

MINUTES

AUGUST 12, 2014

PLANNING BOARD

LONG HILL TOWNSHIP

CALL TO ORDER AND STATEMENT OF COMPLIANCE

Chairman Pfeil called the meeting to order at 7:34 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, 2014.

MEETING CUT-OFF

Chairman Pfeil read the following statement: Announcement is made that as a matter of procedure, it is the intention of the Planning Board not to continue any matter past 10:30 P.M. at any Regular or Special Meeting of the Board unless a motion is passed by the members present to extend the meeting to a later specified cut-off time.

CELL PHONES AND PAGERS

Chairman Pfeil read the following statement: All in attendance are requested to turn off cell phones and pagers as they interfere with the court room taping mechanism.

PLEDGE OF ALLEGIANCE

ROLL CALL

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

J. Alan Pfeil, Chairman
Brendan Rae, Mayor's Designee
Guy Roshto, Member
Gregory Aroneo, Member
Timothy Wallisch, Member
David Hands, 1st Alternate

Kevin O'Brien, Bd. Planner
Thomas Lemanowicz, Bd. Engineer
Dan Bernstein, Bd. Attorney
Cynthia Kiefer, Bd. Secretary

Excused:

Guy Piserchia, Mayor
Suzanne Dapkins, Vice-Chairman
Ashish Moholkar, Member

Ms. Kiefer advised Chairman Pfeil that he had a quorum and could proceed.

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

APPROVAL OF MINUTES

On page 2, paragraph 3 of the minutes of the May 27, 2014 meeting, Mr. Aroneo requested that the word "proposed" be inserted before the words "fitness center". Mr. Hands moved approval of the amended minutes of May 27, 2014. The motion was seconded by Mr. Wallisch. A Roll Call Vote was taken. Those in Favor: Mr. Aroneo, Committeeman Roshto, Mr. Wallisch, Mr. Hands, Chairman Pfeil. Opposed: None. The amended minutes were approved unanimously. Dr. Rae was ineligible to vote since he was not present at that meeting.

Mr. Hands moved approval of the minutes of June 10, 2014. The motion was seconded by Dr. Rae. A Roll Call Vote was taken. Those in Favor: Mr. Aroneo, Dr. Rae, Committeeman Roshto, Mr. Wallisch, Mr. Hands, Chairman Pfeil. Opposed: None. The minutes of June 10, 2014 were approved unanimously as written.

Mr. Aroneo moved approval of the minutes of June 24, 2014. The motion was seconded by Chairman Pfeil. A Roll Call Vote was taken. Those in Favor: Mr. Aroneo, Committeeman Roshto, Mr. Wallisch, Mr. Hands, Chairman Pfeil. Opposed: None. The minutes of June 24, 2014 were approved unanimously as written. Dr. Rae was ineligible to vote since he was not present at that meeting.

Dr. Rae moved approval of the minutes of July 8, 2014. The motion was seconded by Chairman Pfeil. A Roll Call Vote was taken. Those in Favor: Mr. Aroneo, Committeeman Roshto, Dr. Rae, Chairman Pfeil. Opposed: None. The minutes of July 8, 2014 were approved unanimously as written. Mr. Hands and Mr. Wallisch were ineligible to vote since they were not present at the meeting.

PUBLIC QUESTION OR COMMENT PERIOD

Chairman Pfeil opened the meeting to the public for questions or comments on anything not on the agenda for this evening.

RESOLUTION OF MEMORIALIZATION

VILLAGE SUPER MARKET INC.

1153 Valley Road
Block 10501, Lot 1

#14-07P

Minor Site Plan, Dev. Permit
Waiver, Bulk Variances

Chairman Pfeil asked for comments and corrections on the application of Village Super Markets Inc. which was approved at the last meeting. Hearing none, he requested a motion to approve the Resolution of Memorialization as written. Ms. Kiefer advised the Chair that Mr. Wallisch and Mr. Hands were ineligible to vote since they were not present at that meeting. Dr. Rae motioned and Committeeman Roshto seconded the motion. A Role Call Vote was taken. Those in Favor: Mr. Aroneo, Dr. Rae, Committeeman Roshto, and Chairman Pfeil. Those Opposed: None. The motion to approve was passed unanimously.

RESTORE MEYERSVILLE LLC (cont'd)

596 Meyersville Road
Block 14701. Lot 27

#14-01P

Prelim/Final Site Planning Board
Development Permit

Mr. Delaney, attorney from the law firm of *Lindabury, McCormick, Estabrook, & Cooper*, Westfield, New Jersey, noted for the record that he was present and representing the applicant.

Mr. Legato, attorney from the law firm of *The Legato Law Firm LLC*, Somerville, New Jersey, noted for the record that he was present and representing the group, Concerned Citizens of Meyersville.

Mr. Delaney advised the Board that he would not be proceeding with the application that evening. The applicant's engineer, Christian Kastrud, became ill suddenly. He read Mr. Kastrud's email as follows:

As mentioned earlier, I awoke this morning at 4:45 a.m. with an allergic reaction to something still unknown. Because my tongue was extremely swollen, the Benadryl not helping, my wife drove me to Morristown Medical Center emergency room. I sincerely apologize for the situation. I owe the client, the Board members, and the public my 100%. I can not give that tonight. Please request that I be given an opportunity to testify at the next hearing.

Mr. Delaney noted that he had already advised Mr. Bernstein and Mr. Legato of the situation and that the email had been sent after 4:00 p.m. He also advised the Board that it was the applicant's intent to continue the application at a later hearing and that he would give the appropriate time extension.

After conferring with Ms. Kiefer, Mr. Bernstein stated that the first available meeting would be October 14, 2014.

Chairman Pfeil stated that, on the advice of counsel, he was going to recuse himself from further participation in this application.

Mr. Bernstein stated that since Mr. Legato had brought this to the Board's attention, he should be allowed to speak first.

Chairman Pfeil advised Mr. Legato that the Vice-Chairman, Mrs. Dapkins, was not present that evening. The next senior member in attendance who was eligible to chair the meeting was Mr. Wallisch. He then turned the gavel over to Mr. Wallisch.

Mr. Delaney requested that Chairman Pfeil stay in the room to hear the discussion on this issue. Mr. Bernstein had no problem with that.

Mr. Legato discussed the concept of "Conflict of Interest". He noted that the threshold for defining "conflict of interest" was extraordinarily low. He suggested that Chairman Pfeil had a conflict of interest and therefore should no longer chair this application. He stated that the application had already been tainted by this conflict of interest since Chairman Pfeil had participated all along. He emphasized that this was not an accusation of wrongdoing. It was merely an observation that because of an "involvement" with the applicant personally, Chairman Pfeil was rightly or wrongly put into a situation in which he had the "potential" to be tugged in two different directions. Mr. Legato said, "To the extent that that tugging could conceivably, not does, not did, but could conceivably cause him to have second thoughts about what he is doing as chairman, because of his relationship with the applicant, that's good enough for the courts and the law to say, 'You can't preside; you can't take part.' If you do, this whole thing gets tainted." As a further observation, he stated that the conflict was not limited to this application. He felt it went back to the first application, Restore Meyersville LLC #13-07P, and to the development of the Meyersville Element. Christopher Connor was the chairman during much of that development. Mr. Connor also had an involvement with William Kaufman, the applicant, and he stated that it was Mr. Connor who presented the final element to the Township Committee. During this entire period, he stated that Mr. Connor had an undisclosed business relationship with Mr. Kaufman and Mr. Kaufman had anticipated becoming an applicant during that time. Since he did not disclose this relationship, Mr. Legato said that one must assume that Mr. Connor was in conflict.

Mr. Legato noted that the "Meyersville revision" that was finally passed had three (3) changes. One was an increase in lot coverage; second a change in setback; and three, a change in the zoning ordinance when the terms "health and fitness center" were added to the statute without definitions for those terms even though it was said that a very specific definition of what "health and fitness" meant should also be added. The Township Committee passed it with "health and fitness" in there but the definition was somehow dropped. He said that this would become extremely important when this application is considered on the merits. He felt that this was germane not only to this application but the one going before it.

Mr. Legato said that if someone got into an awkward position where it could be conceived by the public as a possibility of conflict, then that person has to disclose it, get approval from the Board, or disclose it and recuse himself from any further consideration. Mr. Connor did not make any disclosure at the time. No disclosure was made by Chairman Pfeil. He emphasized that he was not accusing them of bad faith. However, the outcome was that this entire proceeding was tainted by the conflict of interest as was the entire question of the Meyersville Element for the same reason.

Committeeman Roshto said to Mr. Legato that he shopped in Shop Rite and therefore had a business relationship with Shop Rite. He asked Mr. Legato if that constituted a conflict of interest since he just voted on a Shop Rite application.

Mr. Legato said no.

Committeeman Roshto asked how this was different.

Mr. Legato said that Committeeman Roshto was not involved in gain with Shop Rite. He also noted that Committeeman Roshto was not in a business relationship with Shop Rite. He had no consideration with Shop Rite other than to shop there.

Committeeman Roshto asked if Mr. Legato was suggesting that Chairman Pfeil had a business relationship with the applicant.

Mr. Legato answered yes, in the sense that he used Mr. Kaufman's architectural firm as the architect for his personal residence along with Mr. Kaufman's construction company. He felt in that sense there very much was a business relationship between the two. If there was a relationship with an applicant that the general public did not have, that was the test. He said that Committeeman Roshto had a relationship with Shop Rite but so did "everyone else in the universe".

Mr. Legato related a personal example where he sold life insurance to an attorney and had to recuse himself every time that attorney presented a case when he was sitting on the Board even though the income he derived from that attorney was less than 5% of his total income. It was not "interest", it was "involvement".

Mr. Hands commented that any member of the public could have a relationship with Mr. Kaufman if they wanted to employ his services. He pointed out that in Mr. Legato's example, it was *income to him*. This would be somebody going out and employing somebody *as anybody else could*. A member of the public purchasing someone's services is no different than somebody going into Shop Rite and purchasing a bag of beans.

Mr. Legato noted that in this case it was Mr. Kaufman who sold services to Chairman Pfeil. It gave the appearance of the possibility of prejudice. He had a relationship that the general public did not have. The general public had not hired Mr. Kaufman as an architect.

Mr. Hands said that the general public had the same opportunity as Chairman Pfeil did to hire Mr. Kaufman.

Dr. Rae said that under the test that Mr. Legato had just laid out, the only way he could agree with Mr. Legato was if the present chairman received services that were *not* available to the general public and as was just discussed, anybody could walk into Mr. Kaufman's office and employ him. The only other way would be if Chairman Pfeil was provided these services at preferential rates that were not available to the general public and he noted that Mr. Legato had not mentioned that that was the case so he presumed that that was not true.

Mr. Legato clarified that this was not his idea. It was the law in New Jersey. He emphasized that it was an extremely low threshold and that one must disclose any "involvement" with an applicant. Anybody could walk in and hire Mr. Kaufman as their architect. But if they are sitting on the Board at the same time, they have to disclose that information.

Dr. Rae asked Mr. Legato if he was stating that there was an ongoing relationship during the time that the Chairman was presiding over these proceedings.

Mr. Legato said it could be a past--

Dr. Rae interrupted and asked if this relationship in particular was an ongoing relationship while these proceedings were underway.

Mr. Bernstein stated that the retention of Mr. Kaufman by the Chairman ended before the first hearing. The business relationship ended before the *first* hearing of the *first* application of Restore Meyersville LLC (#13-07P). It was a design for a carport. It was completed *before* the first hearing of Application #13-07P.

Dr. Rae felt that there was no difference between this and Committeeman Roshto's example of shopping at Shop Rite. None of the board members should have been voting on an application for Shop Rite given the rationale given by Mr. Legato for conflict of interest.

Mr. Legato said it was not his rationale. It was case law.

Dr. Rae said that he still could not see the conflict of interest.

Mr. Legato said that these things were always very complex however he felt in this instance it was very straight forward. He especially felt that was the case with Mr. Connor. He thought there was a potential for conflict and those who participated without disclosing have "screwed up inadvertently this whole application process".

Committeeman Roshto asked Mr. Legato, in light of the fact that he had mentioned case law a couple of times, if he could cite any case law that would support his position.

Mr. Legato said he could not cite any case law that particularly related to someone who had hired (inaudible). He then quoted from the Supreme Court, **Wyzykowski v. Rizas**. The ethics law had refined the definition of “conflict of interest” and provided that “no local government officer or employee shall act in his official capacity in any manner where he, a member of his immediate family, or business organization in which he has an interest has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.” He said that Cox interpreted the use of the word “involvement” instead of “interest” to broaden the areas of disqualification to include perhaps even personal friendships. He again reiterated that this was not his idea, but that of the Supreme Court.

Mr. Bernstein suggested that Mr. Legato write a memo discussing conflict, what this board should do, and whether or not this board could take quasi judicial notice of what occurred previously. For example, Karl Pehnke spoke twice before. He questioned whether the Board would have to listen to him speak a third time or could the Board accept his report as written. He felt that the conflict was moot since the chairman had removed that issue. He asked Mr. Legato if there was case law to guide the Board as to whether or not they would have to start anew. Lastly, could the Board accept from prior hearings reports and testimony that was given or was everything tainted? He asked Mr. Delaney to do the same. He assumed that a final report would be forthcoming on planning and engineering which would allow the Board to disregard the prior submissions from the applicant as not satisfying the Board’s professionals.

Mr. Bernstein advised Mr. Legato that whether or not the ordinance was improper or not by virtue of conflict was not for this Board to decide. The Planning Board makes recommendations. The ordinance was on the books and if in fact it was invalid (he disavowed any knowledge of that), Mr. Legato could start a prerogative writ action and claim improper influence. However until a court determined that the ordinance was invalid, the Planning Board was bound by it. He then asked Mr. Legato if he was finished with his comments.

Mr. Legato stated that he was finished.

Dr. Rae said that he was interested in how Mr. Legato would reconcile his thoughts on conflict of interest with the court’s discussion in Hughes vs. Monmouth University where it was decided that there was no conflict. He asked that that be included in the memo.

Mr. Delaney said that he vehemently disagreed with Mr. Legato that there was a conflict; however he felt, as did Mr. Bernstein, that it was moot since the Chair had recused himself. Arguing whether there was a conflict or not was moot unless Mr. Legato was going to take the position that this Board could not hear the case objectively. He wanted Mr. Legato to brief the issue and then allow him to respond since he did not know what Mr. Legato was talking about or where he was coming from.

Mr. Bernstein said that if Mr. Legato submitted his memo in early September, it would not give Mr. Delaney much time if the application was carried to the next meeting which would be September 9, 2014.

Mr. Delaney stated that he would make it a priority. He felt that he needed to know what he was responding to.

Mr. Bernstein clarified that first, was there a conflict. If there was a conflict, did it taint the proceedings to such an extent that the Board would have to start anew. He felt that that was Mr. Legato’s argument.

Mr. Bernstein said that the third comment he would like to hear was could they take judicial notice of the report by Karl Pehnke who has been heard twice before or would they have to hear him repeat his testimony a third time. The applicant’s engineer would testify along with the applicant who would give a brief summation of what he had said before.

Mr. Legato stated that he could have the memo completed by September 5, 2014. He questioned why was this being done in a fashion that allowed Mr. Delaney “two bites of the apple”.

Mr. Bernstein said that Mr. Legato was the one who was making the allegation so he understood Mr. Delaney’s argument. He felt that it was legitimate to ask Mr. Legato, as the one who was claiming the conflict, to “cast the first stone”.

Mr. Delaney felt that Mr. Legato had to lay out the facts. For example, he just learned tonight that the alleged conflict (work) ended before the first hearing. It was important to lay out the facts so that they were all dealing with the same base.

Mr. Wallisch confirmed with Mr. Legato that the Board would have his memo by September 5th.

Mr. Delaney said that he would have his response by September 9th which was the date of the meeting.

Mr. Wallisch noted that he was unsure that the Board would even get to that since there was another matter on the agenda for that night.

Mr. O’Brien stated that this application would have to be adjourned to a date certain. He felt that the Board should consider the possible outcomes of the memos in determining when to continue this application.

Mr. Bernstein felt that the engineering and the planning portions were the core issues. That engineering testimony would preclude the former engineering testimony. He didn’t feel that they would have to review the prior hearings where the engineering did not satisfy the professionals. He felt that Mr. Kaufman could summarize his testimony. Then Mr. Legato could summarize his testimony on those sections of the ordinance which he felt were applicable. The question would be

whether or not they could accept Karl Pehnke's report. He felt that the engineer could state that the report was consistent with good traffic design, etc. That would be part of the memo that both attorneys would submit. He said there could be some de novo testimony if there was the taint that Mr. Legato alleged. The reason for this was if it went to court, he would hate to have an application reversed on the basis of conflict of interest.

Mr. O'Brien asked why the report of Karl Pehnke was in question. He did have an opportunity to testify.

Mr. Bernstein said that Mr. Legato alleged that *everything* was tainted because of Chairman Pfeil. If in fact everything before now was tainted as alleged, there should be independent testimony with a new chairman. He felt that some of that could be easily accommodated.

Mr. O'Brien asked what the possible outcomes were on that evening based on those memos.

Mr. Bernstein suspected that Mr. Kaufman would testify and Mr. Legato would review his commentary that was heard earlier on whether or not this application was conforming in the parking. The engineering testimony would be new and Mr. Kaufman could testify in reference to the architecture and the changes in the plans. The one issue would be whether the Board could accept the traffic engineer's report. He felt that they could accept it.

Mr. Wallisch said that they would have to resolve the issue of the tainted Board before they could go any further which was the point of the memos.

Mr. Bernstein said that even if they found that there was not a taint, if there was additional testimony, Mr. Legato may not be satisfied but a court would be satisfied. It would be part of the record and not require a vote. The testimony would be in a more summary fashion that would be subject to reasonable cross-examination. He felt that even if the Board found that the record was not tainted, he wanted additional fresh testimony so that if it went to court--

Mr. Aroneo asked if the Board would determine itself whether or not it was tainted.

Mr. Bernstein said that the Board would read the legal memos and make a determination on taint. However, regardless of how the determination was made, technically it would be up to a court to determine whether or not there was taint. The memos would be illustrative. He reiterated that he wanted to have summary testimony so that if it went to court, he could say to the court that the Board had listened to Mr. Legato and there was independent testimony.

Mr. Bernstein felt that Mr. Legato wanted the application to start from Day One. Mr. Legato said that he felt that would not be an enormous task especially if they were talking about summary testimony.

Mr. Hands asked Mr. Legato if that was the outcome he was looking for.

Mr. Legato said that that was one outcome.

Mr. Bernstein asked if he could say that was an acceptable outcome or would he have to confer with his clients.

Mr. Legato said he would have to do some reading also. He clarified that it was not his intent to show that Chairman Pfeil had conducted the meetings in a biased manner.

Mr. Bernstein asked if Mr. Legato would agree that Chairman Pfeil had conducted the meetings in a fair manner.

Mr. Legato said apparently so. He added that Chairman Pfeil was in a position that could give pause to the public with respect to his judgment and that was the essence of conflict of interest.

Mr. Bernstein said that he wanted it on the record that Mr. Legato had no compunctions or complaints about Chairman Pfeil's conduct.

Mr. Legato said that that was exactly right.

Mr. Aroneo asked if Mr. Legato was satisfied that Chairman Pfeil had recused himself from this point forward.

Mr. Legato answered, "Yes." With respect to this application, no. He said that if the Board were to vote that evening, he would say that they voted on tainted testimony. He did not think it would be a big deal to repair it by bringing forward the "traffic guy", the engineer, and so on to give a summation of their testimony.

Mr. Delaney added that the board members could be polled and asked if this potential conflict had in any way affected them.

Mr. Bernstein said that if they said it, it still would not cure it if Mr. Legato took it to court. The polling would not have any impact on a judge, if Mr. Legato was correct.

Mr. Delaney said that there was a concession that the Chairman had conducted fair hearings and board members who said that they knew nothing of this conflict. He did not understand where Mr. Legato was going and what he wanted to achieve.

Mr. Bernstein said with the procedure he was suggesting, it would be hard to argue.

Mr. Delaney clarified that at the next meeting he would be bringing the engineer with revised plans, Mr. Kaufman to summarize his testimony--

Mr. Bernstein interjected that there should be discussion by Mr. Kaufman on the differences between the first and second application. Mr. Legato could offer legal arguments to the Board on the three sections of the ordinance.

Mr. Bernstein clarified that an engineer could testify that he had reviewed the Pehnke report and found that it was prepared in accordance with the proper procedures. The testimony that Mr. Pehnke gave during this application was based on that report.

Mr. Lemanowicz stated that there was a revised traffic study summary prepared March 6, 2014.

Dr. Rae said that according to Mr. Legato, the taint went back farther than this proceeding. How would that be resolved?

Mr. Bernstein said that Chairman Pfeil had missed several of the meetings because he was in Florida and that he did not vote on the application.

Dr. Rae said that he was referring to the Meyersville Hamlet.

Mr. Bernstein said, with respect to that, Mr. Legato was saying there was a conflict by virtue of the former chairman's presence and therefore it tainted the recommendation to the Township Committee and therefore it tainted the ordinance. However, as he told Mr. Legato, if he had a problem with the ordinance he would have to sue the township. The Planning Board does not defend a challenge to the ordinance. That would be the municipality's responsibility. He couldn't tell the Planning Board that the ordinance is invalid because the Planning Board did not have any control over that. The Board couldn't decide which provisions of the ordinance are invalid. Allegations of conflict are not sufficient to invalidate an ordinance by the Planning Board.

Mr. Legato agreed. He asked if there was to be new testimony from the applicant, would they hear from the proposed tenant.

Mr. Bernstein said that he believed that Mr. Kaufman, as a parent of children who have attended the facility and as the landlord, could testify as to what would take place. If the Board felt that his testimony was insufficient or the Pehnke report was insufficient, they would tell the applicant.

Mr. Wallisch stated that the board members had heard all the testimony and the Chairman had recused himself. Now the board members would be hearing the same testimony again. How would that be different from the first time they heard the testimony with a different individual sitting as Chairman?

Mr. Bernstein said that Chairman Pfeil's presence, by virtue of this conflict, tainted the other board members. That was the claim and that would be the complaint that could be made to a court. If the Board had this abbreviated testimony, it would clear up any legitimate complaint that Mr. Legato had.

Mr. Legato added that he would cross-examine the witnesses which he did not have the opportunity to do during the earlier testimony.

Mr. Bernstein emphasized that there would be *reasonable* cross-examination. According to the M.L.U.L. (*Municipal Land Use Laws*), the Chair can regulate the cross-examination to keep it on point.

Mr. Hands asked, once the memos had been shared, would there be any other outcome that would alter this approach for the next meeting.

Mr. Legato did not understand the question and asked for clarification.

Mr. Hands asked, at the next meeting, after the memos had been shared, was there any other outcome other than the one that was just outlined? He asked if Mr. Legato was looking for some alternative based upon discussion that may lead in a different direction to the one that was just outlined. He wanted to make sure when the board members came back next time they would know exactly whether or not they were going to continue or not.

Mr. Legato asked if Mr. Hands wanted to know if he had another way to handle this issue.

Mr. Bernstein answered yes.

Mr. Legato said he did not know how else to handle it. He thought that it was probably a very good way to handle it and he didn't think it was particularly onerous for the application.

Mr. Bernstein asked Mr. Legato if he was satisfied with the procedure.

Mr. Legato said he was satisfied that it was a good idea. Would he agree with it after it was implemented? He would not commit to that at that point; however he could not think of a better one.

Mr. Wallisch asked Mr. Delaney if he had any comments.

Mr. Delaney said that he had stated his position. He did not feel that there was a conflict and that this was totally unnecessary however he respected and understood what Mr. Bernstein was doing. He asked who would chair the next meeting.

Mr. Wallisch answered that Mrs. Dapkins, Mr. Moholkar, or himself, in that order.

There was discussion as to whether this application would replace the Morristown Road discussion planned for the next meeting which would be September 9, 2014.

Mr. Wallisch asked if there was any other discussion concerning what had transpired that evening before they began discussing the schedule.

Mr. O'Brien pointed out that Mr. Legato had said that there were three (3) changes to the Meyersville Hamlet Ordinance when it was passed. Of the three (3) changes that he cited, there was only one (1) change that was different from what was originally zoned. This was originally zoned in the B-120 zone, which was a village business zone. The lot coverage in the B-120 zone was 40% of the current coverage in the Meyersville Hamlet zone. Health clubs and fitness centers were allowed uses in all the business zones dating back to 1996. The B-15, the B-120, the B-2, the B-3, and that language carried over into the Meyersville Hamlet Zone because it was also considered a village business zone. The setback was changed to 25 feet. That was the only change that was made of the three (3) that were cited.

Mr. Legato asked Mr. O'Brien if he had said that the health and fitness was part of the Meyersville zoning prior to when the Meyersville Hamlet was developed.

Mr. O'Brien said that that language was in the B-15, the B-120, the B-3, and the B-2 zones and had been since 1996.

Mr. Legato asked Mr. O'Brien if Meyersville at that time was in B-120.

Mr. O'Brien said that that hamlet was newly created from a village business zone so that language carried over. It applied previously and it applied today. There was no change.

Mr. Wallisch stated that the rezoning of Morristown Road was currently scheduled for the September 9, 2014 meeting. He noted that that issue had been languishing out there for a long time.

Dr. Rae asked if there was any urgency about the Morristown Road rezoning.

Committeeman Roshto felt that there was no difference between that applicant and this applicant. He stated that the Planning Board had committed to hearing them on that date and it seemed reasonable to him to continue with that commitment.

There was agreement among the board members. They were unanimous about maintaining the rezoning of Morristown Road on the schedule for September 9, 2014. The application for Metro Swim (1221 Valley Road LLC) was scheduled for September 23, 2014. The first meeting in October which was the 14th, would be the first available meeting to carry Restore Meyersville LLC, #14-01P, to.

There was further discussion about the deadline for the memos and it was agreed by both Mr. Delaney and Mr. Legato that they would have them in by the original September 5, 2014 deadline.

Mr. Delaney agreed to an extension to October 15, 2014.

Committeeman Roshto asked if Mr. Delaney would be prepared on that date.

Mr. Delaney said yes. He was prepared that night to put in the engineering testimony on the new plans and reports. They were almost going to start from ground zero and work their way forward. The engineering would not be a problem. It was the magnitude of Kaufman and whether he could get Pehnke's report ratified.

Mr. Hands asked if they could resolve this matter at the September 9th meeting.

Committeeman Roshto said that the applicant did not have a problem with the October date.

Mr. Hands wanted to have the legal argument resolved at the September 9th meeting.

Mr. Bernstein said that it was the Board's determination. He wanted to make the proceedings as tight as possible so that if there was a complaint in court, it would be superseded. However, if the Board saw it differently, it was their prerogative.

Mr. Hands noted that he was fine with the process however he wondered if it would help the board members if the decision about what would happen after the discussions, whether taint or not, whether they were going to move forward, to have that resolved earlier so that they would have more time to prepare for the October 14th meeting.

Mr. Delaney said that he felt Mr. Bernstein was stating that regardless of what came out of it, he wanted to in essence correct the record.

Mr. Bernstein said that that was correct.

Mr. O'Brien said that the hearing would continue no matter what.

Mr. Bernstein said he did not see it as a big deal since the application appeared to be conforming. There was certain essential testimony required however that would not be a huge burden on anyone.

Mr. Wallisch said given that, at the beginning of the October 14th meeting, at the Chair's direction the board members would review the briefs from both parties and then continue on with the hearing.

Mr. Delaney stated that if that was going to be the procedure, he may not even submit a brief. A ruling had been made as to the way it was going to be handled.

Dr. Rae asked if any of the briefs were necessary.

Mr. Bernstein told Mr. Legato that he was relieved of doing any briefs.

Mr. Legato renewed his request for testimony from the proposed tenant. He felt that that was necessary.

Mr. Bernstein answered that the Board would decide that at the hearing. He felt that an argument could be made that as the landlord, Mr. Kaufman theoretically would know what was going on.

Mr. Legato felt that there was a question of hearsay. Mr. Kaufman didn't have a personal knowledge of the things that he would be testifying about.

Mr. Bernstein responded that Mr. Kaufman had testified that his children had attended the facility and that he had physically gone there also. He said that legally, that was admissible evidence. It was beyond hearsay.

Cecelia Cilli, 11 Sassafra Place, Gillette, came up to the podium. Mr. Bernstein advised her that she could comment if it was a procedural comment. She advised Mr. O'Brien to check the minutes from September 23, 2008 referencing health clubs, fitness centers. In his memo that went out in October of that year--. She stated that they were not part of Meyersville at that time.

Mr. O'Brien stated that there was no Meyersville at that point. Meyersville was in the B-120 zone and health clubs and fitness centers were allowed in the B-120--

Mrs. Cilli interrupted and stated that they were not allowed according to minutes of the meeting.

Mr. O'Brien stated that they were in the current ordinance--

Mrs. Cilli interrupted again and agreed that they were in the current ordinance. They were introduced at that point.

Mr. Wallisch asked Mrs. Cilli to allow Mr. O'Brien to finish.

Mr. O'Brien said that they had been in the current ordinance since 1996 approximately.

Mrs. Cilli said, "No they have not...They were introduced in 2008. They were actually put into the ordinance in Ordinance 236 in late 2008. Prior to that they were not in there and there was a definition put in there that never made it into the ordinance." She noted that he had sent a memo to the Board about that.

Mr. O'Brien asked if she was saying that they were put in all the business zones at the same time in 2008.

Mrs. Cilli answered affirmatively.

Arthur Brown, 479 Meyersville Road, Meyersville, said, "The analogy you gave from Shop Rite as a business to what the relationship with an architect is, is not even in the ball park." He said that he went into Shop Rite all the time and knew people by their faces and names. He noted that as a contractor, he used architects and that there was a relationship that was built up with them. He said, "How do we know how far that relationship was?" He noted that he has allowed his customers to use his shore house because he had become friends with them after he had worked with them. Conflict of interest is conflict of interest.

Mr. Bernstein stated that the Chairman had recused himself and there would be new testimony so whether there was or wasn't, the Board didn't have to decide if there was a conflict. The Chairman had taken the high road and with new testimony to supplement it, he felt that Mr. Brown's point was moot at this stage. He then thanked Mr. Brown for his comment.

Michael Behr, 176 Hickory Tavern Road, Meyersville, noted that the tenant had testified at a prior hearing however at that time the property was not for sale. Now that property was for sale, he felt that it put a whole different light on the situation. He questioned if there was a tenant or what would happen if the property sold. Prior testimony indicated that there was a lease with an option to buy. He wanted to know if that was factual and if the Board had any documentation that there was actually a lease.

Mr. Bernstein said that if the Board were to approve the application, it would be approved as a volleyball facility per the testimony, not as something else. If there were any changes in use should the property sell, they would have to come before the Board again.

Mr. Behr asked if there would be any other testimony from the project manager. He said he had not heard anything during the second proceedings about the asbestos abatement. He asked if there were any new procedures that they might be using. He questioned how familiar the Board was with various techniques that could be used with monitors.

Mr. Delaney said that there would be no additional testimony. That would be part of the engineering process and conditions.

Mr. Behr asked if it were possible for the Board to request that.

Mr. Bernstein said it was possible but presumably it would be at the next meeting. He did not know if the Board had an opinion that evening.

Mr. Behr then referred to the traffic report and stated that in his opinion, that was not an actual study. It was an observation.

Mr. Bernstein said Mr. Behr would be able to comment on that at the public hearing.

Olga Argumova, 691 Meyersville Road, Meyersville, asked if Mr. Kaufman would create a design of the footprint of the building and compare it to others so that the Board could see how big it was. She wondered what they would do with this building if volleyball moved out.

Mr. Delaney said he would bring it back to his client however he would not recommend that he do that.

Debra Schmitt, 486 Meyersville Road, Meyersville, said she was very distressed by what had come to light in the past day or so. She asked if there was something more that they could do. With the prior chairperson, Mr. Kaufman was a business partner and he did not recuse himself until that came to light. She felt that Mr. Kaufman had a history of being a "questionable person and trying to seemingly put things over on the public". She said that he had been "cut slack over and over again when things aren't presented on time." She felt that that was special treatment.

Mr. Bernstein asked Mr. Delaney how many sets of engineering plans had the applicant produced for Restore 2.

Mr. Lemanowicz answered four (4).

Mr. Bernstein added that the application was still not approved. He felt that the township and the professionals had scrutinized it very carefully. As for slack, he pointed out that there had been ten (10) hearings. He added that on those nights, the applicant paid for the township's three (3) professionals and his own attorney so he did not feel that it had been an easy process for the applicant. After being denied the first time, the applicant had eliminated all the variances and made it a different application. He did not see that the Board had given the applicant any slack. The application continued to get better; the engineering was refined. The correspondence wasn't tepid; it was tough.

Ms. Schmitt asked if it was usual that things are accepted beyond the normal deadline.

Mr. Bernstein said that from his perspective, there comes a point when the Board asks for revision upon revision upon revision, where the Land Use Law says that the original plans had to be in at least ten (10) days ahead of time but it doesn't say the third or fourth or fifth revisions have to adhere to time parameters. He felt that to a great extent, the professionals had stuck to it. He did not see it as an easy review for applicant at all.

Ms. Schmitt asked, "As to the repeated relationships that are questionable?"

Mr. Bernstein said he could not comment on them. He did not think that the board members knew of this relationship. He added that he didn't. None of the board members knew of it. He stated that he believed that the Chairman was definitely not biased. He conducted a fair hearing however possibly that is not what the law would say.

Mr. Wallisch added that as a Board, they were obligated to hear every applicant and render judgment based on the rules and ordinances that the Board had to go by.

Ms. Schmitt said that it was very frustrating to see, as a member of the public, things that felt so wrong.

Mr. Delaney commented that he and Ms. Schmitt agreed on one thing: it was extremely frustrating. He said that her "audacious, offensive, and outrageous comments" were too much for him to even respond to. He did not appreciate the personal attacks on his client and he was noting it for the record.

Elaine Zindel, 317 Meyersville Road, Meyersville, asked if the public felt that they had seen bias in the situation, how could they document that.

Mr. Bernstein asked if she meant bias on this Board's part.

Mrs. Zindel answered, "Yes."

Mr. Bernstein advised her to write a memo on it. He noted that as an attorney who had sat on thousands of hearings, he had not seen any bias.

Mrs. Zindel clarified that she felt there was procedural bias.

Mr. Bernstein said that if she felt that there was a bias, she could write to him. He advised her to cite to the minutes where someone had said something that was outrageous. She was entitled to do this and he would offer an opinion.

Michael Behr, 176 Hickory Tavern Road, Meyersville, said that it was his belief that part of the approval procedure was that positive criteria had to be presented.

Mr. Bernstein stated that during a variance application, there would be a request for relaxation of a zoning ordinance. The positive criteria and the negative criteria apply to what the applicant must prove in order to receive a variance. This

application was variance free and therefore the applicant would not have to prove the positive or the negative criteria. They have to show that they are complying with the zoning ordinance and presumably there was and will be testimony on that.

Mr. Behr said, "Each application is based on its own merit."

Mr. Bernstein affirmed that statement.

Mr. Behr stated that his reason for asking was that at the last meeting there was at least 25 minutes of dialogue about language in proposed parking. "If it's this establishment, it will need more parking. If it becomes this, it *could* need more parking. If it's this, it *will* need more parking." The dialogue was on what the potential of this site would be next. With that conversation being had, he did not know how much confidence the Board had in this facility actually succeeding.

Mr. Bernstein responded that a lot of that was from Mr. Legato who had some exhibits. He discussed parking and whether it was a permitted use or not and the Board has to consider that along with the testimony of the applicant whether it's a permitted use, what the parking standard is, etc.

Mr. Legato said that Mr. Bernstein had put on the record that it was an application that did not require variances. He felt he had not had a chance to refute that. He wanted to be on the record that he did not agree that it was a variance free application.

Richard Pfluger, 129 Hickory Tavern Road, Meyersville, said that there were people on the Board who didn't understand or didn't agree with the law on conflict of interest. He said that there were two (2) chairmen that had conflicts of interest and no body knew it even though one of them had a business with Mr. Kaufman. He asked the board members if they had a personal business relationship with Mr. Kaufman that the public did not know about.

Each member answered no.

Mr. Delaney asked if there was a conflict with respect to any of the objectors where there is a personal relationship. He was unaware of any.

Mr. Bernstein said that he was unaware of any either.

Mr. Bernstein stated that the application would be carried with no new notice to October 14, 2014.

Dr. Rae motioned to adjourn. Committeeman Roshto seconded the motion. The meeting was adjourned at 9:15 p.m.

CYNTHIA KIEFER
Planning and Zoning Secretary

Date