kaufman requested a 10 minutes recess.

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Mrs. Raimer stated that, before recessing, the Board was discussing whether or not it should base its decision on the narrow issue of whether, based on the information before Mr. Delia at the time of his decision, was he correct? Having heard testimony tonight, she said that it has been suggested that that would not be applicable and so we talked about the possibility of giving Mr. Kaufman the opportunity to resubmit his application with current and applicable facts and supporting information so that Mr. Delia might be in a better position and a more informed position to make a new decision in which case, if we were to do that, what we would do procedurally is to leave this case open and continue the matter to give Mr. Kaufman an opportunity to resubmit an application, but she wanted that decision left up to Mr. Kaufman. She asked the Board members if that was their understanding of where we left off.

(The Board members responded affirmatively).

Mr. Hoffman suggested that there be some time limit. He said that, obviously, this shouldn't be carried for another 6-9 months, but within a month of two Mr. Kaufman can either provide additional information or not do so, but we cannot leave this hanging indefinitely.

Mr. Gerecht said that he would not say "additional" information, he would say a whole new full application with supporting information so that Mr. Delia has the proper foundation to make whatever decision he needs to make.

Mr. O'Brien added that he should reapply for a new Zoning Permit with the appropriate documentary information.

Mr. Gerecht agreed and added that the Board did not want to short change Mr. Delia's information, so it is not "supplementing".

Mr. Hoffman said that what he thought he was hearing was that this current application should then be withdrawn, dismissed, or denied without prejudice…..

Mr. Gerecht disagreed and said "Just put on hold".

Mrs. Raimer said that she would like to leave the matter open pending, *if* that is the route that Mr. Kaufman wants to take…..pending a new determination in which case the matter would become moot for this Board. If it is determined by Mr. Delia that it's acceptable it would go for site plan approval, and Mr. Delia were *not* to grant Mr. Kaufman's request, then unfortunately we would be back here again, but he would be basing that decision on what seems like new, updated, and supported information, rather than outdated and inapplicable information which is what it seems he had before him and the only basis upon which he could make his decision.

Mr. Hoffman said that, procedurally, that would work.

Mrs. Raimer agreed that procedurally that would work, but she did not know what Mr. Kaufman would like to do.

Mr. Kaufman said that he thought he understood until he heard the last comment, but he thought that maybe then he did and he felt that Mr. Hoffman could provide him with some legal clarification. He said that his understanding was that one option was to withdraw the application

before the Board with respect to all the information and start clean with a new application to Mr. Delia's office for the structure, without prejudice to any other information we are giving. We are giving new information that is specific to this particular project and then we would have to do that within 30 days or some time frame. He said that what you are saying now is that we are going to leave this matter open and still reapply?

Mrs. Raimer replied that Mr. Kaufman can do it either way and that she was just trying to do it so that he would not have to reapply, serve new notice, etc.

Mr. Kaufman replied that, by leaving it open, it was his understanding that if Mr. Delia accepts the application with the new information so that a Zoning Permit can be issued, it would then potentially or it may not, have information that would leave him to believe that it doesn't need to go for site plan review (and that is not a matter for this Board), so if that were his decision it would then close out of this Board without another hearing, that would just be sort of an internal memo? He asked Mr. Hoffman how that would work.

Mr. O'Brien said that, if Mr. Delia were to find that this Board had no further jurisdiction in this matter, then Mr. Delia would inform the Zoning Board of Adjustment that, in his opinion, this matter would be closed and he would ask that this application be closed without any prejudice.

Mrs. Raimer replied, "Withdrawn without prejudice at that point".

Mr. O'Brien thanked Mrs. Raimer and agreed.

Mr. Kaufman said that he was in agreement with that. He said that the only other request he had of Mr. Delia is that there is still a matter pending before the Long Hill Municipal Court which is contradictory to these hearings and, if we could either postpone or delay that until the final hearings are delayed…..and that would be done through the Court Secretary….

Mr. Hoffman replied to Mr. Kaufman that the most he could get from the Board of Adjustment is that they have *no objection* to that being postponed.

Mr. O'Brien said that this body would have no objection if Mr. Delia were to report to the Court that this matter has been placed in a continuance mode and that when the matter was finalized, then Mr. Delia would inform the Court as to the final disposition of this application.

Mr. Delia agreed and said that the violations, at that point, would be dismissed should this go through the system correctly.

Mr. Kaufman said that, if that all comes to summation, then he was in agreement with that and was accepting the idea that the matter be kept open and he would resubmit the application to Mr. Delia's office with all of the information required, within the next 30 days, and pending his decision he will either come back here before this Board or be issued a permit, or some other matter, whatever his decision……one way or another that's a decision and Mr. Delia will inform the Court Clerk.

Mrs. Raimer advised Mr. Kaufman that his understanding was correct.

Mr. Hoffman added that if he still were to deny Mr. Kaufman's revised or supplemented proposal, he would have the right at that point to go forward with either or both of his determinations and have this Board render a decision on it, but if they (Mr. Delia and Mr. Kaufman) could reach a consensus, this could then be withdrawn without prejudice.

Mr. Kaufman replied, "Understood".

Mr. O'Brien said that perhaps the Board could instruct Mr. Delia to inform the Board in 45 or 60 days as to the status of this matter.

Mr. Gerecht asked Mr. Delia how much time he would need beyond that, assuming that Mr. Kaufman got everything to him that he needed within 30 days, to properly analyze it and make his final decision.

Mr. Delia replied that he has 7 days to make a ruling. He said that within 45 days would be a good time frame.

Mrs. Raimer asked Mr. Delia, within 45 days, to report back to the Board, in writing, to let the Board know the status of the matter. She did not feel that it was necessary for him to make an appearance unless he chose to.

Mr. Delia replied that that would be fine.

Mr. Kaufman asked if it would be easier to establish a date since we don't count calendar days the same way.

Mrs. Raimer agreed and said that, so there is no confusion of calendar days or business days…..

Mr. Gerecht replied that that would hinge on when Mr. Kaufman supplied everything that Mr. Delia deemed necessary.

Mr. Kaufman said that the application would need to be before Mr. Delia within 30 days.

Mr. O'Brien said that Mr. Delia is to report to the Board by February 18th (15 days after that).

Mrs. Raimer added, or the first business day thereafter if that should fall on a weekend.

In response to Mr. Delia, Mrs. Raimer repeated to him that he is to respond back to the Board by February 18th.

Mr. O'Brien added that we do calendar days in land use.

Mrs. Raimer asked for a motion to continue this matter based upon the understandings that have been expressed on the record.

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

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

Mr. Kaufman thanked the Board for its patience and time and said that, hopefully, he would not be back in 45 or 60 days.

The meeting adjourned at 10:18 P.M.

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DAWN V. WOLFE
Planning & Zoning Administrator