

TOWNSHIP OF LOWER MAKEFIELD
ZONING HEARING BOARD
MINUTES – MAY 5, 2009

The regular meeting of the Zoning Hearing Board of the Township of Lower Makefield was held in the Municipal Building on May 5, 2009. Chairman Malinowski called the meeting to order at 7:30 p.m.

Those present:

Zoning Hearing Board: David Malinowski, Chairman
 Paul Bamburak, Vice Chairman
 Gregory J. Smith, Secretary
 Jerry Gruen, Member
 Anthony Zamparelli, Member

Others: Nancy Frick, Director Zoning, Inspection & Planning
 Robert Habgood, Code Enforcement Officer
 John Donaghy, Township Solicitor
 Allen Toadvine, Zoning Hearing Board Solicitor
 Matt Maloney, Supervisor Liaison

APPEAL #09-1509 – BARRY RUSH

The Application submitted which was time stamped by the Township March 19, 2009 was marked as Exhibit A-1. Attached to the Application was a letter dated 2/10/09 to Francis J. Sullivan, Esquire from Nancy Frick, Director of Zoning, Inspection, and Planning which was marked as Exhibit A-2. Mr. Toadvine stated this is an Appeal from the determination of the Zoning Officer.

Mr. Donaghy stated the Township would like to participate as a Party in the matter and is in opposition. He stated there may be other Parties who may have counsel present as well. Mr. Edward Murphy, attorney, stated he represents Realen Homes L.P. which is the legal owner of Lot #15 which is the lot for which the Permit was issued which is the subject of the Application. He stated they request Party status and would join with the Township in opposition.

Mr. Donaghy stated he does not feel the Application should be considered by the Board. He stated it purports to be an Appeal to a letter dated 2/19/09 from the Township Zoning Officer which is part of the Application and has been admitted into evidence. He stated the letter is not a final determination from which an Appeal can be filed to the Zoning Hearing Board. He stated it is simply a response to a letter from a neighbor and interested Party. He stated it is not the issuance of a Permit and is not the denial of a

Permit. He stated this letter is treated no more than an advisory opinion and there is not an Appeal from that action. Mr. Donaghy stated he has prepared a short Memorandum of Law which he provided this evening.

Mr. Donaghy stated if the Zoning Hearing Board were to permit Appeals from letters commenting on previously issued-Permits coming from interested Parties, then in effect an Appeal could occur almost at any time subsequent to the issuance of a Permit, and there would be no time limitation. He stated the letter was written three months following the issuance of the Permit, but it could have been a year or two years, and he would question what would be the cut off if one was dissatisfied with the issuance of Permit to a third Party if this Appeal were allowed to continue.

Mr. Smith asked what action subsequent to this letter would be Appealable, and Mr. Donaghy stated it is not Appealable at all. He stated it is not a determination of a Zoning Official. Mr. Smith asked what would constitute a determination, and Mr. Donaghy stated it would be the issuance or denial of a Permit.

Mr. Sullivan stated the initial Building Permit was issued sometime in November of 2008 and subsequently it was determined by his client that the issue for which they are here which is the building of a two-story custom garage came to his knowledge after that fact. He stated they had no knowledge and were given no notice that Building Permit had been issued until he noticed that a building was being constructed to the rear of his property. Mr. Sullivan stated because they were not given notice, when they complained to the Township there were a series of letters which were attached to the petition for the Appeal from the decision of the Zoning Officer. He stated in the letter dated 2/19/09, the Zoning Officer states on page 2, "Any person aggrieved by any decision of the Zoning Officer shall have the right to Appeal. He stated they Appealed within thirty days of the 2/19/09 letter. He stated the Decision that was made by the Zoning Officer specifically was the issuance of the first Building Permit and then an Amendment to the Building Permit was proper under the Lower Makefield Township Zoning Code. Mr. Sullivan stated he would submit that the Decision they are Appealing is the refusal to issued a Cease and Desist Order and the refusal by the Zoning Officer to revoke what they believe was an unlawfully-issued Permit. Mr. Sullivan stated he cannot change the facts as to when the Permits were issued, and he is relying on the letter of 2/19 and the specific statement by the Zoning Officer that if they do not like her Decision as set forth in the 2/19/09 letter which is attached, they may take an Appeal.

Mr. Malinowski stated it states an Appeal may be taken within thirty days of the Decision, but the decision was made in November. Mr. Sullivan stated he believes the writer is making reference specifically to his prior letter to her of 2/17/09, and she is responding to that letter; and he feels a fair reading of her letter of 2/19/09 is the Decision which she is stating they may take an Appeal from. He asked the Board to consider this as well as to look at the other correspondence that has been attached as part of the Application.

Mr. Sullivan marked as Exhibit A-3 a letter he wrote to the Lower Makefield Township Planning, Zoning, & Building Department dated 2/11/09 in reference to Lot #15. The response to that letter dated 2/12/09 addressed to Mr. Sullivan from Nancy Frick was marked as Exhibit A-4. The letter dated 2/17/09 from Mr. Sullivan to Ms. Frick was marked as Exhibit A-5. Exhibit A-2 is the response to Exhibit A-5.

Mr. Sullivan stated when they first notified the Township Zoning Officer on 2/11 they stated that they had just conducted a survey of the property to the rear of his client's home; and as a result of that survey, they discovered that the two-story custom garage was built within the required 75' yard setback. They indicated they believed that the issuance of the Permit in November of 2008 permitting a garage to be built within that setback was improper, and they asked that there be a Cease and Desist Order issued and that the Building Permit be revoked.

Mr. Sullivan stated on 2/12 they received a response indicating it was properly issued and they were not going to revoke it. Mr. Sullivan stated he responded by letter dated 2/17, and the Township responded on 2/19 which stated that if they wished to take an Appeal they may do so in accordance with the provisions of the Zoning Code, a copy of which was attached.

Mr. Sullivan stated the issue before the Board this evening is whether or not the Decision made by the Zoning Officer as of 2/19/09 not to revoke the unlawfully and improperly issued Building Permit was correct.

Mr. Murphy stated what Ms. Frick did in response to Mr. Sullivan's series of letters was to provide not an opinion, decision, or determination; but rather she gave solicited advice which is under case law not a determination from which an Appeal can be filed. He stated there are certain remedies available to appellants under the Municipalities Planning Code; and he noted Section 914.1 which deals with the situation where, if Mr. Sullivan's client did not have immediate notice of the issuance of the Building Permit, there are remedies for when an Appeal might be taken outside the thirty day Appeal period. He stated this is not this case and this is a situation where there is an attempt being made to Appeal from gratuitous advice provided by the Zoning Officer; and the fact that Ms. Frick responded to Mr. Sullivan's letter does not provide a basis for an Appeal to be filed; and he feels the Hearing tonight should be dismissed.

Mr. Donaghy stated this is an attempt to "bootstrap" a phrase that is in Ms. Frick's letter into an Appealable determination. He stated it simply is a general statement that any person aggrieved by any Decision of the Zoning Officer shall have the right to Appeal within thirty days. He stated Mr. Sullivan in his letter of 2/17 in the last paragraph stated, "I strongly urge you to revisit your decision regarding the issuance of this Building Permit," and she is merely passing on advice as to the proper way to have acted in regard to that decision which was the issuance of the Building Permit. Mr. Donaghy stated

while he respects Ms. Frick, she does not have authority to change the law of the Commonwealth of Pennsylvania or to alter the Ordinances of the Township. He stated there is not a basis for Appealing from a non-Decision or non-determination by a Zoning Officer; and whether the person writing the letter attempts to grant that right to Appeal, it is simply not there. He stated this is a nullity and an attempt, because of their failure to make a timely Appeal, to Appeal from a letter; and does not constitute a determination.

Mr. Smith asked Mr. Sullivan if he would agree that the Decision to issue a Building Permit would be a Decision of the Zoning Officer, and Mr. Sullivan agreed. Mr. Smith asked Mr. Sullivan if he would agree that the Decision to not issue a Building Permit would be a Decision of the Zoning Officer, and Mr. Sullivan stated he would agree. Mr. Sullivan stated that is not the Decision they are Appealing. Mr. Smith stated he understands that Mr. Sullivan is trying to set forth the idea that it would be Appealable any time someone asked the Zoning Officer to revisit a previous Decision; and whatever the Zoning Officer's response would be, would then again be Appealable. Mr. Sullivan stated what he is asserting is that when they discovered that the property was within the setback requirement as set forth under the existing Zoning Code, they brought that to the attention of the Zoning Officer and sent a survey which is attached to the letter of 2/11. He stated their statement to the Township was that the Building Permit had been unlawfully issued. He stated the correspondence back and forth on that point and the Zoning Officer's Decision is what they are Appealing. Mr. Smith asked Mr. Sullivan if he has case law to support that position, and Mr. Sullivan stated he only has what they have in their submission with the Application.

A short recess was taken at this time so that the Board could confer with their Counsel.

The meeting was reconvened at 7:55 p.m.

Mr. Malinowski asked Mr. Sullivan if the Appeal is based on the letter of 2/19/09; and Mr. Sullivan stated the Appeal is based on the facts that are asserted in the letter dated on 2/11/09. He stated the problem with the argument related to the thirty days is that the issuance of the Building Permit is a document which is issued internally within the Township to the Applicant for the construction request. He stated the Building Permit is not published, so as a result the Township or Applicant could "sit on it" for thirty-one days and then it becomes by the reasoning of the Township's Counsel and Mr. Murphy, final and un-Appealable. He asked how an owner of an adjoining property would know that there has been a Building Permit issued.

Mr. Toadvine stated in dealing with the issuance of Building Permits, the Courts have recognized an exception to the thirty day Appeal period. Mr. Donaghy stated the Township is not arguing otherwise. He stated they are arguing that this particular Appeal is a nullity; and as of 2/11 there was knowledge of a Building Permit anyway.

Mr. Sullivan stated they presented this to the Township and requested relief and there was a series of exchanges between the aggrieved Party and the Zoning Officer. He stated notice was given to the Zoning Officer that there had been a violation of the Zoning Ordinance as it relates to the existing setback. He stated the Zoning Officers refused their request and set forth in her 2/19 letter that if they did not like the Decision, they can take an Appeal. He stated as a matter of plain reading of Nancy Frick's letter of 2/19/09 the first paragraph on the second page has a statement that they can Appeal what she is saying in the letter.

Mr. Smith stated the Board is in agreement that regardless of what Ms. Frick said in the letter, they cannot Appeal what she said in the letter.

Mr. Sullivan stated the decision that is set forth in the letter is what he is Appealing and this is the final determination made by the Zoning Officer on the notice that was given to her as to the violation of setback. Mr. Malinowski stated it is an alleged violation as there is some difference of opinion as to this; and Mr. Sullivan stated this is why they want to come before the Zoning Hearing Board so that they can present to the Board the evidence that the structure has been built outside of the setback requirement.

Mr. Murphy stated Mr. Sullivan had a remedy under the applicable provisions of the MPC; and for whatever reason he chose not to avail himself of those opportunities. Mr. Murphy stated Mr. Sullivan is now trying to "bootstrap" himself into a position where he can appeal something that took place last November.

Mr. Smith moved, Mr. Gruen seconded and it was unanimously carried to dismiss the Appeal.

OTHER BUSINESS

Appeal #08-1476 – Pennsbury School District – Request for Extension

Mr. Malinowski noted the letter received requesting a six month Extension due to bidding problems. Mr. Gruen moved, Mr. Bamburak seconded and it was unanimously carried to grant a six month extension.

Appeal #08-1498 – William K. and Carol L. Jones – Request for Extension

Mr. Habgood stated Mr. and Mr. Jones are working with the Township to get funding to raise the structure, and he would recommend that the extension be granted for one year. Mr. Smith moved, Mr. Gruen seconded and it was unanimously carried to grant a one year extension.

May 5, 2009

Zoning Hearing Board – page 6 of 6

There being no further business, Mr. Bamburak moved, Mr. Smith seconded and it was unanimously carried to adjourn the meeting at 8:05 p.m.

Respectfully Submitted,

Gregory J. Smith, Secretary