

**TOWNSHIP OF WEST ORANGE
PLANNING BOARD
MINUTES
October 5, 2011**

The Township of West Orange Planning Board held a regular meeting on October 5, 2011 at 8:00 P.M., in Council Chambers, 66 Main Street.

Chairman Bagoff called the meeting to order at approximately 8:00 P.M. It was announced that notification of this meeting was given to the Township Clerk, the West Orange Chronicle and posted on the Township Bulletin Board on January 13, 2011 in accordance with the requirements of the "Open Public Meetings Act".

PRESENT: Chairman Bagoff, Joanne Carlucci, Jerome Eben, Tekeste Ghebremicael, Gerald Gurland (8:05 P.M.), Vice Chairman Ben Heller, Lee Klein (8:37 P.M.), Councilwoman Susan McCartney, Ron Weston

ABSENT: Jason Lester, William Wilkes

ALSO PRESENT: Susan Borg, AICP, PP, AIA, Planning Director
Debbie Dillon Audio Transcription Service, LLC
Patrick Dwyer, Esq., Board Attorney
Robin Miller, Board Secretary

ROLL CALL

Chairman Bagoff, Joanne Carlucci, Jerome Eben, Tekeste Ghebremicael, Gerald Gurland, Vice Chairman Ben Heller, Lee Klein, Jason Lester, Councilwoman Susan McCartney, Chairman Ron Weston, William Wilkes.

ADOPT MINUTES

The minutes of the September 14, 2011 Planning Board meeting were unanimously adopted.

ANNOUNCEMENTS

The next regular Planning Board meeting will be held on November 9, 2011 in Council Chambers at 8:00 P.M.

SWEARING IN

Director Borg was sworn in.

RESOLUTIONS

PB-11-16/Montclair Golf Club

Block: 151; Lot(s): 1, 5, 7, 11, 14, 15.01, 23, 34, 37, 41, 45.01, 49; Zone: R-2
25 Prospect Avenue

Preliminary and final amended site plan with a variance for number of required parking spaces.

DISCUSSION

Addressing the Board, Director Borg read an email she received from Township Engineer Leonard Lepore dated October 5, 2011. In the email, Director Lepore wrote that on September 29, 2011 he met with George Derrick at the Montclair Golf Club to identify areas of the club along the riparian buffer of the

Peckman River that could be used to plant trees as compensation for trees being removed to make drainage improvements along a tributary of the Peckman River. One criteria that Mr. Derrick stressed was that any planting had to be outside the area of play for any hole on the course. Director Lepore and Mr. Derrick were able to identify three areas within the Club where trees could be planted. Director Lepore also wrote that The Township was looking at a compensation area of up to 7,327 square feet. If that could not be achieved a lesser area would be fine. Director Lepore wrote that he read the resolution and suggested that regarding Condition 10 of the resolution, instead of the words "in permitting" in the second line, the words "to allow" may be less onerous. Also in the fourth line when referring to 7,237 sq. ft., it would be fine to state the area to be located outside the area of play for any hole.

Chairman Bagoff asked the Board for if they had any comments regarding the resolution. The Board had no comments.

Mr. Dwyer advised the Board that after discussing the draft resolution with Robert Williams, Montclair Golf Club's attorney, the following changes had been made to the resolution:

- Page 2, item 3: to read "a 36 hole golf course" change from "18 hole golf course";
- Page 2, item 4: to read "...addition to clubhouse will add approximately 1,336 sq. ft..." change from "...addition to clubhouse will add approximately 1,235 sq. ft...";
- Page 2, item 4, section (iii): to read "...Donald Ross Room (256 sq. ft.)" change from "...Donald Ross Room (220 sq. ft.)"
- Page 2, item 4, section (v) to read: "...existing bathrooms (190 sq. ft.)" change from "...existing bathrooms (125 sq. ft.)"
- Page 2, item 7, to read: "30 additional spaces" change from "28 additional spaces"
- Page 3, condition 1, to read: "...approvals and/or regulatory permits." change from "...approvals and/or permits."
- Page 4, condition 10, last sentence to read: "All such plantings shall be outside the area of play for any golf hole i.e. outside the fairway and rough, and the location shall be subject to the review of the Township Engineer."

The Board voted on the resolution as follows:

Motion: Vice Chairman Heller

Second: Mr. Ghebremicael

Carlucci	Y	Eben	Y	Ghebremicael	Y
Gurland	Y	Heller	Y	Klein	-
Lester	-	McCartney	Y	Wilkes	-
Weston	-	Bagoff	-		

APPOINTMENT TO REDEVELOPMENT COMMITTEE BY CHAIRMAN

Chairman Bagoff announced the appointment of Ron Weston to the Redevelopment Committee.

PRESENTATION

Chairman Bagoff told the Board that over the next year, various experts would share their expertise on Planning Board issues. Director Borg and Patrick Dwyer would be sharing their expertise at tonight's meeting.

Chairman Bagoff said that Director Borg would explain the Planning Board and its functions. For the Board's reference, Director Borg had prepared and distributed handouts: "What is the Planning Board and what does it do?", and "Information for New Zoning Board Members." (See attached Exhibit A).

Director Borg gave her presentation. There was a brief question and answer session between Director Borg

and the Board at the conclusion of the presentation.

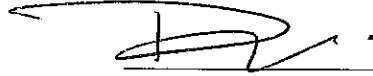
Chairman Bagoff asked Mr. Dwyer to begin his presentation. Mr. Dwyer distributed a handout for the Board's reference: "Title 40 Municipalities and Counties 40:55D-70 Powers." (See attached Exhibit B).

Mr. Dwyer gave his presentation. At the conclusion of his presentation, there was a brief question and answer session between Mr. Dwyer and the Board.

The Board discussed topics they would like covered at upcoming presentations.

MEETING ADJOURNED at approximately 9:11 P.M.

Minutes adopted November 9, 2011



Robin Miller, Planning Board Secretary

****THE NEXT REGULAR MEETING OF THE PLANNING BOARD WILL BE
DECEMBER 7, 2011 AT 8:00 P.M. IN COUNCIL CHAMBERS ****

Exhibit A

What is the Planning Board and what does it do?

The Planning Board functions under the authority of the Municipal Land Use Law of New Jersey.

The Planning Board is authorized to exercise power regarding:

- Adoption of a master plan;
- Subdivision and site plan review for permitted uses;
- Conditional use applications;
- Recommendations as to the zoning ordinance or amendments;
- Redevelopment plan;
- "C" Variances;
- Housing element plan (COAH).

When making decisions, the Board must take into consideration the Township Master Plan, as well as the New Jersey Municipal Land Use Law and case law. In addition, the Planning Board may grant a "C" variance (deviation from a bulk standard) when it is part of an application, while a "D" (use or density) variance may only be granted by the Zoning Board.

INFORMATION FOR NEW ZONING BOARD MEMBERS

What is the Zoning Board and what does it do?

The primary responsibility of the Zoning Board of Adjustment, sometimes called the Zoning Board, is to hear and vote on requests for variances or exceptions to our zoning ordinance.

In addition, for some applications, the Zoning Board reviews and approves or denies site plans. Other powers of the Board are to hear and decide appeals of decisions made by an administrative officer, such as the Zoning Officer or Planner, and to interpret the zoning map or zoning ordinance.

The Zoning Board is called a quasi-judicial body. It functions like a court of law and makes binding legal decisions. The Municipal Land Use Law, 40:55D, sets forth statutory law guiding the Zoning Board. Also important is case law; significant cases will be cited in this booklet.

How does the process work?

The Zoning Board hears an application for development after it has been reviewed by the Zoning Officer, Planner or both. The application should be complete, however, a member of the Board has the right to ask for further clarification of parts of the plan. The Zoning Board acts as a judge and jury. It is a member's responsibility to listen to all testimony, ask questions, decide the facts of a case, apply the law and make an objective decision to approve or deny an application. Conditions may also be applied to an approval.

What is the law that guides the Board's decisions?

The Board of adjustment hears and decides two kinds of variances, "c" variances and "d" variances. "Variance" means permission to depart from the literal requirements of the zoning ordinance. "C" variances are the simplest and sometimes have a less significant impact on the zoning of a municipality than do "d" variances.

The criteria which should be applied when making a decision on a "c" variance and a "d" variance, taking into account the Municipal Land Use Law and case law, is as follows:

"C" Variance

There are two kinds of "c" variances, called c-1 and c-2. Both must apply to a specific piece of property.

A c-1 variance is sometimes called the hardship variance. The applicant must prove hardship as outlined in the Municipal Land Use Law at 40:55D-70c(1) Where:

- (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or
- (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or
- (c) ~~by reason of an extraordinary and exceptional situation uniquely affecting a specific~~ piece of property or the structures lawfully existing thereon, the strict application of any regulation pursuant to article 8 of this act [40:55D-62 et seq.] would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship;

A judge explained, in a case, what he felt should be considered when deciding hardship. He said, "whether the restriction, viewing the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property." If hardship is not proven, the applicant is not entitled to a variance. If hardship is proven, the applicant must also show that such relief from the zoning ordinance will not be substantially detrimental to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. This second criteria is called the negative criteria.

Proof of hardship is not necessary for a c-2 variance (see 40:55D-70c(2)). Two things must be proven to receive approval for a c-2. An applicant must show that the purposes of the Municipal Land Use Law (40:55D-2) would be advanced by a deviation from the zoning ordinance requirement and secondly, that the variance can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance (negative criteria).

The purposes of the Municipal Land Use Law (40:55D-2) are:

- a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;
 - b. To secure safety from fire, flood, panic and other natural and manmade disasters;
 - c. To provide adequate light, air and open space;
 - d. To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole;
 - e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods,
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- f. To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies;
- g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;
- h. To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight;
- i. To promote a desirable visual environment through creative development techniques and good civic design and arrangements;
- j. ~~To promote the conservation of historic sites and districts, open space, energy resources and valuable natural resources in the State and to prevent urban sprawl and degradation of the environment through improper use of land;~~
- k. To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development of the particular site;
- l. To encourage senior citizen community housing construction;
- m. To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land;
- n. To promote utilization of renewable energy resources; and
- o. To promote the maximum practicable recovery and recycling of recyclable materials from municipal solid waste through the use of planning practices designed to incorporate the State Recycling Plan goals and to complement municipal recycling programs.

"D" Variance

There are five times when an applicant must ask for a "d" variance. In these cases, proof by the applicant is especially important because a request for a "d" variance is a request to use property in a way contrary to the West Orange zoning plan and should not be taken lightly. A "d" variance will only be granted by affirmative vote of at least five members.

As listed below, the five instances for granting a "d" variance are enumerated in the Municipal Land Use Law at 40:55D-70d. The Board shall have the power to:

[i]n particular cases and for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit

- (1) a use or principal structure in a district restricted against such use or principal structure,
- (2) an expansion of a nonconforming use,
- (3) deviation from a specification or standard pursuant to section 54 of P.L. 1975, c. 291 (C. 40:55D-67) pertaining solely to a conditional use,
- (4) an increase in the permitted floor area ratio as defined in section 3.1 of P.L. 1975, c. 291 (C. 40:55D-4),
- (5) an increase in the permitted density as defined in section 3.1 of P.L. 1975, c. 291 (c.40:55D-4) except as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings which lot or lots are either an isolated undersized lot or lots resulting from a minor subdivision.

The two things that must be proven for a "d" variance are the positive criteria, sometimes called special reasons, and the negative criteria.

There are three ways of proving the positive criteria (special reasons):

1. Occasionally, an application for a "d" variance is for a use that inherently serves the public good. Examples are schools, hospitals, public housing and sewage treatment plants. Because such a use is inherently beneficial to the public good, and therefore serves the general welfare, the positive criteria or special reasons test would be satisfied. Even if the use is beneficial, the applicant still must prove the negative criteria.
2. Rarely, special reasons can be satisfied if undue hardship or economic inutility can be proven. It is important to point out that the inability to make the most profitable use of the site will not qualify as such hardship or inutility.
3. In most cases special reasons, purposes of the Municipal Land Use Law at 40:55D-2 [see above], must be considered and proven. The most important special reason is 40:55D-2a. "To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals and general welfare;" If number 1 or number 2 above have not been proven, then the applicant must prove that the general welfare will be promoted because the proposed site is particularly suitable for the proposed use. Of course other special reasons should also be proven. The Supreme Court discusses special reasons at length in two cases, Kohl v. Council of Fairlawn, 50 N.J. 268 (1967) and Medici v. BPR Co., 107 N.J. 1 (1987).

If the positive criteria (special reasons) has not been proven, the applicant is not entitled to a variance. If it has been proven, then the applicant must also prove the negative criteria.

The negative criteria has two parts. Both of them must be proven.

1. The use shall not be substantially detrimental to the public good.
2. The use shall not substantially impair the intent and purpose of the zone plan and zoning ordinance.

In a very important case, Medici v. BPR Co., 107 N.J. 1 (1987), the Supreme Court of New Jersey set forth specific requirements when dealing with the negative criteria. The Court indicated that an enhanced quality of proof by the applicant and clear and specific findings by the Board of Adjustment are required to prove that the grant of a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. These proofs and findings would provide a substantive basis for the concluding statement that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

Conflict of Interest for Board Members:

~~The following are examples of conflicts of interest.~~

1. No member of the Board of Adjustment shall be permitted to act on any matter in which he/she has, either directly or indirectly, any personal or financial interest.
2. The legislature has declared that owners of property within 200 feet of the property to be affected by a Zoning Board proceeding have an "interest." A Board Member who owns property within the prescribed distance should disqualify him/herself and may not sit with the Board.
3. Where the applicant is related to the Board Member within the third degree of consanguinity, or is the spouse of a person who is so related to the Board Member, the Board Member should disqualify him/herself. Thus, if the applicant is the father, mother, grandfather, or grandmother of the member or is an uncle, aunt, brother, sister, niece or nephew, or the spouse of any such person, the Board Member is disqualified to act.
4. A Board Member is disqualified from acting where the applicant is his/her employer, employee, or partner or is a corporation in which the Board Member is a shareholder or has a financial interest.
5. It is therefore apparent that it would be highly improper for any member of the governing body to represent any interested parties before such boards or even to appear before either board as a proponent or objector, and such appearance would undoubtedly be held to vitiate the action of the governing body if the member of the governing body who had so appeared before the Board then sat on the appeal of the same matter. The appearance of the mayor before the Board of Adjustment representing objectors in a variance case was characterized as "patently improper."

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6. Where a Board Member is a member of a church or other organization which is either an applicant or objector, he/she must disqualify him/herself.

There may, of course, be other situations where a conflict of interest may exist. If you have any doubt, ask our Board Attorney.

Who hears appeals of Zoning Board decisions?

All appeals of Zoning Board decisions are made to Superior Court, except an appeal of an approval of a "d" variance may be taken to Township Council. The reason for the appeal to Council in this case is because a municipal body (with the Planning Board's advice) decides on the zoning of a municipality and is uniquely qualified to decide "d" variance decisions which might actually impair or significantly affect the master plan or zoning ordinance. An appeal of Council's decision would be made to Superior Court.

How can a Board Member learn more about zoning?

Each Board Member should have a copy of the Municipal Land Use Law, our Land Use Regulations (zoning ordinance), our Master Plan and the Board's Rules of Procedure.

In addition, the Planning Department has a library of tapes on many different zoning and planning topics that may be borrowed by Board Members. Books are also available for the Board's use. New Jersey Zoning and Land Use Administration by William M. Cox is especially helpful.

Exhibit B

DATED THROUGH P.L. 2011, ch. 124, and JR 7)

TITLE 40 MUNICIPALITIES AND COUNTIES

40:55D-70 Powers.

40:55D-70 Powers.

57. Powers. The board of adjustment shall have the power to:

a. Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance;

b. Hear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance, in accordance with this act;

c. ① Where: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of any regulation pursuant to article 8 of this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship; ② where in an application or appeal relating to a specific piece of property the purposes of this act or the purposes of the "Educational Facilities Construction and Financing Act," P.L.2000, c.72 (C.18A:7G-1 et al.), would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow departure from regulations pursuant to article 8 of this act; provided, however, that the fact that a proposed use is an inherently beneficial use shall not be dispositive of a decision on a variance under this subsection and provided that no variance from those departures enumerated in subsection d. of this section shall be granted under this subsection; and provided further that the proposed development does not require approval by the planning board of a subdivision, site plan or conditional use, in conjunction with which the planning board has power to review a request for a variance pursuant to subsection a. of section 47 of this act; and

d. In particular cases for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit: ① a use or principal structure in a district restricted against such use or principal structure, ② an expansion of a nonconforming use, ③ deviation from a specification or standard pursuant to section 54 of P.L.1975, c.291 (C.40:55D-67) pertaining solely to a conditional use, ④ an increase in the permitted floor area ratio as defined in section 3.1 of P.L.1975, c.291 (C.40:55D-4), ⑤ an increase in the permitted density as defined in section 3.1 of P.L.1975, c.291 (C.40:55D-4), except as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings, which lot or lots are either an isolated undersized lot or lots resulting from a minor subdivision or ⑥ a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure. A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board, or two-thirds of the full authorized membership, in the case of a regional board, pursuant to article 10 of this act.

If an application development requests one or more variances but not a variance for a purpose enumerated in subsection d. of this section, the decision on the requested variance or variances shall be

rendered under subsection c. of this section.

No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance. In respect to any airport safety zones delineated under the "Air Safety and Zoning Act of 1983," P.L.1983, c.260 (C.6:1-80 et seq.), no variance or other relief may be granted under the terms of this section, permitting the creation or establishment of a nonconforming use which would be prohibited under standards promulgated pursuant to that act, except upon issuance of a permit by the Commissioner of Transportation. An application under this section may be referred to any appropriate person or agency for its report; provided that such reference shall not extend the period of time within which the zoning board of adjustment shall act.

L.1975, c.291, s.57; amended 1979, c.216, s.23; 1983, c.260, s.13; 1984, c.20, s.12; 1991, c.256, s.21; 1991, c.445, s.10; 1997, c.145; 2007, c.137, s.60.

40:55D-70.1. Annual report

The board of adjustment shall, at least once a year, review its decisions on applications and appeals for variances and prepare and adopt by resolution a report on its findings on zoning ordinance provisions which were the subject of variance requests and its recommendations for zoning ordinance amendment or revision, if any. The board of adjustment shall send copies of the report and resolution to the governing body and planning board.

L. 1985, c. 516, s. 16.

40:55D-70.2. Board of adjustment, determination; reasons

6. If, in the case of an appeal made pursuant to subsection a. of section 57 of P.L.1975, c.291 (C.40:55D-70), the board of adjustment determines there is an error in any order, requirement, decision or refusal made by the administrative officer pursuant to a report submitted by the historic preservation commission or planning board in accordance with section 25 of P.L.1985, c.216 (C.40:55D-111), the board of adjustment shall include the reasons for its determination in the findings of its decision thereon.

L.1991,c.199,s.6.

