

**MINUTES**

**OCTOBER 7, 2014**

**BOARD OF ADJUSTMENT**

**LONG HILL TOWNSHIP**

**CALL TO ORDER AND STATEMENT OF COMPLIANCE**

The Chairman, Dr. Behr, called the meeting to order at 8:06 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, 2014.

**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 later 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., Vice-Chairman  
Michael Pesce, Member (8:10 p.m.)  
Richard Keegan, Member  
Michael O'Mullan, 1st Alternate

Sandi Raimer, Member  
Jerry Aroneo, Member  
Michael Pudlak, 2<sup>nd</sup> Alternate  
Felix Ruiz, Member

Kevin O'Brien, Board Planner (arrived 8:30 p.m.)  
Cyndi Kiefer, Planning & Zoning Secretary

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**EXECUTIVE SESSION**

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

**APPROVAL OF MINUTES**

The regular minutes of September 2, 2014 were approved as written on motion by Mr. O'Mullan and seconded by Mr. Gerecht. Chairman Behr and Mr. Pesce were not eligible to vote since they were not present at that meeting.

The executive minutes of September 2, 2014 were approved as written on motion by Mr. Gerecht and seconded by Mr. O'Mullan. Chairman Behr and Mr. Pesce were not eligible to vote since they were not present at that meeting.

Mr. O'Mullan moved approval of the minutes of September 16, 2014. The motion was seconded by Mr. Gerecht and was unanimously approved. Mr. Pesce was not eligible to vote since he was not present at that meeting.

**RESOLUTION OF MEMORIALIZATION**

**MEREDITH & TRISTAN FORMON**  
59 Madison Street  
Block 11204, Lot 22

**#14-06Z**  
Bulk Variances

Chairman Behr asked if there were any comments or questions about the resolution. Mr. Gerecht moved approval of the resolution of memorialization. Chairman Behr seconded the motion. A Role Call Vote was taken. Those in Favor: Mr. Gerecht, Mr. Keegan, Mr. O'Mullan, and Chairman Behr.

Those Opposed: NONE. The resolution was approved. Mr. Pesce was ineligible to vote since he did not vote on the application.

**RESOLUTION OF MEMORIALIZATION** (revised)

**RICHARD DAUNNO**  
437 South Northfield Road  
Block 10201, Lot 6.01

**#14-05Z**  
Bulk Variances, Development Permit  
Waiver, Unimproved Road

Chairman Behr asked if there were any questions or comments on the revisions to the resolution. Mr. Gerecht moved approval of the resolution of memorialization. Mr. Keegan seconded the motion. A Role Call Vote was taken. Those in Favor: Mr. Gerecht, Mr. Keegan, and Mr. O'Mullan. Chairman Behr and Mr. Pesce were ineligible to vote since they did not vote on the application.

**PROCEDURAL RULES OF THE BOARD OF ADJUSTMENT**

Chairman Behr thanked Mr. Gerecht and Mr. O'Mullan for their work over the summer putting together the document, part of which was in front of the board members at that meeting. As is necessary, they had used Cox as a template.

Chairman Behr had received a copy of "Bernards Township Zoning Board of Adjustment Rules and Regulations" and felt that that board had done an excellent job.

Chairman Behr referred to the document created by Mr. Gerecht and Mr. O'Mullan, specifically "Part I, Administration, Analysis." He stated that the Board could choose to write out all the rules that applied under the headings that they saw there. They could follow Cox with comments and changes as were indicated in the various notes or the Board could look at what was done in Bernards Township which was tight and concise. There was a third option that Chairman Behr wanted to outline and get feedback from the board members.

Chairman Behr said that everything that fell under the heading "Rule 1:1 Organization, Officers, General Provisions" was a matter of law and was covered under Municipal Land Use Law (M.L.U.L.). It was also completely referenced in the township's ordinance. The Board had no discretion over this section other than the Schedule of Meetings. It could be stated that the Rules of the Chairperson, Vice Chairperson, Secretary would be as stipulated in the M.L.U.L. and let it stand as that.

Chairman Behr said the short form would say that this Board would follow exactly the M.L.U.L. or the board members could try to rewrite Cox and get it tighter or the Board could look at Bernards Township and use that language.

Mr. Gerecht commented that he would like to see a comprehensive document. If that document referred to something, copies should be placed with it so that when a new Board member took office, that Board member could be handed one document. He added that those referenced items could be incorporated into their document.

Mr. Keegan said since that Rule 1:1, with the exception of meeting dates, was already defined in the township's ordinances and the M.L.U.L., he felt that they should just refer to them otherwise the document could get out of sync with those resources.

Mr. O'Mullan said, in reference to the designation of officers and their duties, there were offices provided for by the law but not used in this township. He added that the same was true of consultants and experts. He felt it would be prudent if the purpose of the rules was to talk about this board's practices. It might say that "there shall be a Chairman, a Vice Chairman, a Secretary and their duties are set forth in the M.L.U.L. and the ordinance."

Chairman Behr moved ahead to page 7. He noted that this was Cox's language with a number of comments. He referred to "1:1-1. Title of the Board" and stated that that was a matter of law. He suggested in "1:1-2, Annual Meeting; Officers," the date be changed to match their date.

Mr. O'Mullan suggested that 1:1-2 should be the section where the actual offices and appointments specific to the township were listed as per the M.L.U.L. and the ordinance.

Chairman Behr stated that if they went with the notion of a comprehensive document, everything in it would be pursuant to 40:55.d.69. In places where the board members would have the ability to take action on something, it should be there for their review. The board members had nothing to do with the beginning portion of 1:1-2 because the members are selected by law by the Township Committee. Similarly, the Board's election of consultants is clearly specified by law. The Board and the Board only has the power to select any of the consultants that it uses with the one stipulation that the attorney cannot be the municipal attorney. Compensation and duties for consultants are also

determined by the Board. The township has the responsibility of paying that compensation to the extent of the budget that has been set aside for it. He then noted that Bernards Township condensed these sections into four (4) sentences.

Chairman Behr felt that Cox was trying to spell everything out since there were many boards that did not have the same history of careful procedures as Long Hill Township's Zoning Board of Adjustment. He did not think that that much detail was necessary. One could be referred back to the necessary document or section of document. He sensed that Mr. Gerecht felt that this document should be readable and not obligate someone to go back and forth to look at other documents.

Mr. Gerecht added that they could provide copies of what was referred to.

Mr. Pesce said that given the two (2) options, he would rather have a stand-alone document that would not require reference to outside documents.

Mr. O'Mullan said that if the purpose of the document was to allow someone to walk in the door and ask what the rules were, it should be stand-alone. However, the danger in that would be that things could get out of sync.

Mr. Gerecht stated that the only way to keep it from getting out of sync would be to say that the rules would be amended as the M.L.U.L. was amended. Legally, it would be in compliance. If it's amended, these rules would automatically comply with the amendments to the rules. The wording would have to be changed to make it truly in sync.

Several of the board members noted that there were very few changes made to the M.L.U.L.

Chairman Behr said that he sensed that the board members felt the document should be complete and solely reflective of what this Board did and ideally as concise as possible.

Mr. Keegan suggested a bi-annual review to ensure that the document remained in sync.

Chairman Behr moved back to page 1 and highlighted a couple of items. "Rule 1:2 Meetings" was a statement of when the Board met and what the provisions were for emergency meetings and for postponing meetings. He felt that they could condense "Special Meetings" and "Meetings Open to Public" to one or two sentences. He offered to supply the board members with draft language about that.

Chairman Behr stated that the "Order of Business" would reproduce that which they had agreed on previously and would slip right in there.

Chairman Behr moved to "Record of Proceedings" which was 1:2-5 on page 9. He felt that it could be condensed into one sentence. He noted that it was the practice of the township to maintain all stenographers' notes, electronic recordings or other verbatim records of meetings for two (2) years.

Chairman Behr then discussed 1:3-1 "Quorum." The language of what constitutes a quorum, motions and voting is very carefully laid out in the M.L.U.L. so that language could simply be reproduced. He noted that Cox discussed the concept of a quorum at some length and made an interesting point. The M.L.U.L. stated that four (4) members constitute a quorum and is silent as to what to do when there is a D Use Variance which requires a minimum of five (5) affirmative votes. If there were only four (4) members, there would not be a sufficient people to act on a D Use Variance. Chairman Behr felt that there was a difference between the things that had to be done because the law says they do and those areas where the Board had some discretion. It has been the practice of this Board that, if there were only five (5) members present, knowing that an applicant for a D Use Variance needed five (5) affirmative votes, the Board had given the applicant the right, without penalty, to postpone the hearing until six (6) or seven (7) members could attend. This is done as a matter of practice, not as a matter of law. In fairness to the applicant, Chairman Behr felt that language to that effect should be included in their rules. Cox says that if five (5) affirmative votes are required and if there are only four (4) members, they can't act on a D Variance.

(Mr. O'Brien arrived at 8:30 p.m.)

Chairman Behr asked Mr. O'Brien to comment on the concept of "quorum" in relationship to D Use Variances and the addition of language specific to the past practice of this Board. It could be either an additional rule or a comment that this has been the past practice of this Board.

Mr. O'Brien noted that the definition of a quorum is a set one which entails that a majority of the members be present. This is a minimum set number. The fact that the Board cannot act on a D Use Variance with only four (4) members does not change whether there is a quorum or not.

Mr. Gerecht said that, given Mr. O'Brien's comments, the language should state that even though the Board may legally have a quorum with four (4) members, since a D Use Variance requires five (5) affirmative votes, the Board's practice has been to not hear the application with only four (4) members.

Mr. Gerecht said that if the language said that this was not a quorum, the Board could not conduct any other business that evening.

Mr. O'Brien said that in another section, they could state that the practice of the Board was to not hear a D Use Variance unless there are a minimum of five (5) members present or six (6) or seven (7).

Mr. Pesce added that they would give the applicant the option of postponing without penalty.

Mr. O'Brien said that Cox pointed that out particularly in terms of the cross-over members. Even though the M.L.U.L. states that the Board can draw from the other Board to make a quorum, Cox points out that if it's a D Use Variance, getting the four (4) doesn't do anything.

Chairman Behr stated that members could only be brought in for disqualification. Members of the Planning Board could not be brought in for those who are absent.

Chairman Behr felt that after Rule "1:3 Quorum and Voting," it made sense to insert "Qualification and Disqualification of Members of the Board" as Rule 1:4. The board members had already discussed and voted on this at a previous meeting. That language would be inserted here.

Chairman Behr noted that there was a long passage in Cox pertaining to Alternate Members. He felt that they should compress into here the rules governing Regular and Alternate Members particularly as they apply to participation, voting, and any other matters. He felt it was unusual to separate the Alternate Members out and not have said anything initially about Regular Members.

Mr. Gerecht added that Rule 1:4 could be entitled "Members."

Mr. O'Brien noted that the appointment of Alternate Members is at the discretion of the Township Committee. The actual appointment of alternates is voluntary, not mandatory. The M.L.U.L. does not require alternates to be appointed.

Chairman Behr said that all of that was stipulated in the township ordinance.

Chairman Behr then referred to "1:4-3 Alternate to serve until final disposition" and felt that that was fine. He asked the board members to review "1:4-5 Alternate not to serve at adjourned or continued hearing unless present at prior hearings."

Mr. O'Brien said that 1:4-3 has not been this Board's past practice.

Chairman Behr said that if someone is disqualified, they can never return to that matter.

Mr. O'Brien said that that would be correct in the case of a disqualified member.

Mr. O'Mullan said that in Cox, 1:4-3 does not say "disqualified."

Chairman Behr asked, on a continued hearing, if an alternate member takes over and becomes in effect a regular member for that particular matter before the Board, should they not see that matter all the way through. Or when the regular member shows up, if the regular member has listened to the tapes, should they take over?

Mr. Gerecht said that that had been this Board's practice.

Mr. O'Brien said that that was assuming a one-for-one trade however, if Member #1 was absent and Alternate #1 takes his place. In the second hearing, Member #2 is absent, Member #1 comes back, and Alternate #1 is now replacing Member #2. In the third hearing, Member #3 is also absent and Alternate #2 is now filling in for Member #3. At the final meeting, all three (3) regular members are in attendance so that the alternates go back to being alternates. It would be a case-by-case basis.

Mr. Pesce felt it when the Board got to a point where a determination was to be made; it would be the first seven (7) who have either attended all of the hearings or listened to the tape who could vote.

Mr. O'Brien responded that that was correct.

Mr. Pesce stated that that determination would not be made until the hearing when the decision is rendered.

Mr. O'Mullan said that that was not what Cox said.

Mr. Gerecht said that that was why they inserted the word "disqualified" because once a member is disqualified, he can't come back. The alternate would take his place for the duration of that particular case.

Chairman Behr said they were really talking about the first seven (7) eligible members. He said that he would revise that section.

Mr. O'Brien said that 1:4-3 was good because it limited the discussion to disqualification.

Mr. Pesce felt that 1:4-2 discussed the "last seven guys standing."

Mr. O'Brien suggested that since disqualification was dealt with in 1:4-3, it not be referred to in 1:4-2.

Mr. O'Mullan said that 1:4-5 should relate to **all** members.

Chairman Behr said that **nobody** was eligible to participate unless they had attended the hearings or listened to the tapes and he felt that 1:4-5 could be simplified.

The board members agreed that discussing Regular Members before Alternate Members made sense.

Mr. O'Brien noted that there was a hierarchy. Members and Class IVs have a seniority order and alternates have a numerical order.

Mr. Pesce said that the focus should be who's eligible at the time the decision is to be made.

Chairman Behr moved to "Part II – Rules of Practice." He noted that there are items that are unique to Long Hill Township and do not show up in Cox's language. He had not gotten into detail with this because he felt that decisions had to be made before that effort was made.

Mr. O'Brien stated that "2:1-1 "Commencement of Action" is stated in the ordinance and the M.L.U.L. He questioned whether it was necessary to have it in this list.

Mr. Gerecht said that that begged the question as to whether they wanted this to be an independent document that someone could read and understand without someone having to read the ordinance.

Chairman Behr noted that the vast majority of these items were handled by the Planning and Zoning Administrator and/or the Planning and Zoning Secretary. These items follow either the law or specialized practices in Long Hill Township which would encompass the entire Completeness Review process.

Mr. O'Brien added that these items were being done under the authority of the Board as its designated staff. Hence, that power flows back to the Board.

Chairman Behr said the Board Chairman needed to know these processes.

Mr. Gerecht felt that everyone should understand these processes. Each member of the Board should understand how it functions behind the scenes so that he had a working knowledge of what went on because at some point it might have a benefit to that member.

Mr. O'Brien said that because this would be a document that was adopted by this Board, and would stand by itself, and didn't go back to a township ordinance or any other body or any other document, Mr. Gerecht was correct in saying that the Board could insert anything it wanted. It was the Board's document.

Chairman Behr felt that it should be condensed and tight. He again referred to the Bernards Township document as one that was concise and tight.

Mr. O'Mullan said that despite what Mr. Gerecht had stated, the board members didn't care about some of those items. "2:1-1 Commencement of Action" dealt with how to appeal a decision and the board members did not need to know how many copies had to go where in an appeal.

Mr. O'Brien said that the Land use Application Checklist as well as other internal documents were not distributed to the board members for that very reason. There are many things that the consultants and staff require but are not important for the board members to see because staff is advising the board members that the information is there.

Mr. Gerecht agreed that the board members need not see all the documents. They just need to know that they are used and this is how it is done. He felt that they needed to understand that that application had gone through all those steps in order to get to the point of being heard. He did not want to burden the document with all the lists and background information, just note that these processes exist.

Mr. O'Brien noted that Cox did this in 23 pages. As an educational document for the Board, whatever board members and new board members should know should be included in the document.

Chairman Behr said that both procedurally for the Board and administratively through Mrs. Wolfe and Ms. Kiefer, the Board ran a reasonably tight ship unlike a lot of other boards. Cox had to include everything for those more inexperienced boards. The administrative details such as how many copies should be made and where they should be distributed should not be included in the rules. It should state that the Planning and Zoning Administrator shall manage the process in accordance with and following the approved checklist to present the Board with a complete application.

Mr. Pesce said that he felt this was the compromise they had been seeking. The default would be that the document would refer to it except for those items that the board members felt should be in there because they were something that they might want to refer to when sitting behind this dais.

Chairman Behr referred to page 3, "Rule 2:4 Applications and Appeals." He felt that that should be as tight and short as possible since that was all legally mandated.

Mr. Gerecht said that this would occur after the board members had heard the application and therefore need not be spelled out in detail, if at all.

Chairman Behr said that things that were outside the norm would show up on Mr. O'Brien's Planning Report and in the comments that the Board would get from its attorney.

Chairman Behr referred to "Rule 2:5 Hearings" and said that only this Board's order of business should be provided since it had already been agreed upon and established.

Chairman Behr then moved to "Rule 2:6 Evidence" and said that he did not know what to do with it. There were two (2) schools of thought. There were Overriding Principles in the M.L.U.L. that probably could be condensed pretty tightly in terms of evidence but he felt that board members did need to know that the Board did not follow strict legal rules of evidence. However there are procedural rules in terms of the types of evidence that is or is not accepted which should be included.

Mr. O'Brien reminded the board members that they are a quasi-judicial board. People appear before this Board because they have been denied the right to do something. People have the right to appeal the Board's decision at various levels. The evidence that is presented must be recorded in a way much like a court. That evidence is something that is important to note.

Chairman Behr said that this section had to be complete. He referred back to Bernards Township and stated that their section on evidence was quite extensive. He felt that some of the items could be condensed. The principles that the board members act on had to be spelled out, however.

Mr. Pesce said that the gist of the rules of evidence in court is that when things are not admissible, it's because they are inherently untrustworthy. The whole concept would be to ensure that what the Board is hearing is credible.

Chairman Behr noted that they are released from the obligation to strictly follow the rules of evidence however a decision can only be made based upon the credible evidence that has been heard.

Mr. Pesce said that hearsay is the biggest one that they did not pay attention to. But that is an issue.

Chairman Behr said that historically, that type of evidence has not been admitted. Letters are not admitted. Neither are petitions.

There was discussion as to what testimony was and what hearsay was.

Chairman Behr noted that there had been times when the testimony from the Board's experts differed from that of the applicant's experts. The Board then made the decision that it was more comfortable with the expertise of our consultants.

Mr. O'Brien said that as each piece of evidence is given, the Board gives it the credibility it is due based upon the Board's experience. At the end of the process, the board members make a decision based on their acceptance of the credibility of the evidence that had been presented from either side.

Mr. O'Brien said the Board could not NOT accept evidence except in the very clear case of hearsay. The Board attorney would stop any hearsay evidence because his job is to protect the integrity of the Board's decision. He reiterated that it is not the Board's job to stop a piece of evidence. Decisions are made based on which pieces of evidence are deemed credible or not credible. That determination is part of the decision making process and does not need to be codified.

Mr. Pesce asked what Bernards Township spent three pages doing. He wondered how they were able to condense the Rules of Evidence down to three (3) pages.

Chairman Behr stated that there is a paragraph which said, "The Board may refer the application to another person or agency for reports provided such reference shall not exceed the time within which the Board must act. Such reports from other persons shall be made available to the applicant."

Mr. Gerecht equated that to reports from the Shade Tree Commission or the Environmental Commission.

Mr. O'Brien added that the Board may choose to hire an environmental expert or a traffic expert, for example.

Chairman Behr moved to "Evidence." He read, "The formal Rules of Evidence adopted by the courts in the State of New Jersey shall not apply. No decision shall be based on any facts not provided or on matters which are not part of the record unless they are items of which the Board is entitled to take judicial notice in accordance with Rule 246 below. The Board shall follow case law precedent as to admission of evidence in administrative proceedings."

Mr. O'Brien felt that that went a little too far.

Mr. O'Mullan said they could debate where to draw that line.

Chairman Behr said that Cox had language that was helpful and he read a passage starting with "In short the Board may use any reliable source of information..." It said that it was not that those rules don't apply as much as board members are not strictly held to follow them. He felt that that nuance was important.

The board members felt that that passage removed hearsay without actually using the word.

Mr. O'Mullan felt that that passage made a lot of sense. He noted that it was in Cox's commentary and perhaps belonged in these rules.

Chairman Behr offered to copy Bernards Township into a PDF file and annotate. He noted that the next available date to discuss these rules would be December 2, 2014 and hopefully the board members would have comments ready by then.

Mr. O'Brien said that typically the Board would adopt a set of bylaws at the reorganization meeting in January.

Chairman Behr responded that if the Board could get it done, it would be ready for that January meeting.

Mr. Pesce motioned to adjourn. Mr. Gerecht seconded that motion. By unanimous Voice Vote, the meeting was adjourned at 9:10 p.m.

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CYNTHIA KIEFER  
Planning and Zoning Secretary

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Date