

MINUTES

PLANNING BOARD

JANUARY 24, 2012

LONG HILL TOWNSHIP

CALL TO ORDER AND STATEMENT OF COMPLIANCE

The Chairman, Mr. Connor, called the meeting to order at 8:05 P.M. He then read the following statement: Adequate notice of this meeting has been provided by posting a copy of the public meeting dates on the municipal bulletin board, by sending a copy to the Courier News and Echoes Sentinel and by filing a copy with the Municipal Clerk, all in January, 2012.

PLEDGE OF ALLEGIANCE

OATH OF OFFICE

Mrs. Wolfe administered the Oath of Office to newly appointed 1st Alternate, Sandi Raimer.

ROLL CALL

On a call of the roll, the following were present:

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| Christopher Connor, Chairman | Sandi Raimer, 1 st Alt. | |
| Brendan Rae, Vice-Chairman | Charles Arentowicz, 2 nd Alt. | |
| Mead Briggs, Member | | |
| Donald Butterworth, Member | | |
| Joseph Cilino, Member | Kevin O'Brien, Twp. Planner | |
| Jerry Aroneo, Mayor's Designee | Thomas Lemanowicz, Bd. Engineer | |
| Guy Roshto, Member | Dawn Wolfe, Planning & Zoning Administrator | |
| Michael Smargiassi, Member | | |

Excused:

Kevin Dempsey, Member
Barry Hoffman, Bd. Attorney

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

PUBLIC QUESTION OR COMMENT PERIOD

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

DISCUSSION – TIFA UPDATE

Mr. O'Brien said that Mrs. Wolfe has distributed correspondence from the Board to Mr. Gregory Perry and Mr. Christopher Vitz of Morris County who appeared before us back in November to discuss the site plan at Tifa. Mrs. Wolfe also sent a letter to Ms. Stephie Palm, who is the agent for the owners at CBRE, both of which outline the decisions made by this Board at our meeting in November and, based upon our decisions, the Administrative Site Plan reviews for Tifa will cease until the bonding is completed for the sidewalk and road narrowing project. He and Mrs. Wolfe confirmed that they have not received a response from Tifa. He noted that the County is in full accord and is very happy, particularly since this dates back to 1989 and they would like to get this off their books.

In response to Dr. Rae, Mr. O'Brien said that what was decided by this Board was that they have so many days to get a bond and, if they don't get a bond, their approval process comes to a halt. If they do not have everything in place by September 1st, they are not going to get any approvals. Based upon their recent activity over the last couple of years, they having been sending one or two new tenants to us every couple of months. He said that if they can't get approvals to put people in there, within 3 or 4 months they are going to have a backlog and he thought it was the Board's hope that that would work.

Mr. Aroneo asked what happened to bring the change about. He asked if they came to the Board looking for something and the Board realized that they hadn't made the improvements they were supposed to make 19 years ago, or whether the Board decided to enforce previous conditions of approval?

Mr. O'Brien replied that it was a combination of events. He said that probably the trigger to everything was the retirement of the Supervising Planner at the County who, after seeing one of the last Administrative Site Plan Waivers granted for the Tifa property, drew our attention to the fact that their site plan approval had not been perfected dating back to 1989 and asked us if we would please take a look at it.

Mr. Connor said that there was a concern about trees coming down, where the sidewalks would have to be, and whether the size of the road would have to be reduced because one of things they wanted to do was widen another section of that road. He said that Mr. Perry and Mr. Vitz came before the Board and had a discussion and we came to a resolution that they would make some changes (not to widen the road) and we had one issue with the utility closet that happens to be in the front where, if you cut everything back, all of a sudden an ugly utility closet is sticking out, so there was some need to make sure that didn't happen. He said that it all worked out fine without the Tifa representative being there and so the rest of the communications have been between Mrs. Wolfe and Tifa and, as far as he knew, they seemed to be okay with the resolution.

Mrs. Wolfe said that she had not heard back from Tifa as to the latest letter she had sent.

In that case, Mr. Connor requested Mrs. Wolfe to request a follow up as to what their planned activity is and how they intend to meet the requirements of the Board and County.

Mrs. Wolfe replied that she would do so, however she noted that a few months ago they were at the point of going out for bids for the sidewalks, therefore she did not believe that this was a surprise for them. She said that they were willing to install them and then at that time and were then told to hold off.

Mr. Connor agreed and said that the only thing he did not know is that they put together a design that they were proposing and he was not certain that they may not have to make a slight modification to that design before they go out to bid. He felt that they will cooperate and he just wanted to make sure that we continue talking so that the matter is not forgotten.

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DISCUSSION

EDUCATIONAL SESSION

- **Role of Twp. Committee, Planning Board and Zoning Board**
- **Conflicts of Interest**
- **Burden of Proof**

Mr. O'Brien said that he targeted an overview of what the various bodies in the Township do, as well as what the burden of proof is for various applications before the Boards. He said that it is an introduction, particularly for the new Board members.

He said that there are several bodies that have planning and land use powers. The first is the County Planning Board, which is a body very much equivalent to the Planning Board and is appointed at the County basis. People from throughout the County belong to it and staff is usually County staff and they have their own attorney, planner and engineer. They are responsible for reviewing the land use ordinances at a County level and are responsible for site plan and subdivision review, as well as review of any application that affects a County asset or a County interest, such as a County road or a County piece of property. He said that some of the things we do actually go up the ladder and get reviewed by the County Planning Board. Any ordinance that is passed by the Township has to be sent to the County so that they are aware of what we have done, and our ordinances don't take affect until they are filed with the County. The Master Plan and all of its elements also have to be noticed and sent to the County upon adoption so that that puts them into the library there and makes them legal. At the municipal level, he said that we have a municipal Planning Board and Zoning Board of Adjustment, and several other boards such as an Environmental Commission, and an Historic Preservation Advisory Committee, both of which have *some* land use duties. He said that our Township Committee is the body that actually adopts the land use ordinances that the Township is regulated by. The Township Committee can also hear appeals from the Zoning Board of Adjustment decisions. There is also a little used section in our Ordinance where an interested party can appeal an approval granted by the Zoning Board of Adjustment to the governing body and the governing body has the right to hear that appeal. The municipal governing body also, as they adopt ordinances and go through ordinances, refer them back to the Planning Board for its review. The Planning Board reviews those ordinances, decides whether or not they are consistent with the Master Plan and, if they are, they recommend them back to the governing body at which point they proceed with whatever decision they are going to make on those ordinances. The Township Committee also appoints one of its members to the Planning Board. He said that the Environmental Commission has review authority. They are sent copies of applications that come before both Boards and the Environmental Commission makes recommendations to those Boards based upon its area of expertise. Those recommendations are advisory only. They do not have to be acted upon by the Planning Board or the Zoning Board. In Long Hill Township, he said that the Environmental Commission has had quite an effect on the number of applications that have appeared before us. The Shade Tree Commission is another commission that also has advisory powers with the Board in that applications are sent to it for review and they send back review letters making recommendations to the Boards. The Historic Preservation Commission is not as involved because we do not have historic districts in the Township. If we did, they would have a different role. However, the Historic Preservation Advisory Committee is supposed to look at anything that affects a historic property and make recommendations.

Mr. Aroneo said that *every* advisory board does receive a copy of every application from both Boards, so whether or not it is statutory or not, in practice they do.

Mr. O'Brien said that we actually distribute about 20 copies of every application that comes before either body.

Mrs. Wolfe said that it more like 23 or 24 copies of every application.

Mr. O'Brien said that, typically, we will hear from the Environmental Commission, Shade Tree Commission, the Police Dept. and Fire Dept. Beyond that, it is a rare occasion.

Mr. Aroneo replied that the Open Space Advisory Committee does review them for opportunities but hasn't found one yet. He said that, if they did, you would probably hear about it.

In response to Mr. Roshto, Mrs. Wolfe said that she is the one who distributes applications.

Mr. Roshto asked her to check to see if the Historic Preservation Advisory Committee is on the list.

Mrs. Wolfe did not believe that they are on the distribution list and said that she would double check the Ordinance (since distribution is governed by the Ordinance).

Mr. Roshto said that the Ordinance says that they should be informed of every application on historic preservation property. He said that he has been assuming for the past few years that there hasn't been a historic property for review because they haven't received anything.

Mr. O'Brien said that we have two sites on the National and State Registers.

Mr. Roshto said that the Millington Train Station is one, as well as his own house. He added that the Millington School House has been sent to the National Register, so it looks like it is going to be finalized.

Mr. O'Brien said that any time any of those would be involved in a land use application, the Historic Preservation Advisory Committee.....

Mr. Roshto interjected and said that any property that is listed in the Historic Element is considered a historic property for the Township.

Mr. O'Brien agreed that it is considered historic for the Township but statutorily that does not rise to the level of having mandatory review.

Mr. Roshto felt that that is something that we could look into.

Referring to her distribution list, Mrs. Wolfe said that she did not see the Historic Preservation Advisory Committee listed. She questioned if it was in the Ordinance because the Ordinance had been double checked in the past to ensure that the distribution list was accurate.

Mr. Roshto replied that it was a *Resolution* where it states that the Historic Preservation Advisory Committee should be forwarded any historic properties as designated by the Township, and not an Ordinance.

Mrs. Wolfe replied that she did not have a copy of such Resolution and, if she was provided with one, she would be happy to add it.

Mr. Roshto said that he would forward the Resolution to Mrs. Wolfe.

Mrs. Wolfe said that there are sections of the Ordinance which specifically state all of the officials, commissions and committees that are to be copied for the various types of approval requested, however she did not believe that the Historic Preservation Advisory Committee is included and that is why she surmised that they have not been getting copies.

Referring to his overview, Mr. O'Brien said that it lays out the three bodies (Township Committee, Planning Board, and Zoning Board). He said that on the left the discussion is concerning the regulations. The governing body appoints the Planning Board which prepares the Master Plan. The Master Plan is a visionary document that lays out what the community wants the Township to look like in the future. It is a policy document that makes recommendations and lays out goals and objectives.

He said that the next panel shows the governing body and they are the ones that adopt the municipal laws and the ordinances. He said that the ordinances are the implementation of the Master Plan which lists the goals and objectives and recommendations as to what ordinances *should* or *should not* be adopted by the Township. It is up to the governing body to adopt those ordinances and the Land Use Ordinance, as a body, becomes the rules that govern how land is developed in the Township. In addition, the governing body is responsible for the Zoning Map, as well as the Official Street and/or Road Map.

In terms of regulation, he said that a development application would come in to the office and, if it is generally consistent with municipal laws or it is permitted, it goes to the Planning Board. He said that the Planning Board is known as the board of permitted uses. If an application is *inconsistent* with the local Ordinance, then it would go to the Zoning Board of Adjustment, which is the board that deals with non-permitted uses.

As to the various powers of the various boards, he said that the Planning Board writes the Master Plan and the Master Plan has to be re-examined every 10 years according to Statute. A public hearing at the very least must be held with notice to surrounding municipalities and to the County. The Planning Board is also responsible for subdivision and site plan review. Site plan review is a power that is given to the Planning Board for all (essentially) nonresidential properties. The site plan would be looked at by this Board and adopted or denied. A site plan that is allowed in all respects (meaning that it meets the Zoning Ordinance completely) is one that is very, very difficult to turn down unless you can find grounds in terms of safety, health, and general welfare. A conforming site plan is one that is generally approved by a Planning Board. Subdivision review is also done by the Planning Board. If a subdivision is conforming, again it is very difficult to turn down unless there are concerns about health, safety, and the public welfare. On either a site plan or a subdivision, there may be variances that are required. In general, there are two types of variances. One type of variance goes with a dimensional standard either associated with the land or with the development that is proposed. For instance, if the Ordinance allows 50% lot coverage on a piece of land and an application comes in for 55% lot coverage – that is a bulk variance because it is a dimensional variance on a piece of land which requires then a c (or bulk) variance(s) from the Planning Board in addition to that site plan review. Under no condition can the Planning Board review a use variance, even if there is subdivision and/or site plan review associated with the use variance. A use variance is for a use that is not permitted in a zone and would

have to go to the Zoning Board of Adjustment. He said that conditional uses are also powers which are given to Planning Boards in that a conditional use is allowed in the zone provided that it meets all of the conditions that are laid out in the Ordinance. It can also be approved by the Planning Board and is a matter that is reviewed by the Planning Board.

As to variances in conjunction with subdivisions, site plans, and conditional uses – again any dimensional variances that come along with those applications would be reviewed by the Planning Board. The Planning Board is allowed to put reasonable conditions of approval on any application that comes before it based upon the application that has been discussed and reviewed by the Board.

He said that the Zoning Board of Adjustment is the Board that reviews things that are not allowed. They have the only jurisdiction when somebody comes in for a use that is not permitted in a Zone. There are actually six types of use variances which include: a use not permitted in the Zone; an expansion of a non-conforming use; a conditional use that does *not* meet the conditions that are laid out in the Ordinance; density (meaning that a density that is higher than which is allowed has been presented); floor area ratio (meaning that the building is larger in mass than what is allowed); as well as height (if a building is higher than what is allowed). All of those become use variances and go to the Zoning Board of Adjustment. Any use variance at all triggers Zoning Board review so that that whole application (even if it involves site plan or subdivision) goes to the Zoning Board and that is where it stays – they maintain jurisdiction. He said that they too can put in reasonable conditions of approval based upon the application in front of them and depending on what type of action they take on an application before it. He said that they are a very different board than this one. One of the major difference is that the Planning Board is a *policy making* board and gives guidance, makes decisions, can consider concept plans (meaning almost an informal review of an application), whereas the Zoning Board of Adjustment is known in the Statute as a quasi-judicial body, meaning that everything they look at is used as part of an application that goes before them and they can use all of the information as evidence as to whether or not that variance gets approved or denied. It is a much stricter way of looking at an application. The Zoning Board also has a couple of other powers one of which is, if there is a question concerning the Zoning Officer's decision, an applicant can appeal the Zoning Officer's decision directly to the Zoning Board of Adjustment. If there is a question as to what the Zoning Ordinance means, an interested party can ask the Zoning Board for an interpretation of what those words actually mean and how it affects a particular property or a particular application.

Mr. Lemanowicz said that the issue of height is a dimensional issue, however in some cases it is a c (or bulk) variance that the Planning Board can hear and in some cases it is a d variance which the Planning Board *can't* hear and the issue there is if the building is more than 10' or more than 10% over the allowed, it becomes a d variance. So if a height of 35' is permitted and you are proposing 38', then the Planning Board can hear it because it is only 3'. If you go to 40', then that is a d variance and the Board of Adjustment gets it. He said it is a little tricky to deal with at times but is one that could go either way.

Mr. O'Brien agreed that there are a few permeations in the law that are fact sensitive. He said that our Planning Board consists of 9 members. A Class I member is the Mayor or the Mayor's designee. A Class II is a Township Official. A Class III is a member of the governing body (and appointed by it). Class IV members are the regular citizens. The Chair and Vice Chair must be Class IV members and the Secretary may be a Board member or may be appointed by the Board. Among other things that a municipal Planning Board does are to prepare and adopt a Master Plan Reexamination Report and go through subdivision and site plan review. The Planning Board can review proposed zoning ordinances and amendments or *proposed* zoning ordinances and amendments to the governing body. The Planning Board could also prepare a capital improvement program, which is allowed by the M.L.U.L. He said that this is done in more urbanized areas for the most part where the community is doing an awful lot of infrastructure work and the Planning Board maintains the capital improvement program by holding hearings, making lists, and publishing that information. They could also review capital projects. There is a courtesy review required of all development that goes on in a Township even though the bodies that are doing that development are exempt. Exempt bodies would include the Board of Education, County, State, and Federal Government, so everybody upstairs from us can basically do what they wish on their land. But the M.L.U.L. requires them to come to the Planning Board for what is known as a courtesy review so that the Board is aware of what changes are being made on those other properties so that they can be aware of it and take into consideration as you develop your policies for the future of the Township.

He said that the Zoning Board of Adjustment has 7 members and 2 alternate members who are known as Alternate #1 and Alternate #2. It is made that way because, for a bulk (or c) variance, a simple majority of those who are sitting at the meeting will approve an application. So, of the 7 sitting members, 4 would make a quorum and more than half would make an approval, so you could actually approve something with 3 affirmative votes out of the 4 people who are sitting if that is the quorum that night. However, things change when there is a use variance. A use variance requires at all times, under all circumstances, 5 affirmative votes regardless of how many people are sitting. So, if you only have 5 people at your meeting, you require every single vote of those 5 people. The Statute requires a super majority for a use variance, making it the most difficult approval to get in land use and the M.L.U.L. made it that way because this is a use that is not allowed in the Zone and, therefore requires a lot of thinking and they want the towns to think really hard about this. With 5 affirmative votes, most applicants want 5, 6, or typically 7 members to sit there. If a member is not present, then Alternate #1 comes in and, if another regular member is not present, Alternate #2 comes in. The Chair and Vice Chair are also members of the Board and they are all citizen members. None of them can be Township Officials or elected or appointed in any way. They cannot have any other function within the municipality.

He said that, again, there are 2 types of variances – a c variance (the “c” stands for a section of the M.L.U.L.). They are mainly called bulk variances. Use variances are known as d variances because that is also a section of the M.L.U.L. that they will be heard under. Any variance that comes before the Board has got to meet a burden of proof. There is a burden of proof that applies to the c (or bulk) variances and a different burden of proof that applies to use variances that are heard by the Zoning Board. He said that the c (bulk) variance has got to meet what is called a positive criteria and a negative criteria. The positive criteria is that you show that this application can be granted without substantial detriment to the public good. The second piece is that it will not substantially impair the intent and purpose of the zone plan and the Zoning Ordinance. Those two quotes come right from the M.L.U.L. and they are applied by each Board based upon its knowledge of the application in front of them and by your knowledge of the Township and the locality of an application. He said that substantial detriment to the public good is the first prong and that typically means in this instance what is happening around this application, what is happening with the properties in the area, and what is happening with the neighborhood. Will there be an impact from this application and what they are proposing to adjoining landowners or landowners in a general area surrounding the applying property? The second prong is will it substantially impair the intent and purpose of the zone plan and zoning ordinance? The intent and purpose of the zone plan is the Master Plan. The Zoning Ordinance is clearly what the Ordinance calls for. Because they are applying for a variance, that means that what they are doing is not permitted in the Ordinance, but they have to reconcile what they are applying for in terms of what the Master Plan says for either this property (if it is specifically discussed in the Master Plan) or this area (if it is part of a residential zone or a commercial zone) – what are the goals for that zone as laid out in the Master Plan? The second part is the Zoning Ordinance itself. What does the Zoning Ordinance say and does it allow certain extenuating circumstances, for instance, height? An applicant could come in for some type of tower on a building that exceeds our height limits. He said that we have a clause in our Ordinance that allows exceptions to the height levels that are allowed based upon what they are used for such as steeples, water towers, flag poles, or cupolas.

He said that there are two types of bulk variances – a c-1 and a c-2 variance of which the “c” stands for a bulk variance. A c-1 bulk variance is one that is based upon the size and shape of the land itself and it is called a hardship variance because the hardship is associated with the land itself. If the land is exceptionally narrow, very shallow, has a very odd configuration, or if there are unique topographic conditions that are upon the property or there is a completely exceptional situation that just affects this property, the applicant will say that these are the problems I am facing – I may not be deep enough and have a very shallow piece of land and instead of being 100’, 150’ or 200’ deep as the Ordinance requires, for some reason I’ve got a 50’ deep property and this is what the neighborhood is zoned, so I’ve got a hardship problem and cannot extend my deck or build my extra bedroom because I don’t meet the requirements of the Zone. He said that the basis for your review would be whether or not that application was reasonable and whether there was going to be an impact upon neighbors, the area, or upon the Master Plan or the Ordinance. He said that a c-2 is called a “flexible” or a “planning” variance in that there is not a hardship, but instead the applicant makes a case that the application in front of you is a better planning alternative to what could be there by right – meaning that what they are putting in is better than what would be allowed (a better alternative).

Mr. Lemanowicz said that an example would be if you have a piece of property that has some sloped areas and the applicant requests a side yard setback so that they could pull the detached garage that they want to place out of the sloped areas and, in order not to disturb that slope, I need to encroach on the side yard somewhat. He said that you could say that you are basically playing one against the other, but that is the case. He said that it is just a better idea. He said that it is not that common and a hardship is, generally, more common. He said that he has seen a number of c-2 variances and they are pretty unique and just make sense.

Mr. O’Brien said that when they make their presentation before the Board, they are going to say that, on balance, we can cut into the slopes because that is where we would be allowed to do this, or we don’t and instead violate the side yard setback and that is a better planning alternative than doing more damage. He said that the differences between the two types of bulk variances is that a c-1 emphasizes the characteristics of the property and the practical hardship that is associated with the property itself. Hardship only pertains to the property. He said that applicants cannot come in and say that they lost their jobs and no one will hire them and they want to make their one family townhome a 4 family house or want to rent out their basement or their attic. He said that that is not the hardship we are talking about. A hardship is based on the size and shape of the land. Personal, financial, or economic hardships have nothing whatsoever to do with hardship in a land use reference. The c-2 variance emphasizes the characteristics of the property that present a better planning alternative or a better design in light of the M.L.U.L. as opposed to what would be allowed.

He said that a use variance, in addition to having to prove in terms of a c-1 or a c-2, has got to show that they meet a special reasons test. He said that the M.L.U.L. has a number of goals at the very beginning of it and an applicant for a use variance has got to prove to the Zoning Board of Adjustment that their application meets a goal of zoning and that it is a better alternative than what is allowed. He said that it is a tough row to hoe, but that is why the Zoning Board is more of a quasi-judicial body than the Planning Board.

Mr. Smargiassi noted that applicants share their financial hardships even though they are not to be considered. It doesn’t stop them presenting that as part of their evidence and case.

Mr. O’Brien replied that anyone can present anything they would like to the Board and it is up to the Board that is reviewing it to admit that evidence and use it in their review, or ignore it. The same goes for expert witnesses. The Board can listen to a parade of experts and just because they say it, doesn’t make it so. He said that the members can decide, either on their own or even as a Board, that an expert had no credibility and that you didn’t give their testimony any credence. He said that the evidence is put in front of you and you are judges and judge whether or not

that evidence makes sense to you and whether or not that evidence meets the burden of proof that the Statute says you have to consider. If it does, you can grant a variance and if it doesn't, for whatever reason that is in your mind – what they said didn't make sense, what they propose is no good, or what they are doing you don't like, whatever that reason is, provided that it is based somewhere in zoning and you can enunciate the reason for your negative outlook, you make the decisions and you make them individually, as well as as a Board.

Mrs. Raimer added, “And they should have no precedential effect”.

Mr. O'Brien agreed saying they have “absolutely zero precedential effect” meaning that if you grant that nuclear power plant over in one neighborhood and somebody comes around next week and says that they want to put one in another neighborhood, they have got to go through the entire process, from scratch, and prove their case for that location and for the circumstances that effect that individual application. Every application stands on its own, by itself. Just because a particular use, thing, or dimension is down the street does not mean that you have to accept it.

Mr. Aroneo said that you know that they are going to tell you that you approved one down the street last year and now you want yours approved – they will make that part of their application, for sure.

Mr. O'Brien replied that that is where your staff will say that every application is judged in its *own* merits and the circumstances of that application could be completely different than your circumstances. He said that not every piece of land, use, or application is exactly alike. There may be similarities and, as Mr. Aroneo said, they are going to throw them at you – absolutely – that is part of the game and the lawyers, planners, and engineers know that they are not supposed to say it because it has nothing to do with it, but they are going to throw it at you anyway because they want to influence you.

Mr. Connor asked what the applicant's remedy is if a Board does not approve a site plan or subdivision application because of a variance.

Mr. O'Brien replied that in cases where any application that is rejected by this Board, its decision can be appealed and that goes up the ladder to Superior Court. He said that the standard of review at the Superior Court level is that a Judge will read the transcripts of the hearing(s) and will look at all of the evidence that has been presented to the Board. On *extremely* rare occasions, there will be an oral argument presented by the parties involved.

Mrs. Raimer added that the Judge will consider whether the Board's decision was arbitrary and capricious, not really looking deep within the merits of the decision, but was the decision arbitrary and capricious based upon the facts before him/her.

Mr. O'Brien agreed. If it is deemed that the Board acted arbitrarily or capriciously, the Judge *could* overturn the Board's decision and grant the application or, in most situations, will remand the application back to the Board for a new hearing at which point the Judge will advise the Board to consider all of the evidence it has already seen and let them make their arguments in whatever way they felt that they missed the last time, or the Judge may say that he/she wants them to do a whole new hearing and ignore everything you heard and every exhibit you saw – they are all gone, and advise the applicants to come back and start from scratch and let the Board make a decision. He said that that applies to both the Planning Board and Zoning Board of Adjustment. The only wrinkle is that an approval from the Zoning Board of Adjustment can be appealed to the governing body directly.

Mrs. Raimer added, however, when there is an appeal to the Board of Adjustment from a decision by a Zoning Officer, that appeal is based upon the facts available to the Zoning Officer at the time he makes his decision and not new facts that might come to light since the Zoning Officer might have rendered his decision. She said that when they make the appeal, it is frozen in time to the date that the Board made that decision, whether it be the Planning Board for something that is appealed here, or the Zoning Officer for an appeal that takes place before the Zoning Board.

Mr. O'Brien said that Mrs. Raimer made a very good point which is that on the date of that decision whatever is known at that point is what goes up the ladder on whatever appeal may or may not occur. He said that you can't take into account things that happened later on.

Mr. Connor asked if there were any circumstances in which the Court can order the applicant's rejected application to be adopted as is.

Mr. O'Brien replied that it *can* happen and that the Courts have that authority if they so choose, however on a practical level, in most of the Courts in New Jersey, the Assignment Judge (who is the land use judge in each County) will not overturn a Township decision unless it is really, really bad because the presumption is that the town has made a decision in good faith based upon information they had and they are doing what they feel they should do for the betterment of their community. But if it is really a bad decision, the Judge gets that from the transcripts and his/her review and could overturn the Board's decision right there at the bench, or as is more usual, send it back to the Board for a re-vote/re-hearing.

Mr. Lemanowicz said that he has seen it where, even on a remand, the Board denied it again and then it goes back to the Judge and the Judge says “I'm done with this - I'm tired of seeing this one”. However, he agreed that usually they will give the Board another shot at it and suggest that it be worked out. He said that the applicants have to give the Board certain proofs for it to be *allowed* to grant the variance. He said that not so much for the Planning Board,

but with the Zoning Board you will have the 3 Board consultants asking questions that appear to be redundant because they are trying to get something out of the resident who really doesn't get it and we are trying to get those little pieces of proofs on the record. If it is not on the record and it is appealed, whether someone is appealing a denial or an objecting neighbor is appealing an approval, it is what is on the record that counts.

Mr. O'Brien said that the most crucial item at the end of any application is the Board Resolution. He said that the Resolution lays out the decision that was made and the reasons for that decision. He said that he has worked in some communities where the Resolution is a two paragraph piece of paper that says that the Board approved it or denied it. Should that type of Resolution go up the ladder to a Judge, the Judge is going to ask himself what the Board was thinking because he/she does not see it in the Resolution. He said that it is very important that a Resolution carry the decision that is made by the Board, the reasons for it, and lays it out very clearly, as well as any reasonable conditions that should be granted to an approval. The decision of the Board, as laid out in the Resolution, is what is going to carry the day with a Judge because that will tell that Judge the decision that was made. On another level, he said that laying out the conditions of approval in writing gives the Township a small peg to hang their hat on in making sure that an applicant does go along with those conditions that are in the Resolution, meets them and does what they are supposed to do, and the Township can enforce those conditions so long as they are down on paper somewhere.

Mr. Connor added that sometimes when an applicant comes from a piece of property that has already had some variances approved but they were approved 10-12 years ago, if there isn't a rationale of why the variances were approved in the past, it makes things more difficult. He said that Mrs. Wolfe often has to investigate and at least find out why something was done and you at least get the logic of the previous Board, not that the Board is necessarily bound by that, but it is helpful to see why a previous Board may have done something that you may not understand.

Mr. O'Brien said that it doesn't matter what the testimony was or what everybody understood, it has got to be in the Resolution for it to really happen.

He said that Barry Hoffman's partner, Daniel Bernstein's father was actually rather instrumental in getting the M.L.U.L. passed, as was a number of other land use attorneys such as William Cox. Before that, the Land Use Law was a "hodge podge" and, before that, the Town Council served as the Zoning Board of Adjustment in granting variances, however there was a Zoning Board of Adjustment that met and reviewed the applications and then the Township Council itself would make the decisions. Some of our old matters that come up to us, such as a certain recreational facility, the original applications dating back to the 1950's are one paragraph items in the Township Committee minutes. The farther back you go, the less you actually have.

Mr. O'Brien said that conflicts of interest affect every member of either Board in that, if you have an interest in an application that is before your Board, you have a conflict of interest and you should not hear the case, obviously. One of the land use attorneys he has worked with over the years had a rule which was, if you asked whether there was a conflict of interest, there *was* because it created enough of a doubt in the Board member's mind that that attorney just had a hard fast rule. He said that if you do have a conflict, you should leave the dais and, in fact, most attorneys say that you should leave the room and have nothing to do with the application whatsoever. He said that this where the Board members have less rights than their fellow citizens because, even though you are a citizen of the Township, and any citizen can speak on any matter before the Board, as a Board member you lose that right if there is a conflict of interest. He said that it is a shame but it is the only way that the Board can maintain its neutrality and its appearance before the public. He said that there is a rule on conflicts and it says "No local government officer or member of their immediate family shall have an interest in a business organization or engage in any business transaction or professional activity which is in substantial conflict with the proper discharge of their duties in the public interest". He said that that applies to *all* Board members. In terms of conflicts of interest, he said that the quote from the M.L.U.L. is "No member of a Planning Board shall be permitted to act on any matter in which they have either directly or indirectly any personal or financial interest". He said that that has been dealt with by going down the list. He said that the list means, do you have a personal interest or involvement in the application that is in front of you? Are you a neighboring landowner or within the 200' limit? Are you related to them in any way? Are you a member of an organization or a religious organization along with the application that is in front of you? Are you an office holder in the organization that is appearing before you? If any of your considerations show that there is a conflict through *any* level, then the best thing for the Board member and the Board is for the member to step down. He said that members have asked, if they were a stockholder of an AT&T that came before the Board of Adjustment for a cell tower, does that conflict them out? In the past, attorneys have said that if they only have a few shares of stock and it is not a significant number in any way, then they didn't think so because their approving or denying the application would have no impact on that stock, so there was no personal or financial interest in it. But, if you were a partner in Harry's Bar & Grill and Harry showed up for an expansion, that would not be appropriate because that *would* be a conflict because you have a direct interest in it.

Mr. Lemanowicz said that there are some real tough conflict calls. One that came to mind was when he attended a hearing on an application in a municipality where the largest church in town came in to expand and ¾ of the Board were members of the church. They went through some discussion and he believed that most of them stayed (except for a member of the church Board of Directors). He said that that was a situation that could happen in any town.

Mr. O'Brien said that, if there is a situation where Board members have to be removed, then there is provision for the other Board to fill in. That it is something that occurs on a very rare basis and there are a lot of rules that go with it and a lot of circumstances that have to occur for that to happen.

He said that, from our own perspective, it is not only the conflict itself but it could also be the *appearance* of a conflict. If there is an appearance of a conflict, even though there may not be an actual inherent conflict that is right there, the appearance could make things very difficult. If it does go before a Judge and it *looks* bad, it is going to look bad to the Judge, and that is something that we have to consider. He gave several examples of different scenarios.

Mr. Cilino asked, if there was no blood ties but there was friendship 30 years ago and they haven't seen each other for 30 years, one might say that there is reason enough that there are not ties, but again, how would one know?

Mr. O'Brien said that, if that information should come out at a later time and it points to the *appearance* of a conflict (even though there was none), that is as bad as having a conflict. That is where everything has got to be decided on on a case by case basis that is fact sensitive to the application before the Board.

Mr. Aroneo asked Mr. O'Brien to reread the part where it talks about compensation or financial interest. He said that he hadn't considered the appearance part which he felt is one of the most important things that we deal with either as elected officials or as Board members.

Mr. O'Brien said that, in one of the examples he had given, the answer was yes and the rationale was that, because the person was a manager in the office hierarchy, even though they did not have a direct relationship with that client, they were a manager and in an administrative responsible position, so the Court felt that that conflicted them out. If they were a messenger person, possibly not, depending upon the facts, but a manager is looking at the financial ups and downs of the entire office.

Mr. Lemanowicz said that, ultimately if there is a question, a member would speak to Mr. Hoffman and see how he feels. He said that he knew that one of the questions he asks is if you feel you can act objectively on the application. He said that a firm which he had worked for previously did a survey for the Tifa property and the survey was done 6 years prior to the application and the company no longer did business with that applicant and the surveyor who prepared the plan no longer worked for the company, but Mr. Hoffman felt that there was enough of an appearance so he stepped aside for that application. So, there are potential conflicts on the Board's professionals end too.

(Mr. Aroneo left the meeting).

Mr. O'Brien said that everything that comes before either Board is very fact sensitive. It is an individual application that goes before you and you've got to make some very serious decisions based upon the application, the presentation that you see and hear, and the facts as you see them. He said that the decisions that you make are going to be based upon those facts and those facts are different every single time there is a different application before you. Just because you approve one, a similar application does not automatically get approved – there is a whole different set of facts and circumstances, not the least of which is that it is a different location and each location has impacts upon its surroundings that differ by their location. He said that a lot of what was discussed tonight was a high overview of what we do on the Boards and for many of the examples he had given he could find a number of exceptions for many of them, however we are not hear to talk about them tonight because they are rare and exceptional circumstances. He said that, as we go deeper into things, we can talk more about the details. He said that those members who are new to the Board and will be taking the class that is mandated for new Board members have 18 months to do so and the NJPO will be offering courses in the spring between February and May and they will present them again in the fall. He also said that anyone who attends the League of Municipalities Convention can also attend the NJPO seminars and get credit for them. He said that Rutgers also presents the class at various times through the year and Mrs. Wolfe will keep the Board informed when she gets the flyers from them. He said that new members will learn a lot more details than those presented this evening, but if there was something they would like to know or if there is an element they feel we should go into in more detail, he asked them to let him, Mr. Lemanowicz, Chairman Behr, or Mrs. Wolfe know and the next time there is an opportunity to hold an educational seminar like this evening, we will go into more detail or different topics.

Mr. Connor noted that he had excused Mr. Hoffman this evening. He said that, if we get into things which will entail direct legal advice based upon a specific case, it will be Mr. Hoffman who will give us such advice. He said that Mr. O'Brien's job was to provide an overview and Mr. Hoffman's job is to prepare Resolutions and provide legal advice when needed. He said that he chose to save his fee this evening for some other date.

Mr. Cilino said that Mr. O'Brien, in speaking about the Master Plan, mentioned that there are a number of people who are incorporated, including surrounding Townships. He asked if there is a component of the citizens of the Township that make up part of the input to the Master Plan.

Mr. O'Brien replied that the M.L.U.L. requires us to notice each surrounding community and the County whenever a change to the Master Plan or Ordinance is made, so they have an opportunity if they would like to make comments or appear. He said that citizen advice into the Master Plan or the Ordinance is given at that noticed public hearing. He said that any public hearing on the Master Plan or Zoning Ordinance must be noticed in the newspaper and, in Long Hill Township, it is placed on the website along with the agenda for that particular meeting and is on TV, as well. He said that the public is not only notified, but the meeting is open to the public solely for public comment. He said that a Master Plan or Zoning Ordinance cannot be adopted by this body unless there has been public comment.

Mrs. Raimer thanked Mr. O'Brien for his informative presentation. She noted that Mr. O'Brien had sent the members a list of "Planning Initiatives". She knew that there are sometimes where the Planning Board is going over

a particular application, but sometimes they have work sessions where the Board goes over some of these Planning Initiatives. She said that the Zoning Board is facing one particular application that deals with Valley Rd. and the improvements to Valley Rd. as a business district and what comes into play in some of their discussions are the architectural standards. She said that they are referring to this “loose set” of architectural standards that are not binding and so, when she saw Mr. O’Brien’s list and saw that it was something that this Board might be able to move to the next level, she felt it would be helpful from the Zoning Board perspective because then they would referring to something that is based on law as opposed to something that is more of a concept plan. She did not know what the priorities are on the list, but if there was any way to get the architectural standards moved up on the list because of the pending applications that the Board of Adjustment has before it, that would be great.

Mr. Connor replied that the Board had reviewed the list at the last meeting and came up with *some* priorities that they asked Mr. O’Brien to work on in trying to match what we needed to do and it was delayed some because of some changes, particularly in the Land Use Element. He said that they looked at the budget and time that the Board has and he knew that architectural standards were mentioned.

Mr. O’Brien said that the architectural standards were being worked on by others such as Dr. Behr and Patrick Jones who will be presenting them to us.

Mr. Connor said that we had set up when we think and how we are going to handle various elements of the Master Plan that are going to come up and we need to sit down and review that list to see where the architectural standards fit. He said that certainly Dr. Behr was a proponent of the architectural standards when he was here.

Mrs. Raimer replied that she appreciated that and said it is nice to have him on the Zoning Board to talk about it, but it doesn’t have the force of law and so, for us as a Board to be referring to this and trying to encourage applicants to follow it, it is a little less persuasive than something that *would* have the force of law.

Mr. Smargiassi asked how that would work with the time of decision? He asked if it fell under that or not.

Mr. O’Brien replied that, if new standards were adopted now, they would have no affect on this application.

Mr. Smargiassi replied that he did not want to use that as an excuse *not* to move it to the front, he was just curious.

Mr. O’Brien said that, no matter when it was acted upon, it would have no effect on the current application.

Mrs. Raimer said that it would have no legally binding effect, however if you have a cooperative applicant who is trying his best to adhere to whatever standards are appropriate and applicable in an effort to make it the best case to persuade the Board to vote in favor, she felt that they would disregard the time of decision rule.

Mr. O’Brien said that we also have Master Plan language may be appropriate depending on the facts of the application, however he did not want to go too far.

Mrs. Raimer said that she did not want to put anybody in a comprising position, she just wanted to advise the Zoning Board when it is sitting there and referring to this vague concept. She felt that it would nice, since it is pending, if could be made more formal so that what we are referring to had some teeth to it. She thanked the Board for considering it.

Referring to the same document Mrs. Raimer was referring to, Mr. Briggs said that one of the items we have is the application Checklist which is before the Township Committee and Dr. Behr had offered to write the Applicant’s Guide to it once it is approved. He asked if anyone was against the idea of soliciting Dr. Behr to see if he would still continue to do that on behalf of the Board even though he is not present. He said that the other part of that is the architectural standards which is one of the items that he was very much involved in. He said that the Chair may be willing to reach out to him to see if he is still willing to do both of those items given t he amount of work that he was involved in at the beginning rather than reinventing the wheel.

Mr. Connor said that his view on that is that some of that activity affects both the Zoning Board and the Planning Board. He felt that it is almost a legitimate use of the Zoning Board’s time to participate in that development and certainly Dr. Behr has been responsible for a good portion of that development and he felt that continuing that would be useful.

Mr. Briggs agreed and suggested that he be solicited to see if he is still willing.

Mr. Connor replied that he would do that.

There being no further business, the meeting adjourned at 9:30 P.M.

