

MINUTES

January 20, 2015

BOARD OF ADJUSTMENT

LONG HILL TOWNSHIP

CALL TO ORDER AND STATEMENT OF COMPLIANCE

The Chairman, Dr. Behr, called the meeting to order at 8:03 P.M. He then read the following statement: Adequate notice of this meeting has been provided by posting a copy of the public meetings 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 on January 7, 2015.

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:

E. Thomas Behr, Chairman
Edwin F. Gerecht, Jr., Vice-Chairman
Michael Pesce, Member
Michael O'Mullan, Member
Thomas Sims, 1st Alternate
Jeffrey Wills, 2nd Alternate

Thomas Lemanowicz, Bd. Engineer
Kevin O'Brien, Bd. Planner
Cyndi Kiefer, Bd. Secretary

Excused:

Jerry Aroneo, Member
Richard Keegan, Member
Dan Bernstein, Bd. Attny.

Absent:

Michael Pudlak, Member

EXECUTIVE SESSION

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

RESOLUTION – Sandi Raimer

Chairman Behr read the following Resolution:

Whereas, Sandi Raimer joined the Long Hill Township Zoning Board of Adjustment in 2004, and for ten years was an invaluable member, serving as Vice Chairperson from 2006 through 2013, and,

Whereas, Sandi Raimer also served two terms as the Zoning Board of Adjustment cross-over member of the Planning Board — a time-consuming commitment of four evenings per month, and,

Whereas, during her time in office Sandi Raimer set the standard for the entire Zoning Board of Adjustment in compassionately balancing the strict legal requirements the Board must meet with her unswerving commitment that residents be treated fairly and compassionately, and,

Whereas, in her role as Vice Chairperson, Sandi Raimer consistently provided wise, judicious counsel in helping the Zoning Board of Adjustment effectively deal with difficult legal and ethical matters, and,

Whereas, Sandi Raimer was honored by Long Hill Township with its 2014 Prominent Volunteer Service Award for her dedication to the people of Long Hill Township and her love for the township,

Now therefore, be it resolved on January 20, 2015 by the Zoning Board of Adjustment in the Township of Long Hill, in the County of Morris, that Sandi Raimer be honored by the Board, and that she publicly receive our warm thanks and deep appreciation for her exemplary service to the Board and to the community.

Chairman Behr moved approval of the resolution. The motion was seconded by eg. A Voice Vote was taken and the resolution was approved by unanimous vote.

EDUCATION SESSION – Board Procedures

Chairman Behr along with Mr. O'Brien and Mr. Lemanowicz, conducted an education session on the following topics:

- The nature and function of a Zoning Board of Adjustment
- Board member legal and ethical responsibilities
- Legal requirements for granting “c” and “d” variances
- Guidelines for assessing and responding to conflicts of interest

The education session began with the following self-test for board members.

1. If members of the public want to discuss their opinions about either a pending or current Board application personally with a Board member outside of the public hearing, the most proper response would be”
 - a) “I don’t mind discussing the issues in general, but I don’t want to share my opinions about the application.”
 - b) “I don’t mind talking off the record, but please keep our conversation confidential, out of fairness to the applicant.”
 - c) “It is improper for me to have any discussion whatsoever about a pending or current application outside of the formal public meeting.”

ANSWER: (c)

2. It is acceptable for a Board member to state support for or opposition to the application before the Board Chair calls for deliberations.

a) True

b) False

ANSWER: (b) FALSE

3. If Board members have factual information pertinent to the application based on their personal knowledge, they may offer testimony about that information as part of the public record in the Board hearing.

a) True

b) False

ANSWER: (a) TRUE

4. It is appropriate for Board members to conduct detailed research into an application to glean further information to present to the Board.

a) True

b) False

ANSWER: (b) FALSE

5. If Board members have information they want the rest of the Board to know about regarding an application, the best approach is to:
- Present the information to *the Board* as a statement about the information: "I've noticed that..."
 - Ask *the applicant* to describe how they are considering the issue: "How are you addressing...?" "What options have you considered for...?"
- ANSWER: (b)
6. If Board members believe they have a solution to a problem presented by an application, the best way to bring that information to the Board and the applicant's attention is to:
- Recommend or suggest the solution: "You could remove the need for a variance if you..."
 - Ask *the applicant* whether (or how) they have considered the potential solution: "What are your thoughts about...?" "What might happen if you...?"
- ANSWER: (a)
7. Which of the following should be considered sufficient proof for approving a c(1) "hardship" variance?
- The applicant has physical disabilities, health limitations or other personal hardships.
 - The applicant needs to upgrade a current residence to a more competitively market-size and style of residence to increase its financial value.
 - Because of the exceptional narrowness, shallowness, topography or shape of the applicant's property, strict application of a regulation would result in exceptional and undue hardship to the applicant.
 - The applicant would suffer economic loss if the application were not granted because their proposal represents the "highest and best" potential financial value for the specific site.
- ANSWER: (c)
8. Which of the following factors should be considered required proof for an applicant to meet the Negative Criteria for acceptance?
- The application can be granted without substantial detriment to the public good.
 - The application can be granted without substantially impairing the intent and purpose of the zoning ordinance.
 - The application can be granted without substantially impairing the intent and the purpose of the zone plan (Master Plan).
- ANSWER: ALL THREE
9. Which of the following two statements is correct?
- If an applicant is granted a variance on the basis of hardship, they *still have to satisfy* the Negative Criteria.
 - If an applicant is granted a variance on the basis of hardship, they are *automatically exempted from* having to satisfy the Negative Criteria.
- ANSWER: (a)

10. Granting a variance for one property creates the precedent for having to grant variances for all similar properties?

- a) True
- b) False

ANSWER: (b) FALSE

11. Which one of these two statements is correct?

- a) For the Board to *deny* a variance, *the Board* is required prove that granting the variance would substantially impair the intent and purpose of the ordinance and zone plan (Master Plan).
- b) For the Board to *grant* a variance, *the applicant* is required to prove that granting the variance would *not* substantially impair the intent and purpose of the ordinance and zone plan (Master Plan).

ANSWER: (b)

12. Which of the following two statements better describes the appropriate procedure when granting *any* variance?

- a) The Board *may change the specific relief granted* to the applicant from what the applicant requested to what the Board decides is more appropriate for this specific application.
- b) In granting relief, the Board must limit itself only to the *specific relief requested by the applicant*.

ANSWER: (b)

13. Which of the following conditions should cause Board members to question whether they should recuse themselves from hearing an application based on conflict of interest:

- a) The Board member owns property within 200 feet of the property to be affected by the Board's decision.
- b) The Board member or a member of his or her immediate family has a direct or indirect financial or personal involvement in the application.
- c) A Board member has occasional social contact with an applicant.
- d) The Board member has made prior public statements suggesting a personal bias against an applicant or application.
- e) A Board member is a member of an organization which is either an applicant or objector.

ANSWER: (a) (b) (e)

14. During deliberations, it is acceptable for a Board Member to abstain from declaring their support for or opposition to granting the requested relief (Their vote is "I abstain.")

- a) True
- b) False

ANSWER: (b) FALSE

Following the meeting, Chairman Behr distributed the following notes summarizing the discussion points from the education session.

BOARD OF ADJUSTMENT OVERVIEW

POWERS

The Board of Adjustment is a legally-created body whose statutory duties under New Jersey Municipal Land Use Law MLUL 40:55D-70 include hearing appeals regarding enforcement of the zoning ordinance and rendering interpretations of the zoning map or ordinance, as well as its primary responsibility of granting exceptions (variances and waivers) to the zoning regulations and ordinances of the Township.

In New Jersey Municipal Land Use Law, the granting of variances is “disfavored” because the intent of zoning is to thoughtfully regulate development within specific zones to accomplish the Purposes of Zoning as specified in MLUL 40:55D-2.

MLUL, however, recognizes that exceptions for specific properties may be granted for a number of reasons:

“c” variances

1. **(c-1) “hardship variance”:** Where, because of exceptional narrowness, shallowness or shape of a specific piece of property, or exceptional topographic conditions or physical features *uniquely affecting a specific piece of property*, strict application of any regulation would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property.
2. **(c-2) “flexible variance”:** Where, because of an extraordinary and exceptional situation affecting a specific property, strict application of any regulation would result in peculiar and exceptional practical difficulties or undue hardship upon the developer of such property; where the Purposes of Zoning (or the purposes of the “Educational Facilities Construction and Financing Act,” P.L.2000) *would be advanced* by a deviation from the zoning ordinance requirements; and where the *benefits of the deviation would substantially outweigh any detriment*.

Important words to note:

- *specific piece of property* : Variances are always specific to the application and the unique conditions of property in question. A variance granted for one specific property does not, therefore, establish a precedent for apparently similar applications. For example, the fact that the Board grants a variance for a swimming pool on one property does not mean that every resident with a constrained lot on a given block now also meets the statutory criteria and has a right to install a swimming pool.
- *extraordinary and exceptional situation*: The intent here is clear: to grant variances where the conditions differ significantly from what is normally permitted in the zone. The intent of zoning is that most buildings in a zone would be able to reasonably conform to the zoning regulations.
- *exceptional narrowness, shallowness or shape of a specific piece of property, or exceptional topographic conditions or physical features*: The Board’s decision needs to reflect the *degree* of hardship based on the evidence presented by the applicant and a comparison with what an applicant might be permitted to do were the piece of property conforming to the zoning requirements. In principle, the Board needs to determine whether the conditions affecting the applicant are such that no other reasonable alternative to the applicant’s proposal before the Board could be accomplished.
- *exceptional and undue hardship*: We have many older homes in Long Hill Township (for example three bedrooms and a single bath) that do not meet the needs and expectations of today’s families. The Board hears frequent applications whose intent is to modernize a smaller home with an addition whose size or location on a lot triggers the need for variances. The Board has to decide, on a case-by-case basis, whether denying the application represents an “exceptional and undue hardship.” (Alleged “financial hardships,” however, with rare exceptions, are not considered as justifying approval of a variance.)

In practice, applicants typically modify their proposal during a hearing to create “reasonable alternatives” to what they initially proposed that remove the non-conformity or substantially mitigate its detriments.

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- *Substantially outweigh*: In deciding, under a “flexible c-2” variance whether or not to grant relief from a given ordinance, the Board needs to weigh whether granting the variance represent a significantly greater benefit than denying the application. In effect, the Board is affirming that allowing the variance actually is a better means to accomplish the Purposes of Zoning.

“d” variances in general

MLUL also allows, with specific limitations, variance from the permitted uses, bulk and density requirements within a zone. There are six types of “d” or “use” variances: “d-1” use, “d-2” expansion of a non-conforming use, “d-3” conditional use, “d-4” floor area ratio, “d-5” density, and “d-6” height.

The first three deal with uses not permitted in a zone; the last three regulate the *intensity* of use, because significant expansion in size and mass could have a negative impact on the Master Plan and the public good.

In principle, granting a “d” variance should be the exception, rather than the rule. To gain a “d” variance, therefore, an applicant needs to receive *five affirmative* votes, regardless of the number of members present, rather than the simple majority required for “c” variances.

The burden of proof on an applicant seeking a “d” variance is significantly greater than that required for “c” variances. The applicant has to prove that:

1. Special reasons exist that would allow this particular application to be approved because it clearly advances the Purposes of Zoning.
2. The application meets the Positive Criteria in that the benefits of granting the relief substantially outweigh any detriments.
3. The application meets the Negative Criteria in that it will have no negative impact on surrounding properties and the Township (see below).

Special reasons can include:

- Proof that the property in question cannot be reasonably adapted to a conforming use.
- Proof that the proposed non-conforming use is particularly suited to the particular location for which the variance is sought.

Some uses, such as schools, hospitals, etc., are considered “inherently beneficial,” because they inarguably serve the public good and promote the general welfare, one of the most important Purposes of Zoning. In principle, therefore, a use found to be “inherently beneficial” automatically meets the requirement for “special reasons.”

Note that an applicant’s assertion that the existing zoning precludes the most profitable use of the subject property has been consistently held by courts NOT to constitute “economic hardship” and thus is not adequate grounds for granting a “d” use variance. Alleviation of economic hardship for the property owner is not a Purpose Of Zoning or, by itself, a reason for a variance.

Similarly, the fact that a proposed use would significantly benefit the owner, the customers of a business, or the immediate neighbors does not make it inherently beneficial to the community as a whole.

Negative Criteria

In addition to the proofs required above for “c” and “d” variances, *any* application that is approved must also meet the Negative Criteria:

“No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted *without substantial detriment to the public good* and *will not substantially impair* the intent and the purpose of the zone plan (Master Plan) and zoning ordinance.” MLUL 55D:60

As pointed out in *New Jersey Zoning & Land Use Administration* by William M. Cox and Stuart R. Koenig, section 8-2.1 [2014 edition] “The negative criteria determination always involves a balancing of the benefits and detriments, the positive and negative effects, of a given variance

proposal. Thus the greater the benefits, or in the case of a “c-1” variance, the greater the hardship, the greater the detriments need to be to rise to the level of “substantial.”

Conditions for Approval

In order to ensure that an application fully meets the positive and negative criteria, the Board may impose reasonable conditions on an approved application, including, for example, a requirement for enhanced storm water retention measures or additional buffering to shield the new development from neighbors.

The board may change the specific relief granted to the applicant from what the applicant requested to what the Board decides is more appropriate for this specific application.

Note on “d-6” height variances

The Board has often heard applications where a building’s height exceeds the township ordinance 35 feet - 2 ½ story limit within a zone.

The legal trigger for such a “d-6” variance is that the height of “a principal structure exceeds by *either* ten feet *or* 10% the maximum height permitted in the district.” Often those variances are triggered by a house on a steeply-sloped lot such as those on Long Hill Road, in which case the front of a house on the south side facing Long Hill Road might be conforming but the rear on the downward slope might be 3 ½ or even 4 stories high.

In the past, the Board considered the two-pronged definition of “height,” 35 feet and 2 ½ stories to be equally applicable so that an applicant who failed to meet *either* standard was required to meet the enhanced burden of proof for a “d-6” variance.

In 2014, the Board of Adjustment heard an appeal asserting that because the building height in feet met the ordinance standard for the zone but the number of stories exceeded the 2 ½ story limit, the application should be treated as a “c” variance (with its lower burden of proof) rather than a “d-6” variance.

The Board of Adjustment heard testimony from the applicant’s attorney including the opinion in *New Jersey Zoning & Land Use Administration* by William M. Cox and Stuart R. Koenig below:

“Sometimes ordinances provide for height limitations expressed both in terms of stories and in feet. Where the limitation as expressed in stories is exceeded but the limitation in feet is not, it would seem appropriate to treat the application as a c variance inasmuch as the statute requires that the structure exceed the height limitation by ‘10 feet or 10%.’” [2013 edition, p. 175]

After deliberation, the Board of Adjustment resolved that “...the variance for three (3) stories, rather than the permitted two and a half (2 ½), is cognizable under N.J.S.A. 40:55D-70c and the applicants are not required to satisfy the greater standard of proof, nor are they required to obtain the greater number of votes necessary for *d* variance relief.” [Long Hill Township Board of Adjustment Board Resolution April 1, 2014]

THE HEARING PROCESS

The Board of Adjustment is recognized as a *quasi-judicial* body that functions as a court with a notable exception: an appearance before a Board of Adjustment is not an adversarial process. Applicants are not “defendants,” and the members of the Board should not, in any sense, be “prosecutors.”

In practice, the Long Hill Township Board of Adjustment works with applicants to find ways applicants can accomplish the goals of their projects while also ensuring that the required legal criteria that justify granting variances and waivers are fully adhered to.

The process of a hearing centers on:

- Evidence presented by the applicant, their professional witnesses, the Board’s consultants, or members of the public, either in their own person or through expert witnesses they have employed, and
- Cross-examination by the Board, the Board’s consultants, and members of the public.

Board members may have factual information about an application relevant to the Board (such as their observations from a site visit). They can offer this information as part of the official record during the hearing.

In principal, however, Board members should always seek to bring out important testimony

through questions to the applicant and their witnesses rather than through their own observations.

The decisions made by a Board of Adjustment must be based solely and entirely on the evidence presented as part of the official record during a properly noticed public hearing in order to meet the statutory requirements.

- Hearsay evidence, for example in the form of letters or petitions, is not admissible as evidence since no opportunity exists to cross-examine the source of the information.
- At times, applications may be opposed by a group of objectors, who may employ their own attorney and provide their own expert witnesses in the attempt to refute the applicant's testimony. The applicant and their expert witnesses have a comparable right to cross-examine the testimony of opposing witnesses.
- Where the Board is confronted with conflicting testimony from expert witnesses (including applicant's or objectors' witnesses and the Board's consultants), Board members have the authority to choose which testimony they believe is most credible and compelling.
- The *number* of objectors to an application present at a hearing, or the number of supporters, or even the fact that no objections to the application are raised, should not play a role in the Board's deliberations.
- The testimony of neighbors, however, may be of significant value in determining the relative benefits and detriments of a given application as they relate to "the public good."

If an applicant has not produced compelling testimony that meets the appropriate requirements for the "c" and "d" variances listed above as they apply to the application, the Board *is not permitted* to grant the requested relief.

In their deliberations, Board members should state the reasons for their decision to approve or deny an application specifically in terms of the relief required ("c" and or "d" variances listed above) and the testimony that has been presented in light of the required burden of proof.

The decision by a Board of Adjustment to affirm or deny an application may be appealed for judicial review. On appeal, a reviewing court may not "re-hear" the factual disputes decided by the Board or substitute its judgment for that of the Board. Judicial reviews only examine whether or not the action of the Board, in the court's judgment, was arbitrary or unreasonable, and whether the Board acted properly in accordance with statutory standards.

BOARD ETHICS

Rule 1:5. Qualification and Disqualification of Members of the Board [adopted by Board of Adjustment 11-19-2013.]

1:5-1 Impartiality and Transparency

- a) Board members shall not discuss the substance of any current or pending application with each other except within the specific context of a properly noticed public board hearing.
- b) Board members may discuss procedural matters relating to a pending application or seek clarification of the legal issues impacting a given application, so long as that conversation does not touch on the specific merits of the application.
- c) No board member shall discuss any matter pending or before the board with any applicant, interested party, member of the public, or elected official except within the specific context of a properly noticed public board hearing.
- d) Board members are encouraged to visit the subject property prior to the hearing of an application. In doing so, however, the Board members shall not engage in any substantive conversation with the owners or residents of the property concerning the pending application.

1:5-2. Disqualification of Members

- a) Any member of the Board of Adjustment shall disqualify himself/herself from sitting on the hearing of any matter in which he or she has a disqualifying interest such as, but not limited to, the following situations:
 - Where the board member owns property within 200 feet of the property affected

by the action. Where the applicant or their attorney is the employer, employee, or partner of a board member, or is a corporation in which the board member is a shareholder or has other financial interest.

- Where the board member or a member of his or her immediate family has a direct or indirect financial or personal involvement that might reasonably be expected to impair the board member’s objectivity or independence of judgment.
- Where the board member has any other personal or pecuniary involvement or interest that might reasonably be expected to impair the board member’s objectivity or independence of judgment.

- b) Any member who is disqualified shall not sit with the Board or participate in meetings or hearings related to the matter in question, nor may that board member participate as a member of the public by testifying either for or against the relief sought by the applicant.
- c) When a member fails to disqualify himself, any interested party or member of the Board of Adjustment may move the Board for a determination that such member is disqualified to act. The motion shall contain a statement of facts upon which it is based, and the Board may thereupon hold a hearing on the matter or take whatever action a majority of the Board may deem appropriate.

1:5-3. Grounds for Removal

Whenever Board members shall absent themselves from meetings of the Board for a period deemed detrimental to the conduct of Board business, the Board may recommend to the governing body of the municipality in writing that such member be removed in accordance with the provisions of N.J.S. 40:55D-69.

Chairman Behr motioned to adjourn the meeting. Mr. Pesce seconded that motion and a Voice Vote was taken. The board members unanimously voted to adjourn at 9:46 P.M.

Cynthia Kiefer
Planning and Zoning Secretary

Date