

TOWNSHIP OF LOWER MAKEFIELD
ZONING HEARING BOARD
MINUTES – JUNE 18, 2019

The regular meeting of the Zoning Hearing Board of the Township of Lower Makefield was held in the Municipal Building on June 18, 2019. Mr. Gruen called the meeting to order at 7:30 p.m.

Those present:

Zoning Hearing Board: Jerry Gruen, Chair
 Pamela Lee, Member
 James McCartney, Member

Others: James Majewski, Director Planning & Zoning
 Adam Flager, Zoning Hearing Board Solicitor
 Frederic K. Weiss, Supervisor Liaison

Absent: Anthony Zamparelli, Zoning Hearing Board
 Vice Chair
 Keith DosSantos, Zoning Hearing Board
 Secretary

APPEAL #19-1826 – SHADY BROOK INVESTORS, L.P.

Mr. Gruen stated Shady Brook Investors L.P. have requested an Extension. He stated he assumes they did not have time to do the Traffic Study. Mr. Majewski stated they are still working on the Traffic Study which should be ready shortly. He stated they have requested a Continuance until the meeting on July 16, 2019 at which time they will have the Study done; and hopefully we will have time to have the Township traffic engineer review it. Mr. Majewski stated if not, the Applicant will probably request another Continuance.

A gentleman from the audience asked if the public could be heard; and Mr. Gruen stated it is not open for discussion at this point, and it is just that they are asking for an Extension. Mr. Flager advised that he could be heard if Mr. Gruen wanted him to, and Mr. Gruen agreed to give the gentleman the opportunity to speak.

Mr. Joseph Gioconda, 26 Autumn Drive, stated he lives approximately one mile from the proposed warehouse location. He stated he testified previously at the earlier Hearing. Mr. Gruen asked if he needed to be sworn in again since he was sworn in at the last meeting, and was advised he did need to be sworn in again; and Mr. Gioconda was sworn in at this time.

Mr. Gioconda stated he is an attorney licensed to practice in Pennsylvania. He stated the burden of proof was on the Applicant seeking the Special Exception, and they produced an incomplete Traffic Study. He stated the Board granted them a Continuance once so that they could supplement the Study, and they have not appeared here tonight to produce it. Mr. Gioconda stated if the Board in its discretion allows them to have a second Extension, he would propose that it be made on the Record that it is the final Extension; and if the July 16 date comes, and no Traffic Study has been provided, then the Applicant has had a full and fair opportunity to present a Record, and the Record should be closed at that point if they do produce a Traffic Study. He stated his second point is that in the event that they do produce a Traffic Study, he would request that it be published in advance of the next Hearing by possibly a week or a few days so that the public has an opportunity to review it in preparation for any Public Comment they may have so that criticisms or other facts may be brought to the Board's attention. He stated he would like at least a few days to review the Report prior to the meeting either by an independent expert of his own or just himself to review it for any potential defects or additional facts that would assist the Board in making a determination.

Mr. McCartney asked Mr. Flager if this is something that would be within the Board's realm of capability if the Extension is granted, and that they be given a Final Extension to the July 16 date and to ask for the Report to be submitted one week prior to the Hearing. Mr. Gruen stated the Board has never done this in the past. Mr. Flager stated the practice is not to issue "final ones" because it is the Applicant that is coming before the Board. He stated if the Applicant states that they need more time, he would question why the Board would care if it is the next meeting in July or a meeting in August. Mr. McCartney asked about the request to have the Study presented one week earlier, and Mr. Flager stated the Study most likely will be done well in advance of a week before that because not only does the Applicant need to conduct a Traffic Study, it also needs to be given over to the Township's traffic engineer to review and comment. He stated he does not know how the Township wants to go about getting the Study out, but he assumes it could be made available at the Township Building. Mr. Gioconda stated just being available for inspection would be fine from his perspective although he cannot speak for anyone else. Mr. Flager stated typically "that stuff" is not available because it is on the Applicant to produce that here, and they do not technically need to make that available to the public until it is brought here and introduced into Evidence. He stated the Application packets could be made available for "these normal Appeals" because it is sent in a month in advance. He stated he could reach out to Mr. Edward Murphy, their attorney, to see if this is something that they are okay with; and when it is made available, it could be made available to the public as well. He stated he will reach out to Mr. Murphy after the meeting to see if we can honor that request.

Mr. Gruen stated he feels Mr. Gioconda has a good point since they are coming in presenting the Traffic Report and no one in the audience or the residents had a chance to look at it or get an expert to rebut it or to question anything. Mr. Gruen stated he feels it is fair that if they do have a Traffic Report, it should be available to the public a week before the Hearing. He stated maybe the residents want to get their own traffic engineer to bring with them. He stated the Township has time to review it and so should the public have the right to review the Traffic Report. Mr. Flager stated while this is correct, the Applicant is submitting it to the Board for the Board to make a Decision. He stated the Board does not work “in a dark room outside of the sight of the public,” but he does not know that the Board needs to make something available just for the public to be able to rebut a Traffic Study. He stated because of the impacts of this particular case, there is more widespread interest than a normal Application. He stated he will reach out to Mr. Murphy, the Applicant’s attorney, and see if they can make that available sooner than later; and as soon as they do, if Mr. Murphy is okay with that being available to the public so that anyone who wants to see it ahead of time can see it ahead of time.

Ms. Lee stated she believes that they can require that the Zoning Hearing Board receives it in advance of the Hearing. She stated this is not a simple matter. She stated the next Appeal they are going to be hearing has submitted everything, and the Board has that at least one week and a half if not two weeks prior to the Hearing. Ms. Lee stated in this case, they did have the Application and some of the Evidence that they put in their Appeal package; however, they chose not to conduct a full Traffic Study. Ms. Lee stated the Zoning Hearing Board granted a Continuance because the Board was prepared to deny the Appeal because of a lack of information. Ms. Lee stated she would like additional time to review the Traffic Study, and she feels that is a very common sense request that the Board have the additional time to review it.

Mr. Flager stated he agrees; and as soon as it is delivered to the Township, it can be forward to the Zoning Hearing Board so that the Board has it. He stated as soon as the Township traffic engineer issues a reply or review of that, that can be made available to the Board right then as well. He stated that way the Board will have everything as soon as it is available.

Ms. Lee stated she feels they can grant the Continuance subject to the Applicant providing the Traffic Study two weeks prior. Mr. Gruen stated it should be submitted a minimum of ten days; however, Ms. Lee stated she would like it two weeks prior. Mr. Flager stated he will reach out to Mr. Murphy after the meeting to get a better idea of when he feels it will be available. Ms. Lee stated the Zoning Hearing Board can put their own Conditions on it; and Mr. Flager stated he agrees, but he wanted

the Board to be aware, and he will bring the Board up to speed about when to expect it. Ms. Lee stated the Board needs to make a Motion tonight. Mr. Flager stated he is just saying when the Board will know when to expect the Traffic Study.

Ms. Lee stated the next Hearing is July 16, and Mr. Flager agreed that the July 2 meeting will be cancelled. Mr. McCartney asked Mr. Flager if one week prior to a Hearing is reasonable, and Mr. Flager stated he does not think it is only in the sense that he does not know if the Township traffic engineer can get a review back that fast. Ms. Lee stated they have had since April already. Mr. Flager stated he is saying that he does not know if the Township traffic engineer could get the Report within a week and then turn around and get the Zoning Hearing Board a review letter, and they may need more time. Ms. Lee asked if they are therefore waiting on the Township. Mr. Flager stated Shady Brook Investors needs to finish conducting a Traffic Study and submit the Report to the Township. He stated the Township will then need to review it, so there is time needed for both of those things – initially for the Traffic Study to be completed, and then for the Township to have time to review it. He stated what was done last time was that the Board granted a Continuance and also authorized Dr. Weiss to “take it up” with the Board of Supervisors to authorize the Township traffic engineer to review the Traffic Study that is completed by the Applicant. Ms. Lee asked why they need the Township to review it before the Zoning Hearing Board reviews it. Mr. Flager stated it is the Township’s traffic engineer who is going to review it. Mr. Gruen stated they will Testify on it. Ms. Lee stated that is to Testify, and she feels the Zoning Hearing Board can get it at the same time the Township gets it; and Mr. Flager agreed. He stated as soon as it is made available to the Township, it can be made available to the Zoning Hearing Board, but it still needs to be made available to the Township so that way the traffic engineer can review it and make formal comments. Ms. Lee stated she agrees, and she feels we should give the Township traffic engineer at least two weeks to review it; and she asked why they are limiting the Township’s traffic engineer.

Mr. Majewskis stated no one is limiting anyone. He stated the Applicant could actually show up to the meeting with the Traffic Study, present their Testimony, enter the Traffic Study as an Exhibit; and then the Parties could request an additional Hearing to review that, to provide their own Testimony, to cross examine the Witness on their Testimony, and the Township can do the same thing. Mr. Flager stated if everything can get done before July 16, they would have the Traffic Study, the Township engineer’s response to the Traffic Study, and you can cross-examine all in one night. He stated what Mr. Majewski is suggesting is another option which would require a third Hearing, which he does not know the Board would want to have; and Ms. Lee stated she does not. Mr. Flager stated the previous Continuance was just one part, and the Board also wanted the Traffic Study to be submitted to the Township for their review and comments as well. He stated at the next Hearing, everything could get handled at that time.

Mr. Majewski stated while the Zoning Hearing Board could require that the Traffic Study be provided two weeks in advance of the meeting, if it is not ready, it is not ready. Mr. Gruen stated if it is not ready, they could ask for another Continuance or if they come on July 16 and advise that the Traffic Study has just been finished, the Board would advise them that they will not render a Decision that night as the Board needs to study it and will need to have a third meeting. Mr. Gruen stated the Board can request two weeks; but if the Applicant cannot honor it, they cannot honor it. Mr. Majewski stated a Decision does not have to be rendered on July 16, and the Parties involved will have ample time to review it, cross examine Witnesses, and bring in their own Witnesses should they so choose. He stated the Township may also intervene and bring in their traffic engineer in as a Witness, and everyone will have an ample opportunity to be heard under any scenario.

Mr. Gioconda stated the word "Party" is a key word; and a Party would have the right to cross examine, but he is talking about the public who may not be Certified Parties under the Law. Mr. Gruen asked Mr. Gioconda if he sought Party Status, and Mr. Gruen was advised that he did not; and there was only one who sought Party Status that night. Mr. Gioconda agreed that he did not seek Party Status; and there was only one that night, and that Party did not take a position. Mr. Gioconda stated he is speaking on behalf of the general public. Mr. Gruen asked Mr. Gioconda if he would like Party Status; however, Mr. Gioconda stated he cannot as under the Statute he is not entitled to Party Status. Mr. Gruen stated from what he understands "they were wrong," and Mr. Gioconda can request Party Status. Mr. Gruen stated he can grant anyone he wants Party Status; adding while it might not stand in Court, he could give Mr. Gioconda Party Status here. Mr. Gruen stated he was advised that it is more prudent to give him the Party Status than Mr. Gioconda going to Court and saying he did not get Party Status. Mr. Gioconda stated he will reserve his position on that. He stated he is in a unique position because he is an attorney, and he cannot take a position on something that is not allowed under the Law. Mr. Gruen stated he was told by a Zoning Board attorney that "under the Law" we are allowed to do it. Mr. Gioconda stated he will defer to that because he is not a Zoning attorney.

Mr. Gioconda stated he does want to reserve the right that in the event Shady Brook Investors L.P. shows up on July 16 with an expert Witness, Report, and Testimony presenting it that night, and the Board asks questions and cross examines on the spot without the Board or the public having the opportunity to do a full cross examination, that there would be the opportunity to keep the Record open and come back and do it again if necessary. He stated he does not want the Applicant saying they are here with "their guy here once, and there is one bite of the apple, and you take it or leave it, here is the Record, and it is closed, and they don't get to come back and criticize him again."

Mr. Gioconda stated if that is the case, the Zoning Hearing Board should put Conditions on it and say “no” and there has to be advance access to this Report to the public. He stated they cannot “sandbag this Board and the public by dropping a big voluminous Report that is technical and full of expertise on the day of the Hearing and saying here is the Record, no one is allowed to cross examine Witnesses other than a Party; and they are not here and therefore our guy will not be here after tonight.”

Mr. Gruen stated the Zoning Hearing Board could then make a decision against it.

Mr. Gioconda stated he is just anticipating that issue. Mr. Gruen stated it is up to the Zoning Hearing Board decide; and it is not the Applicant’s position to tell the Board whether the Board is allowed to cross examine or have to render a Decision that night. Mr. Gruen stated the Board does not have to render a Decision that night. Mr. Gruen stated speaking for himself if the Traffic Report is given that night he would personally like to see another Hearing, and he does not want to make the Decision with “them dropping the information in front of him.” Mr. Gioconda stated that is what happened at the last Hearing.

Mr. Majewski stated the Municipalities Planning Code anticipates that provision which is why there are a certain number of days in which to start a Hearing and so many days in which to complete it unless you mutually agree to extend those times.

Ms. Lee stated she would make that agreement as well; however, there are usually five members of the Board so if they are provided that technical information that night without anyone having the chance to review it, she would not make a Decision that night or she would vote “no” if there is a pending vote since she would not have had time to review the information. Ms. Lee stated that being said, there are five members so hers could just be the second vote with Mr. Gruen’s.

Mr. Gruen asked if they could put in a Motion that should they bring the information on July 16, they will not render a Decision. Mr. Flager stated he would then be “proactively adjudicating something.” Mr. Flager stated the understanding from the last meeting was that it was not enough for the Applicant to just produce the Traffic Study, and it has to be reviewed by the Township traffic engineer so both things need to happen before a Decision would be made.

Mr. McCartney asked Dr. Weiss if the Board of Supervisors has approved review by the Township traffic engineer, and Dr. Weiss agreed.

Mr. Gruen moved, Ms. Lee seconded and it was unanimously carried to grant the Extension to the July 16 meeting; however, we would like to see the Traffic Report presented to the Township two weeks prior to that, by July 2, so that the Board members and the Township engineer can review it.

APPEAL #19-1837 – MICHAEL WEINSTEIN

Mr. Michael Weinstein and Ms. Sarah Weinstein were present and were sworn in.

Mr. Flager marked the Exhibits as follows: The Application was marked as Exhibit A-1. The Site Plan was marked as Exhibit A-2. The reasons for relief was marked as Exhibit A-3. The Impervious Surface Breakdown was marked as Exhibit A-4. The letter submitted discussing the remediation needed at the residence was marked as Exhibit A-5. The Proof of Publication was marked as Exhibit B-1. The Proof of Posting was marked as Exhibit B-2. The Notice to the neighbors was marked as Exhibit B-3.

Mr. Gruen asked for an explanation of the Application and explain what is the hardship, why they are seeking relief, and how much relief they are seeking.

Mr. Weinstein stated their hardship is that they are in a Resource Protected Zone, but their parcel is in a 500 hundred year flood zone so they have a very limited Impervious surface ratio. He stated when they moved in, they were already above the limit and unable to do any work to make their home their “forever home.” He stated they want to connect the house with a patio to the pool so they can go in and out without creating dirt and so that they would be able to enjoy their space. He stated they are asking to go above the limit.

Ms. Lee asked to be shown the property, and Mr. Weinstein stated they are Tax Parcel #20-047-165, and Ms. Weinstein showed their property on the slide.

Mr. Gruen asked if the pool is already existing, and Mr. Weinstein agreed. He stated everything there was existing before they moved in. Mr. Gruen stated they are just asking for a Variance to connect the pool with a “house patio,” and Mr. Weinstein agreed.

Mr. Weinstein stated they have indicated that they would add an infiltration trench to replace the water run-off, and those Plans were submitted as well.

Ms. Lee asked what will be the effective impervious, and Mr. Gruen stated it is 15.19. Mr. Flager stated that is incorrect, and that is their current impervious surface. Mr. Weinstein stated he had a Civil Engineer review the added space which is 672 and for the run off, he indicated that they would be required to add a 132 cubic feet storm run-off replacement, and the infiltration trench shown is a 5 by 21, 3 feet deep which would be 330 cubic feet; but because it is filled with the stone, you are only getting 40% of the run off which would bring them down so that the addition would have limited to no impact from the extra run off.

Mr. Majewski stated that would effectively keep it neutral to where it is now at the 15.2%. Mr. Majewski stated the Lots in this neighborhood were originally developed as R-2 Zoning which would have had an 18% impervious surface; however, when they changed the Zoning to RRP – Resource Protection Zoning, it lowered the amount down to 13% meaning that almost every house in this neighborhood is already over the 13%.

Mr. Gruen asked if there was a Building Permit issued for the pool originally; however, Mr. Majewski stated he did not check into that. Mr. Gruen stated they do not know if the pool is even legal there. Mr. Majewski stated he would imagine that it probably would be legal. Mr. Gruen stated the “pool already brought it from 13” so they must have gotten a Variance; and they would not have been able to get the pool without a Variance because from 13 they went to 15.19, and they would have been required a Variance. Mr. McCartney stated the pool could have been in before the Zoning changed. Mr. McCartney asked Mr. Weinstein how old the pool is; and Mr. Weinstein stated it looks “pretty old,” and it probably from the 1980s or 1990s. Mr. Majewski stated he believes they changed the Zoning to RRP in the 1990s.

Mr. McCartney asked Mr. Majewski if the trench they are proposing adequate to bring it back to what it currently is; and Mr. Majewski stated while that will be reviewed by the Township engineer, he believes that it is adequate. Mr. McCartney asked if there would be a way to bring it to 13; and Mr. Majewski stated that would be abnormally large and would not really required under the Stormwater Management Plan.

Mr. Weinstein stated currently there are no water issues on the property or the area, but they are willing to do what is right.

Mr. Gruen asked if there is any way they could re-design the deck so that it does not go so far in the back of the pool. He stated they could connect the two decks with a smaller deck. He stated the deck they are proposing is 672 square feet which is 32 by 21 which is a large deck. Mr. Weinstein stated they wanted to be able to use the outdoor space and limit having “to do the grass around there.” He stated they were going to have river rock around the edge so there would still be water run off

allowed there as well on the back side. Mr. Gruen stated there are also other ways of connecting it, and they could do it with a raised deck which would not involve impervious surface. Mr. Weinstein stated while he understands, “visually this is what they really love.” He stated they did not know about the Resource Protected Zone, and this is their request. He stated they are willing to do whatever from the environmental side to get it back to the level, and they would ask that they consider what they are requesting. He stated if that is not approve, they would look into another option, but this is the house they want to grow up in and they do not plan to move, and they would like to make it the design they have proposed.

Ms. Lee moved and Mr. McCartney seconded to approve the Appeal as presented as long as the trench that is proposed brings the impervious surface down to where it is now under Township supervision.

Mr. McCartney asked Mr. Majewski if the trench they plan to put in will bring them back to where they were, and Mr. Majewski agreed. Ms. Lee stated the Motion includes that the Township will oversee that.

Mr. Weinstein stated he had a Civil Engineer review it as well and certify it; and if it does need to be changed, they would be happy to oblige.

Mr. Majewski stated he has made up a spread sheet for people to calculate out the size of the trench so that there is more accurate information for the Township to work from.

Motion carried with Mr. Gruen opposed.

CANCEL JULY 2 MEETING

Due to lack of an Agenda, Ms. Lee moved, Mr. McCartney seconded and it was unanimously carried to cancel the July 2 meeting.

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

Respectfully Submitted,

Jerry Gruen, Chair

