

TOWNSHIP OF LOWER MAKEFIELD  
ZONING HEARING BOARD  
MINUTES – JULY 7, 2009

The regular meeting of the Zoning Hearing Board of the Township of Lower Makefield was held in the Municipal Building on July 7, 2009. Chairman Malinowski called the meeting to order at 7:35 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:                                Robert Habgood, Code Enforcement Officer  
   John Donaghy, Township Solicitor  
   James Majewski, Township Engineer  
   Allen Toadvine, Zoning Hearing Board Solicitor  
   Matt Maloney, Supervisor Liaison (joined meeting in  
   progress)

APPEAL #08-1483, #08-1483(A), and #08-1483(B) – T-MOBILE NORTHEAST LLC

Mr. Toadvine stated the Applicant has requested that the matter be continued until September 15, 2009 and agreed to waive the time limits until September 30, 2009. He stated this is based on their assumption that they will have an alternate site.

Mr. Smith moved, Mr. Gruen seconded and it was unanimously carried to continue the matter until September 15, 2009.

APPEAL #09-1514 – WELTON O'NEAL

Mr. Welton O'Neal was sworn in. The Application submitted was marked as Exhibit A-1. Attached to the Application was a one-sheet Plot Plan for Lot #10 of Hidden Oaks I, Phase III, time-stamped by the Township 5/19/09, and this was marked as Exhibit A-2.

Mr. O'Neal stated he was denied approval of his Application for installation of an egress at his home which is necessary to come from the basement of the house to the outside. He stated he is re-locating to Maryland and has found a buyer for his home. In order to meet the Code which was approved in 2006, an egress must be in place for any rooms

that are in the basement if they were put in without a Permit which he did not know at the time that he needed a Permit in 1997. He understands that the egress cannot be grandfathered in because of the fact that he did not have the basement rooms properly Permitted. He is requesting that he be permitted to put the egress in according to the Code so that he can sell his home.

Mr. Maloney joined the meeting at this time.

Mr. Toadvine stated he is requesting a front yard setback.

Mr. Donaghy stated the Township is not participating at this time.

Mr. Habgood stated it will be slightly more than 1 ½' encroachment into the front setback so he would suggest that they grant a 2' encroachment.

Mr. Gruen asked when the front step was built, and Mr. O'Neal stated it was part of the house when it was built in approximately 1994. Mr. Gruen stated it appears that the front step is in the front yard setback, and Mr. O'Neal agreed. Mr. Habgood stated it is in the front yard setback, and the Applicant did put a portico over it and did have to come before the Zoning Hearing Board for a Variance for that encroachment into the front yard. Mr. Habgood stated he reviewed the Decision, and the Decision indicated it was specifically for the front porch. Mr. Gruen stated the front porch goes further than the window, and Mr. Habgood agreed. Mr. O'Neal stated this is the way he purchased the home when he bought the home which was a new home in 1994.

There was no public comment, and the Public Hearing portion was closed.

Mr. Smith moved, Mr. Gruen seconded and it was unanimously carried that the request in the way of a front yard setback of 2' bringing it to 38' be granted.

#### APPEAL #09-1515 – MERRICK WILSON

Mr. Merrick Wilson was sworn in. The Application filed was marked at Exhibit A-1. Attached to the Application is a Plan which has been photocopied onto four separate sheets and is entitled "Grading Plan for Lot #4, Towering Oaks of Yardley, Tax Map Parcel #20-72-112, time-stamped by the Township 5/19/09; and this was marked as Exhibit A-2.

Mr. Wilson stated he was cited by the Zoning Officer for not having a Certificate of Occupancy or a Temporary Certificate of Occupancy on a house that was completed nearly two years ago. He stated two years ago an Application was submitted for a Certificate of Occupancy or a Temporary Certificate of Occupancy considering that the house had been completed and all inspections had been completed and approved, and at that time it was denied for what appeared to be insignificant and deminimous circumstances. He stated since that time he has been billed by Ms. Cecchine, the Tax Collector, for full taxes for the property in the amount of approximately \$16,500 a year which he has paid over the past two years. He stated there is no reason he can imagine why a Certificate of Occupancy or a Temporary Certificate of Occupancy was not issued for the property since the property was completed, everything was done, it was inspected, and it was proper; and the items that were cited by the Building Department at that time as “standing in the way” are deminimous and should not have stood in the way of at least having a TCO or a CO.

Mr. Toadvine stated this is an Appeal from the determination of the Zoning Officer which is according to the Application dated 4/21/09. The letter issued by the Township dated 4/21/009 addressed to Mr. Wilson and signed by Mr. Habgood was marked as Exhibit A-3. Mr. Toadvine stated while there is a request for a Variance, he does not see any Sections and/or specifics cited for the Variance; and he asked Mr. Wilson to clarify this.

Mr. Donaghy stated the Township is participating in this matter and is in support of the Cease and Desist Order which was issued by the Code Enforcement Officer. He stated the Cease and Desist Order related only to the occupancy of the building, and there is no request for, nor has there been a request for the issuance of a Certificate of Occupancy or a Temporary Certificate of Occupancy; and that is not before the Zoning Hearing Board tonight.

Mr. Smith stated the jurisdiction of the Zoning Hearing Board would be over the question of whether the citation was issued because of the failure to have a CO and not whether the failure to have a CO was proper or not as this would be outside of the jurisdiction of the Zoning Hearing Board. Mr. Smith stated he feels they can agree that there was not a CO, and they would have to determine if there was not a CO was it proper for the Township to cite him for not having a CO.

Mr. Toadvine stated the only issue before the Zoning Hearing Board is the challenge to the letter which was marked as Exhibit A-3 stating that there was no Certificate of Occupancy for this property. He stated there was also a request for either a Special Exception or a Variance by the Applicant, but no Sections were cited nor was there an indication of the underlying issues. Mr. Donaghy stated even though the block was checked off he saw no supporting evidence that there was a basis for a Variance or a

Special Exception and in reading the Application it addresses simply the issue of the letter issued by Mr. Habgood. Mr. Toadvine stated the only issue before the Board would then be whether the Applicant applied for the Certificate of Occupancy or not. Mr. Donaghy stated there were actually two Applications made in 2007 which were denied, but nothing subsequently; and no Appeal was taken from the denial.

Mr. Wilson stated he would like to request a continuance so that he can seek legal counsel since the heart of the matter is not that he did not seek a CO or TCO; but rather that he did apply for it, got all the inspections required, and; if in fact one was not issued and because of it not being issued, he is being cited for that, he would ask for a continuance so he can seek legal counsel to determine whether they can combine the two Appeals.

Mr. Toadvine asked Mr. Wilson if he would agree that no CO or TCO was ever issued, and Mr. Wilson agreed.

Mr. Toadvine asked Mr. Donaghy the Township's opinion on the request for a continuance. Mr. Donaghy stated the Township would oppose it because of the fact that this property continues to be occupied without a TCO or CO. He stated in the letter from Mr. Habgood marked as Exhibit A-3, he called to Mr. Wilson's attention that he should either have the property vacated or submit an Application for a CO or TCO.

Mr. Toadvine stated he felt that it was indicated earlier that it was established that an Application for a TCO or CO was submitted; and Mr. Donaghy stated this was done in 2007 and was denied, but there has been no subsequent request. He stated simply because one is denied a CO does not mean they cannot re-apply if they correct the conditions, but this did not happen and instead the property was occupied without a CO or TCO being issued.

Mr. Toadvine asked Mr. Wilson if he ever re-applied for a TCO or CO since the denial in 2007, and Mr. Wilson stated a significant issue of this was the completion of a sanitary sewer line which was held up for issues having nothing to do with this lot or house. He stated in all likelihood this will be completed within the next few weeks having finally satisfied the conditions and concerns of Bucks County Soil Conservation as far as cleaning up the site that is not part of this lot. Mr. Toadvine stated it appears that the answer to his question is that he never re-applied once it was denied, and Mr. Wilson agreed that he did not.

A short recess was taken at this time. The meeting was re-convened at 8:00 p.m.

Mr. Donaghy was asked to discuss the underlying issue, and Mr. Donaghy stated this is a parcel of real estate with a single-family home on it that has been recently constructed. Under the Township Ordinances a newly-constructed home cannot be occupied or used in whole or in part without the issuance of a Certificate of Occupancy or at least a Temporary Certificate of Occupancy. To date this building has not received a TCO or a CO and it is currently being occupied.

Mr. Toadvine asked why the CO was not issued. Mr. Donaghy stated he does have a copy of the denials from 2007, and there were a number of items on that as to the reasons for denial. Mr. Wilson stated the sewer was originally designed and approved as a gravity feed sewer line meaning the depths at the lowest point were at some points 15' below grade. He stated once the contractor came in to actually dig the sanitary sewer line, he hit bedrock at 6'. Mr. Wilson stated the entire sanitary sewer line was then re-designed so that instead of a gravity feed system, they had a force main and instead of having one large 8" line 15' below grade at the ending point, a force main allows you to have a pump on each individual house. He stated this forces the effluent to go through a 3" line. He stated by virtue of it being a force main, it could all be placed about the bedrock at the 6' line. He stated it took approximately a year or so before this was designed and approved. He stated once it was approved, they went back to DEP which had originally given an exemption since there were only seven houses on the gravity line which did not require any Permits or special Planning Modules; but once they came in for the force main, DEP indicated they had to submit for Planning Module revision. He stated they did this and were issued a Permit. He stated once the Permit was issued last year, they were ready to install this when Bucks County Soil and Conservation indicated the Permit he had for the entire Subdivision had expired two months ago; and he had to come back and re-submit the entire Grading Plan for the entire Subdivision for Planning Modules which had to be re-approved. He stated DEP had agreed that the entire sanitary sewer line was permitted to be built except for the last 75'. He stated DEP indicated they should not do the last 75' or hook up the last component until he had the Planning Module approved. He stated they went back to Bucks County Soil who agreed that since all the improvements other than the last 75' had been put in, they did not require him to do a new Grading Plan for the entire site; but he was told to cut the grass, put up a portion of the silt fence that had fallen down, remove the construction material from one of the lots which had cinderblocks, wood, etc. and this has virtually been completed with the last of it to be completed tomorrow.

Mr. Smith asked if there is currently a sewer line hook up to the home being occupied, and Mr. Wilson stated it has a holding tank.

Mr. Wilson stated they are just waiting for the last 75' of pipe which is a three or four day job. Mr. Bamburak asked when this job will start. Mr. Wilson stated tomorrow they are finishing up the rest of the clean up on another lot, and they will then call back Bucks

County Soil who will do their inspection, and they will then be permitted to complete the other 75'. He stated the contractor has been standing by waiting to do this; and is, in fact, the same contractor who is helping them to clean up the lot.

Mr. Smith stated if the Board gives a thirty-day continuance of the Appeal, this should be enough time to get everything done and by the time the matter comes back to the Zoning Hearing Board, it should be a moot issue; and Mr. Wilson agreed.

Mr. Donaghy stated Mr. Wilson still has this property occupied and has not submitted an Application for a TCO or CO, and he has had notice of this situation since April of 2009 and done nothing to correct it. Mr. Donaghy stated he does not know that the sewer is the only issue regarding whether or not a Certificate of Occupancy will be issued. He stated they would not know this until he actually applied for the CO. Mr. Toadvine asked what were the issues on the previous Application. Mr. Donaghy asked Mr. Wilson if he would have any objection if Mr. Donaghy provided the Zoning Hearing Board with a copy of prior Application and decision; and Mr. Wilson stated he would have no objection. Mr. Wilson stated he also has a copy of a letter he sent to Mr. Fedorchak once the original Application was denied in which Mr. Wilson discussed item by item all the issues.

Mr. Toadvine asked Mr. Wilson, if the Board were inclined to grant a thirty day continuance, would he agree as a Condition that he would apply for the Temporary Certificate of Occupancy during that thirty days, and Mr. Wilson agreed.

Mr. Donaghy stated the Township would still have the same position since the property would continue to be occupied without the Certificate of Occupancy, and has been for some time. Mr. Toadvine stated were the Board to make a decision this evening, the Applicant would still have thirty days to Appeal to the Court of Common Pleas. Mr. Donaghy stated whatever happens this evening would not effect how the Township would deal with the Application for CO, but the problem is that they continue to have the property occupied without the CO; and if a continuance is granted it would result in the property being occupied for another thirty days. He stated if they wait for another thirty days, and the Board then denies it the Applicant would then have an additional thirty days to Appeal from that date. Mr. Gruen agreed and stated the matter will continue to drag on.

Mr. Wilson stated Mr. Majewski was with him and the DEP when they had the last inspection and could attest to the issues. He added he could also attest that Mr. Wilson has already submitted to the Township, Bucks County Soil, and DEP and that everything on the site was completed including all of the site improvements or the vast majority of them. Mr. Wilson stated he has not been doing nothing but was forced by circumstances to submit a new Application to DEP since it was never anticipated that there would be a

force main and subsequent to that Bucks County Soil Conservation advised him that his old Application expired two months ago and they would not then allow him to renew it which would have been logical.

Mr. Majewski stated the house was substantially completed over eighteen months ago and since that time there has been little or not activity on the site until recently when Mr. Wilson had the issue with the sanitary sewer and could not make the last hook up because he was in violation of the NPDES Permit that DEP has for the property. Mr. Majewski stated he subsequently met with Mr. Wilson, Mr. Habgood, Mr. Hoffmeister, and representatives of the Bucks County Conservation District with the DEP and walked the entire property – not just this one lot – and at that time a number of deficiencies were identified by the DEP that needed to be rectified by Mr. Wilson. Mr. Majewski stated to date he believes he has taken little action on that since the date they were there approximately June 1. Mr. Majewski stated he believes he did install a few sections of silt fence, but the major clean up items of construction debris that have been sitting on the property for two years have yet to be cleaned up.

Mr. Wilson asked Mr. Majewski if he was on the site within the past two weeks, and Mr. Majewski stated he was on the site about one week ago. Mr. Wilson stated as of today there are five dumpsters on the site. He stated one of the major items was that when the original contractor was going to do a gravity feed system, all of the concrete structures were purchased. He stated these are huge concrete structures with 6” thick walls, and you cannot just have someone come and take these off the site. He stated he contacted at least twenty-five sewer contractors indicating he would give them to them at not cost and none of them would take them. He stated he also contacted every concrete recycling company in the area, and the only thing they could do was to put them in dumpsters which is why there are five dumpsters there now.

Mr. Majewski asked if there is a plan to carry the dumpsters off site and dispose of them, and Mr. Wilson agreed there is. He stated close to 3,500 hours has been spent by laborers on the clean up of every item that was addressed including height of the grass, silt fencing, sweeping of the roads, and cleaning out the filter fabric that was in each of the inlets. Mr. Wilson stated there is no reason for him to prolong this as it is his daughter and grandchildren who are living in the home. He stated they are also paying up to \$16,500 a year in property taxes and the mortgage which adds another \$25,000 or more a year.

Mr. Malinowski asked how he obtained a mortgage without a CO, and Mr. Wilson stated he did not and it is still based on construction financing, but he has been paying this all along.

Mr. Gruen asked whether the sewer line or the houses were built first, and Mr. Wilson stated he only built one house and was permitted within the context of the Builder's Agreement to put up one model home. Mr. Gruen asked if they had not done test borings to determine where the sewer line would go, and Mr. Wilson stated the contractor was on site and had already purchased every concrete structure at a cost of approximately \$50,000. It was at that time that they actually started digging, and at that point they hit bedrock as they did not anticipate that this would be a problem. Mr. Wilson stated they had done test borings on the site itself and never found that this was an issue. Mr. Gruen asked if the house was completed at that time, and Mr. Wilson stated it was.

Mr. Toadvine asked when the original request for a TCO was made, and Mr. Wilson stated it was 10/1/07, and it was denied on 10/9/07. Mr. Wilson stated on 10/12/07 he sent a letter to Mr. Fedorchak itemizing every item that was in the denial and asking him that at least the TCO be granted. Mr. Donaghy stated they do not have a copy of that letter, and Mr. Wilson agreed to provide this. Mr. Donaghy stated on 10/15/07, Mr. Wilson filed another Application which was subsequent to the date of the letter to Mr. Fedorchak referred to by Mr. Wilson, and that Application was denied on 10/31/07. Mr. Wilson stated he does not have a copy of that in his file, but has no reason to disbelieve that this is correct. Mr. Donaghy stated he does have copies.

Mr. Smith asked Mr. Wilson if he knew of the sewer line issue on 10/31/07, and Mr. Wilson stated he did. Mr. Gruen stated he knew about the problem with the sewer line on 10/9/07 when the first Application was denied, and Mr. Wilson agreed, but stated it was not the issue of the sewer line itself that was the reason for the denial since he had a holding tank.

Mr. Donaghy marked the first Application dated 10/1/07 as Exhibit T-4, and the denial of that Application dated 10/9/07 was marked as Exhibit T-5. The next Application dated 10/15/07 was marked as Exhibit T-6, and the denial of that Application dated 10/31/07 was marked as Exhibit T-7.

Mr. Gruen asked when the house was first occupied, and Mr. Wilson stated he does not know for sure but stated it was approximately October or November of 2007. He stated his daughter had sold her house and had no place else to live.

The letter provided by Mr. Wilson which is a copy of his letter written to Mr. Fedorchak dated 10/12/07 addressing the original denial was marked as Exhibit A-4.

Mr. Gruen asked Mr. Habgood if it is a common practice for a house to have a holding tank if it does not have a sewer system, but Mr. Habgood stated this would be a question for the Sewer Authority. Mr. Toadvine stated DEP would approve this. Mr. Gruen asked Mr. Wilson who gave him approval for the holding tank, and Mr. Wilson stated he had a Permit from Bucks County Health Department. He stated it was approved or recommended by DEP who was sympathetic to the situation they were in and knew that he was working on getting the Planning Module completed and applying for every Permit that was required. They agreed to grant the holding tank as a temporary measure until the rest of the work was done. Mr. Donaghy asked Mr. Wilson if DEP indicated there was a time limit on the holding tank, and Mr. Wilson stated he did not think so. Mr. Donaghy asked if Mr. Hoffmeister from the Township indicated that there was a time limit, and Mr. Wilson stated he did not recall. Mr. Donaghy asked if an eight month limit sounded correct, and Mr. Wilson stated this could be correct.

A short recess was taken at this time. The meeting was reconvened at 8:35 p.m.

Mr. Donaghy moved into evidence his Exhibits T-4 through T-7. Mr. Wilson asked that they move into evidence Exhibit A-4.

Mr. Gruen asked why it took the Township two years to cite the Applicant, and Mr. Donaghy stated the Township did not necessarily know when the occupancy occurred. He also noted there was another proceeding involving the issue of occupancy which is still pending but this is in another jurisdiction and did not go through the Zoning Hearing Board. Mr. Gruen stated he now understands that the Township did not ignore this for two years, and Mr. Donaghy agreed. He stated the Township did not know about the occupancy initially. Mr. Gruen asked when the Township found out about the house being occupied, and Mr. Donaghy stated he does not know the exact date but believes it was in the spring of 2008 based on the materials he has read that came out of the other proceeding.

Mr. Bamburak asked how the property was being taxed, and Mr. Donaghy stated typically properties are taxed upon the issuance of the Certificate of Occupancy. He stated the Board of Assessments can at any time re-assess on the value of a completed home, but before that it would be based on the land; although they can do it at any time they believe the structure is completed. Mr. Donaghy stated typically it is the issuance of a CO that is the trigger, and he does not know what caused them to re-assess. He is taking Mr. Wilson's word that it was re-assessed as a building and not just land. Mr. Wilson was asked when this happened, and Mr. Wilson stated it happened approximately one and a half years ago.

Mr. Wilson stated the question came up of appealing the taxes and he asked why he was being taxed as if it was a completed house with a CO, and the Tax Board came back to him advising that he should get a real estate appraiser to give an opinion; and he had two highly-experienced real estate appraisers both of whom could not understand how they could place a value on the property without a CO; and yet the Board of Assessments indicated it was finished house with a bill issued for full taxes of \$16,500. Mr. Bamburak stated the family living in the home has taken advantage of Township services.

Mr. Donaghy stated the assessment is done by the County. Mr. Gruen stated it is also possible that this is not the full assessment and they were assessed only on what they felt was completed. Mr. Wilson stated he was told by them that this is fully assessed as if it were complete.

Mr. Smith moved and Mr. Bamburak seconded that a continuance of 30 days be granted.

Mr. Smith stated he assumes that within the next two weeks, Mr. Wilson will have, as he indicated earlier, his Certificate of Occupancy applied for with all proper Permits in place. He stated when Mr. Wilson comes back before the Board in thirty days they will have a good indication of the veracity of the testimony heard this evening. He stated he would highly recommend that Mr. Wilson show the Board in the next thirty days that he is trying to comply with all Township regulations.

Mr. Toadvine noted the dates of the Board meetings in August and asked that the matter be continued to a specific date as opposed to thirty days. Mr. Smith asked Mr. Wilson if he would waive the time limits to August 18, and Mr. Wilson stated he will be out of the Country on August 18 so that if it is not August 4, he would request that it be continued to September. Mr. Wilson agreed to a continuance to August 4 and agreed to immediately apply for the Certificate of Occupancy or TCO. Mr. Wilson stated there is already a worker lined up and five dumpsters on the property to complete the clean up; and the minute the clean up is completed, he will call Bucks County Soil and DEP to re-inspect and immediately following that the contractor is ready to proceed. Mr. Wilson stated he set up escrow accounts two months ago for the completion of the 75' of sewer line. Mr. Toadvine stated it appears that August 4 would be sufficient, and Mr. Wilson agreed. Mr. Wilson stated if it is not sufficient, he will come in and provide a progress report. Mr. Smith stated when he comes back, Mr. Wilson should bring back supporting documents for everything he has discussed if in fact it is not completed by that time.

Mr. Bamburak asked about the notation regarding the propane tank, and Mr. Wilson stated he has pictures of the green stickers and everything has been inspected in the house; but he will call for another re-inspection of the propane tank. It was noted there was not a Permit for the propane tank, and Mr. Wilson stated at the same time he calls for the inspection, he will apply for a Permit. Mr. Donaghy stated if there was no request for a Permit, there would not have been an inspection done.

July 7, 2009

Zoning Hearing Board – page 11 of 11

Mr. Smith moved to amend the Motion that the Continuance be granted to 8/4/09.  
Mr. Bamburak agreed to the amendment. The motion carried with Mr. Gruen opposed.

There being no further business, Mr. Bamburak moved, Mt. Smith seconded and it was unanimously carried to adjourn the meeting at 8:45 p.m.

Respectfully Submitted,

Gregory J. Smith, Secretary