

MINUTES

FEBRUARY 4, 2014

BOARD OF ADJUSTMENT

LONG HILL TOWNSHIP

CALL TO ORDER AND STATEMENT OF COMPLIANCE

The Chairman, Dr. Behr, called the meeting to order at 8:00 P.M. He then read the following statement: Adequate notice of this meeting has been provided by posting a copy of the public meeting dates on the municipal bulletin board, by sending a copy to the Courier News and Echoes Sentinel and by filing a copy with the Municipal Clerk, all in December, 2013.

MEETING CUT-OFF

Chairman Behr read the following statement: Announcement is made 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 latter specified cut-off time.

CELL PHONES AND PAGERS

Chairman Behr read the following statement: All in attendance are requested to turn off cell phones and pagers as they interfere with the court room taping mechanism.

PLEDGE OF ALLEGIANCE

ROLL CALL

On a call of the roll the following were present:

Excused:

E. Thomas Behr, Chairman
Edwin F. Gerecht, Jr., Member
Michael Pesce, Member
Felix Ruiz, Member
Michael O'Mullan, 1st Alternate

Sandi Raimer, Vice Chairman
Richard Keegan, Member
Michael Pudlak, 2nd Alternate

Absent:

Barry Hoffman, Bd. Attorney
Thomas Lemanowicz, Bd. Engineer
Kevin O'Brien, Twp. Planner
Cyndi Kiefer, Planning & Zoning Secretary

Jerry Aroneo, Member

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APPOINTMENT OF VICE CHAIRMAN

Chairman Behr opened the floor for nominations for the position of Vice Chairman for the remainder of 2014. Mr. Pesce nominated Mr. Gerecht. Mr. Ruiz seconded the nomination.

Chairman Behr asked if there were any other nominations. Hearing none, he asked for a motion to close the nominations and to direct the secretary to cast a unanimous ballot for Mr. Gerecht. Mr. Pesce moved and Mr. Ruiz seconded. A Voice Vote was taken and the motion passed unanimously.

Chairman Behr and the Board congratulated Mr. Gerecht.

EXECUTIVE SESSION

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

APPROVAL OF MINUTES

Mr. Pesce moved approval of the minutes of the July 2, 2013 meeting. The motion was seconded by Mr. Ruiz and was approved unanimously by Voice Vote. Mr. O'Mullan abstained since he was not present at that meeting.

Ms. Kiefer advised Chairman Behr that there were two (2) corrections in the minutes of the October 1, 2013 meeting. On pages 2 and 5, the word "Board" was replaced by "B". Mr. Ruiz moved approval of the amended minutes. The motion was seconded by Mr. Gerecht and was approved unanimously by Voice Vote. Mr. O'Mullan abstained since he was not present at that meeting.

Mr. Ruiz moved approval of the minutes of the October 15, 2013 meeting. The motion was seconded by Chairman Behr and was approved unanimously by Voice Vote.

Mr. Pesce moved approval of the minutes of the November 5, 2013 meeting. The motion was seconded by Mr. Gerecht and was approved unanimously by Voice Vote.

RESOLUTION OF MEMORIALIZATION

STIRLING LIBRARY, LLC

91 Central Avenue
Block 13103, Lot 6

#07-03Z(A)

Request for Removal of
Condition No. 2 (c,d,e)

Mr. Hoffman advised the Board that Mr. O'Brien and Mr. Lemanowicz had reviewed the draft resolution and their comments had been incorporated into the version that was currently in front of the board members.

Chairman Behr asked the board members if there were any comments or changes they wished to make. There were none.

Mr. Gerecht moved approval of the resolution as amended and Mr. Pesce seconded that motion. A Roll Call Vote was taken. Those in Favor: Mr. Gerecht, Mr. Pesce, Mr. Ruiz, Mr. O'Mullan, and Chairman Behr. Those Opposed: None. Motion passed unanimously.

Mr. Ruiz asked the Chair to be excused for personal reasons and left the meeting at 8:10 P.M.

EDUCATIONAL SESSION

INHERENTLY BENEFICIAL USES

1. Why, in principle, do "d" variances require a higher burden of proof than other variances and a "super majority" affirmative vote of five (5) members?

Mr. Hoffman said that the core of a "d" variance is for a use that is not permitted. Although it is not to be frowned upon, it is to be treated rather rigidly and skeptically. The applicant must prove that this is a special reasons case because the planning experts of the municipality have established what is and is not allowed.

Mr. Hoffman stated that there are differences between the six (6) types of "d" variances. The most fundamental one is a variance for a use that is not allowed. A store or a factory or a two-family or four-family house can not be placed in an area that is zoned for single family homes. It is not what was envisioned by the Master Plan. There are other types of "d" variances of lesser impact, each with its own criteria attached. They, like all "d" variances, require a showing of special reasons however case law has shown that something less needs to be shown. For example, in expansion of a non-permitted use, "d-2" variance case law has shown that if there is a use that has already been allowed by a variance, an expansion of that use can be granted without putting the applicant through the rigors of a "d-1" use variance.

Mr. Hoffman added that three (3) of the six (6) types of "d" variances include a deviation from a specific standard applicable to a condition of use. The thought is that, unlike a use variance where the use being requested is contrary to what is permitted, a conditional use is envisioned by the legislators of the municipality as being a permitted use subject to meeting the follow-up conditions. The others are for a floor area ratio variance ("d-5") and a height variance ("d-6"), where the height exceeds the allowable number by 10% or greater. Those are deemed to be statutorily requiring an exceptional vote of five (5) members to approve but the proofs that need to be established as developed in case law are significantly less rigorous than for a "d-1" type of use variance.

Mr. O'Brien stated that when zoning was introduced in the United States in the 1910's and 1920's, the whole purpose behind it was to separate uses so that industrial uses would not be next to residential uses; commercial uses would be in their appropriate place. Over the last one hundred (100) years or so, the whole purpose of the basis of zoning has been to separate the uses. Therefore the question of use is a fundamental one. Whether or not a use is allowed in a zone speaks to the entire purpose of zoning. It is why there are zoning laws in effect.

2. What are the *Purposes of Zoning*, why are they important, and where can you find them listed in the MLUL?

Mr. Gerecht read, "Local Boards of Adjustment can grant variances not contrary to the public interest to avoid unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice is done." He felt that that summed up following the zoning purposes and what the Board has to follow in order to exercise it.

Chairman Behr said that in the section of the MLUL (7-6 "Special Reasons; Promotion of Zoning Purposes; "a" through "o"), "enhancing the general welfare" ("a") was the most important. During testimony, the general public welfare goes directly to the special reasons. He said that when applicants make their cases for the special reasons, the Board must be mindful of that section. There must be testimony concerning to what degree this application has met its burden of proof in showing that it has met the purposes of zoning.

Mr. O'Brien said that in addition to a use variance being rooted in the basis of zoning, a bulk variance (C-2) can also say that the benefits outweigh the detriments and that it advances the purposes of zoning.

Mr. Lemanowicz said that the application did not have to enhance all of those purposes since they may not all apply. He said that the Board must decide whether the burden of proof is met even if only one of those applied—is it reasonable and has it met the burden of proof.

Chairman Behr said that during testimony it might become obvious that the application works against some of the goals of the MLUL. As the negatives and positives are balanced, there could be an issue since if the application is approved, it would in some way work against some of the goals and purposes of zoning.

Mr. O'Brien said that if there is a negative vote on an application, it would be very important for the Board to put on the record the reasons for not supporting the application so that those reasons could be placed in the resolution. Those reasons should be based not only on the purposes of zoning but also on fact-specific items that relate to how this did not meet, in a negative case, the zoning ordinances or plan and in addition did not meet the purpose of zoning. The more specific, the better.

3. The MLUL authorizes granting a "d" variance only in *specific cases* and for *special reasons*. What three general circumstances constitute *special reasons*?

- (1) Inherently beneficial use
- (2) Undue hardship
- (3) Promoting the general welfare

Mr. Hoffman said that all of which, or any of which would need to be shown to establish a "special reason" to support the positive criteria.

4. In order to qualify as an *inherently beneficial use* and thus meet the *special reasons* "positive criteria," what must an applicant demonstrate?

Chairman Behr stated that if the application is an "inherently beneficial use," it is presumed to qualify as contributing to the public good.

Mr. Hoffman added that the burden in effect shifts. If the use benefits the community, the application has presumably met the positive criteria. Someone who might think otherwise would then have the burden of proving why that would not be true.

Mr. O'Brien said that the application would still have to meet the negative criteria which could outweigh the positive criteria. Both have to be proven.

Chairman Behr noted in Cox's discussion of "D Variances" 7-7.1 "Nothing is inherently beneficial without consideration of context. The irrebuttable presumption of site suitability (or the exemption from the special reasons or site suitability test), may have laudable origins but now misses the mark and threatens the integrity of zoning. Site suitability should be shown for all variant uses. Why shouldn't there be substantive special reasons for all variances instead of a compulsory and automatic process that ignores the essence of zoning..."

Chairman Behr asked what would happen if there was an application for a hospital in an area where several already existed.

Mr. O'Brien said that in addition to local need, there is a concept of regional need. If the applicant can show that that need is not served in a general geographic area, under certain circumstances it might meet the general welfare criteria however it had to be very specific.

Mr. Hoffman said that choosing another site that might be better suited for the application would weigh into the mix when establishing the negative criteria.

Chairman Behr asked how the Board would deal with this while maintaining impartiality. How could a Board ask if there is another location outside the municipality where the need could be met regionally without demonstrating a sense of bias against the applicant?

Mr. O'Brien suggested that the Board ask the question of the applicant. "If this is your capture area and there are two of these facilities in this community, is there any place else more suitable or more central to the remainder of your capture population?"

Mr. Lemanowicz added when an applicant wants to subdivide an undersized lot, the first question is, "Have you inquired if there is any additional land available?" It is the same idea.

Mr. O'Brien commented that there is both case law and opinion that indicates once a need is met, inherently beneficial may not apply to that particular use. In the case of multiple iterations of a use, for example multiple hospitals, a town could decide that an additional hospital is no longer inherently beneficial. Cox states that doctor's offices are not on the list because they are everywhere so they are not inherently beneficial. They are not that rare. A board should look for something that is fairly rare and needs protection.

Mr. Hoffman said that churches have their own set of criteria by virtue of a federal statute. It says that if a house of worship applies, presumptively it would get approval irrespective of anything on a local level.

Mr. O'Brien added that cell towers were mistakenly considered inherently beneficial in the early 2000's but that had changed even though they do serve the general welfare.

5. What are the two components of the *negative criteria* that any applicant must satisfy to be granted a "d" variance?

- (1) Relief granted should be without substantial detriment to the public good.
- (2) Relief should not substantially impair the intent and purpose of the zone.

Chairman Behr asked if a *permitted use* could be placed in the same spot and could provide the same benefits as the "d" variance application, how should a board react.

Mr. O'Brien said that the Board must rule on the application that is in front of it. Even though presumably a permitted use could go into a space, that was not the application in front of the Board. If the "d" variance application met the burden of proof, the Board must rule on that particular application.

Chairman Behr asked what weight should be given to the argument that there would be economic benefit to a township.

Mr. O'Brien answered, "None." He then added that an applicant would point out that there would be economic benefit such as construction jobs, long term jobs, tax rates to the community, and other economic benefits because in a sense, that would enhance the general welfare of the community. It could not be a reason for approval. Approval is granted when the application meets the special reasons, positive and negative criteria.

Mr. Hoffman said that economic benefit would be incidental.

Mr. O'Brien added that "economic benefit" could not be THE argument or used to meet the proofs. It is something that is said because it contributes.

6. What four components of the *SICA balancing test* (*SICA v. BOARD OF ADJUSTMENT OF WALL TWP.*) must applicants demonstrate and a Board of Adjustment evaluate in granting a "d" variance?

- (1) Identify the public interest at stake and make a finding on how compelling the public interest at issue actually is.

Mr. O'Brien said that because the Board would be dealing *only* with inherently beneficial uses when the SICA test is presented, the public interest must be provided. The applicant must state what essential need they are supplying to the community. The Board could determine that that need has already been met and decide that the public interest presented is not that compelling or inherently beneficial because it would not be adding anything. There are two sides to that one statement.

- (2) Identify the detrimental effects that will ensue from the granting of the variance.

Mr. O'Brien suggested effects such as increased traffic and environmental considerations as examples.

Chairman Behr added that he recalled an application where the Board considered whether the township would have the appropriate fire response apparatus to respond promptly if a particular application was granted.

- (3) Determine whether any legitimate detrimental effects can be reduced by imposing reasonable conditions on the use.

Mr. Hoffman said that by placing reasonable conditions on the approval, there would be a way for an applicant to potentially supplement what a township otherwise had to offer and hence reduce any detrimental effects. For example, if a granted use would burden a local volunteer rescue squad, a requirement for the applicant to contract with a private rescue squad service would be considered a reasonable condition of approval.

Mr. O'Brien added that the Board should point out the potential detriments and then ask the applicant how those detriments could be alleviated in terms of public safety and general welfare. He noted that those conditions had to be proximate to the site. Buffering and lighting restrictions were other examples of reasonable conditions which could be listed in a resolution.

Mr. O'Brien said that the professionals' reports should be used in the board members' deliberations to identify the potential detriments and the potential reasonable conditions which could be set to alleviate those effects. Questions raised in reports are those that should be asked and answered.

- (4) Weigh the positive and negative criteria to determine if it would be a substantial detriment to the public good.

Mr. O'Brien noted that a "d-2 expansion of a non-conforming use" has a lesser burden of proof than to put in a non-conforming use.

Mr. Hoffman added that it would still require a vote of 5 members.

There were no further questions.

Mr. Gerecht motioned to adjourn the meeting and Mr. Pesce seconded. A Voice Vote was taken. By unanimous vote, the meeting was adjourned at 9:18 P.M.

CYNTHIA KIEFER
Planning and Zoning Secretary

Date