

WEST WINDSOR TOWNSHIP PLANNING BOARD
REGULAR MEETING
AUGUST 1, 2018

The regular meeting of the Planning Board was called to order at 7:07 pm on Wednesday, August 1, 2018 by Chair O'Brien in Meeting Room A of the Municipal Building.

STATEMENT OF ADEQUATE NOTICE

Pursuant to the Sunshine Law, a notice of this meeting's date, time, location and agenda was mailed to the news media, posted on the Township bulletin board and filed with the municipal clerk as required by law.

ROLL CALL AND DECLARATION OF QUORUM

Present: Linda Geever
Michael Huey
Andrea Mandel
Hemant Marathe
Simon Pankove
Allen Schectel-Alt 1
Anis Baig-Alt 2
Michael Karp
Gene O'Brien

Chair O'Brien asked if anyone in the audience had any comments on anything other than the applications listed on the agenda.

Elizabeth Peck of 11 Glenview Drive came forward. She said that her house is located across the street from the property that wants to be developed and she has concerns.

Chair O'Brien clarified that this is not a development.

Ms. Peck asked if they were requesting a variance and said that they talked about getting permission to do some building.

Chair O'Brien replied that there is a representative that will be speaking on behalf of Princeton University and her concerns may be addressed at that time.

Richard Goldman from Princeton University said that there are three applications for a minor subdivision to change lot lines a little bit but not to build anything.

Mr. Goldman said that staff reports indicated that some items needed to be attended to and they need more time. He is asking the board to adjourn the three applications of PB18-02, PB18-03 and PB18-04 until October 3, 2018.

Mr. Goldman said that the board's attorney has reviewed the notice and indicated that Princeton University has complied so he is asking that the board accept jurisdiction of these three matters and carry them publicly to October 3, 2018 so they do not have to re-notice.

Chair O'Brien said that unless anyone on the board objects, the board accepts responsibility and acknowledges that October 3, 2018 is the new date for appearance.

Chair O'Brien explained to Ms. Peck that Princeton University wants to change one lot into two lots. They are doing that on three separate parcels of land that they own located on the west side of Route One, straddling the Dinky Line and Washington Road.

Ms. Peck questioned why they are changing lines.

Chair O'Brien advised that this is what they will explain at the October 3rd meeting.

The public has already been noticed of this new meeting date for the applications and no letter will go out.

Chair O'Brien thought that it would be the first order of business at the October meeting.

Ms. Peck was advised that there are public copies of the proposed ordinances in the Land Development office to view.

Another resident, Toby Simon, who resides at 65 North Harrison Street, came forward to speak. He received a certified letter and stated it is obvious that some type of construction is going on.

Chair O'Brien replied that on the area where Mr. Simon resides, there are structures and if he comes to the October 3rd meeting, he will learn more about this and can voice his concerns.

Mr. Simon said that it is obvious that they are putting in underground pipes on the whole lot on Washington Street and even by Harrison Street.

Chair O'Brien said that the university was at a planning board meeting in January and gave an overview of their master plan going forward into 2025 to 2030. They do plan to create a Lake Campus on West Windsor land this side of Carnegie Lake. Ultimately, there will be construction but right now all they plan on doing is dividing three existing lots into two lots each, to create six lots.

Mr. Surtees said that the University has the Master Plan on their website.

Mr. Surtees also said that the construction that Mr. Simon is seeing is underground conduits that will tie into the new power substation that they are building on Route One.

Chair O'Brien advised anyone who just came into the meeting that the Princeton University applications will not be heard because the attorney representing the university has asked for an extension. The revised date is October 3rd and another letter advising of this change will not be sent out.

There were no other comments about Princeton University business.

PRESENTATION: Land Use Liability Seminar

Ed Schmierer, attorney with Mason Griffin in Princeton will conduct the presentation.

A lot of the cases referenced in the presentation are on land use ordinances that came about at the request of planning and zoning boards after a relatively controversial application, and the boards want to have some protection or basically a reason to deny an application.

This has gotten a little better, because in New Jersey the rules have changed and New Jersey has the Time of Application rule. This means, when an applicant files an application with Mr. Surtees and it is deemed complete, then the law or ordinances that are in effect at that time govern the application.

It had been that the application could start down the road to get approvals, and the land use board could say that it looks like they might have to approve the application and would recommend a change to whatever zoning was in place at the time so that the new zoning controlled the application.

The legislature felt that this was unfair, and it was changed several years later. A lot of the older cases fall into that category. The rush to change the zoning before a board had to act on something gave them an excuse to basically deny the application.

Delays in winning approvals are normal, and it usually takes a long time to get through the development process. Board members are encouraged to do their due diligence and let the audience speak and then make a decision.

Land Use Boards and individual members have the same protection from lawsuits as judges and have immunity from being sued individually as members of the board.

Board members are covered by virtue of the town's indemnification and defense ordinance for the decisions that they make. Section 4-83 of the code says West Windsor Township has adopted a pretty expansive ordinance, which states that board members are all considered municipal employees for purposes of defense and indemnification provided that they do their job the right way, allowing people to testify and you do not trample on their due process rights to speak. Decisions are made on the record and in an intelligent and fair way.

West Windsor has an indemnification ordinance, which says that whether you have insurance or not, you are protected for your decision-making as a quasi-judicial body.

Immunities may not apply, if the board violates someone's civil rights like freedom of speech, due process and equal protection.

Land Use laws provide that private property shall not be taken for public use without compensation. When a governmental entity condemns private property for public use, it must pay the owner just compensation. This is called condemnation or acquisition of property.

Inverse Condemnation is when the board takes an action, which makes a piece of property unusable, the town may end up having to buy the property.

Under the law no person has the right to use property in a fashion that threatens public safety or is obnoxious. On the other hand, government does not have the right to adopt regulations that effectively prohibit any reasonable use of private property. As long as you follow what is in the land use code and required regulations, then you are fine.

Board members have to fight that temptation and focus on the facts and the law and apply the facts to the law and make a decision. As long as you do that, you do not face liability for anything.

Fee shifting would apply if the board was to get sued and there was to be a finding of some kind of a constitutional violation for something that the board did. If that person proves their case, then the lawyer that the person hired to go after the board and to make that point could win damages that would be paid for by the town.

If there are a lot of people that show up to comment at a meeting and it looks like it is going to be a long night, there are ways to ensure that everyone gets their due process to be heard and the board does not appear arbitrary, capricious and unreasonable, which is the legal standard for conduct. The Chair can announce at the beginning of the meeting that there will be a time limit and set a reasonable time limit for comments, make a motion to extend the clock, or postpone the discussion and pick it up at a future meeting.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) was adopted by the federal government in 2000. It is intended to give a leg up to religious institutions to be able to build their facilities in most zones in most towns.

Most towns will zone for where they would like to see religious facilities built; and, if the town has enough opportunity and zones to do that, there is no harm; and the organization comes in and looks around to see where they want to build, and it is a normal application.

Congress found that a lot of towns were throwing artificial roadblocks up because of people who did not support large religious facilities near where they live.

RLUIPA calls for planning boards, zoning boards and governing bodies to be respectful of religious institutions. When they come to your town and want to build a facility, if you are not going to allow it, you better have a good reason as to why they cannot build.

RLUIPA law is one that, when you do get an application that involves the construction of a religious facility, you have to be very sensitive to the presumption that goes with that approval and lean towards finding a way for it to work, if you can do that.

If someone is using a residence as a house of worship and that residence is drawing people that walk and drive there on a Saturday and there is no parking for it and noise is coming out of the house, the zoning officer will address the issue by discussing with the individual who is running that congregation and try to work out something by letting him/her know that what he/she is doing is disruptive in the residential neighborhood. Since you have been very successful in attracting people to your religion, let's see if there is another place in town that might make some sense for you to practice. You shouldn't just hit them with a zoning violation. Try to work with them to avoid a confrontation.

Mr. Huey asked, if a religious group acquires a specific structure and it decides that bocce ball should be a part of the complex, are they permitted to do so since they are a religious group.

Mr. Schmierer said that such would be a site plan issue. It is fine to talk about the features of the site plan and make suggestions as to location of exterior issues. Usually, you do get cooperation.

Mr. Schmierer said that you can't prevent a religious symbol. You can suggest something else be put in its place; but, when push comes to shove and the Mother church says they must have a certain symbol and it must be at a specific angle, then you cannot deny.

Council President Miller said that there is a height limitation in West Windsor and asked would a religious symbol be subject to these limitations.

Mr. Schmierer said they would be; but he is sure they would ask for relief from that on the site plan application. A distinction has to be made between decoration and an integral part of a facility. If a mosque came in and said that under religious beliefs the minaret has to be a minimum of 75 feet, and since your ordinance caps it at 50 feet in this zone, we need a use variance. If someone were to testify that these are the type of requirements for building this type of facility, it would be hard to say no and turn it down.

Mr. Schmierer said that symbol and the requirements have to be integral to the function of that facility. If they can prove that it is and have a good reason, then you are stuck with it under RLUIPA.

Mr. Huey asked if the board has a say in deciding what external facilities are going to be good, or can it be left up to the homeowner association, developer, or the community. External facilities have to be an accessory to what the church is doing. If it is not integral to the mission of a religious institution, when you deliberate and deny the application you can say that the reason for denial is that 95% of the site is not related to a religious mission.

In the matter of voluntary contributions, it is not legal to accept the strictly voluntary contribution from the developer. Courts have been real careful to say you can't trade off approval to get these benefits for the community, even if it is a good benefit like affordable housing. You have to be mindful of that and cannot be accused of extorting the applicant in order to get something you need. If what you ask for directly benefits the applicant too, then it is fine. You can tweak the site plan or elements of the site plan.

Board site visits can get you in trouble. You get an application and you want to understand it better so you decide to drive out to the property to get a better sense of what the application is all about. While you are standing there, you start having a conversation with the applicant off record and outside of the hearing.

When you come to the hearing, you should put on the record that you had a site visit. You advise of some concerns you have as a result of the site visit.

However, the applicant responds that when you were on site, you said you had absolutely no problem with this application.

You have to be very careful. If someone confronts you, simply state you are a member of the planning board and are considering the application, but you cannot discuss anything about the application. Tell the applicant that you are there to observe the property. If the applicant continues to talk, advise that you will have to recuse yourself from hearing it, because someone is going to accuse you of being predisposed and hearing something outside of the proceedings. Also, objectors may follow you.

It is legal for the other members of the board who were at this site meeting to continue in the proceeding. Everything is shared and on the record.

Municipal Excess Liability Insurance policy usually do not cover punitive damages. If you do something that is wrong, you are on your own. The town could say in this ordinance that they are not going to pay punitive damages, but West Windsor ordinance says that it will cover you for damages if you get hit individually.

Discretionary immunity protects members of a planning board personally from punitive damages even if they willfully ignore an order of the Superior Court to approve an application. It is in the public interest that planning board members should act independently without fear that developers will bring them to court.

If a board member lives within 200 feet of a property that is applying for a variance, they should recuse themselves from the deliberations. Board members should not be coaching people outside of their role as planning board member.

Mr. Surtees asked if a board member lives in a development with a homeowner's association and the homeowner's association property is within 200 feet but the individual's property is not, can they recuse themselves.

Mr. Schmierer said that, if the homeowner's association was notified because it was within 200 feet, then the board member must be recused because she is part of the association.

Ms. Geever questioned the legality if an applicant decided to pull out of an application the night of the meeting. Can the board still conduct the meeting and take testimony on it without the applicants having any representation?

If it is still a pending application and at the last minute you get a call to say that the matter has to be put off for some reason but 200 people show up and still want to testify, you cannot do that because no one is there on behalf of the applicant to cross examine or ask questions. This would be a Constitutional violation of the applicant's due process, and they would have a lawsuit against you.

Mr. Karp asked what are the rights of the opposition. If an applicant presents one witness and is ready to come back next meeting with a second witness, and the opposition says that their planner cannot be there at the next meeting to testify against the application, does the board have any obligation to the objector because their planner cannot show up.

Mr. Schmierer said that in that case they may have to get another planner to show up because of the board's schedule. But if the matter is going to continue for two to three meetings, you might juggle the schedule and ask the applicant to bring their planner back not at the next meeting but the following meeting, because this is going to go on and then we can accommodate the individual who wants to bring in their own expert to ask questions. If you are going to finish up at the next meeting, it is fine for the chair to say that we have an agenda with other things pending and we cannot accommodate that request; so you are going to have to ask your planner to make different arrangements or get a different planner.

Mr. Huey asked if it makes a difference if the applicant says we are no longer going before the planning board, but are moving the application to the zoning board. Can residents still testify at the planning board meeting?

Mr. Schmierer said that would be a jurisdictional issue. If Counsel Muller ruled that this is a use variance or conditional use variance and we don't have jurisdiction, necessitating it has to go to the zoning board, then the planning board is done with this matter. A motion should be entertained to transfer it; and, if 200 people are sitting there to testify, apologize and say that this is a legal issue for the zoning board and we will require that board to give you notice.

Ms. Geevers asked, if there is a mistake on the notice to applicant about the starting time of a meeting, can the chair still open the meeting and discuss other issues. Mr. Schmierer responded that you must wait until the time on the notice to launch on the application, but you can open the meeting and talk about minutes or the master plan, etc.

The Chair is permitted to change the order of the agenda. If the notice was for 7:30 pm but should have been for 7:00 pm; and property owner arrives at 8:00 pm, because he/she thought that according to the agenda the application would not be heard before then, but the agenda was shifted, the property owner has an obligation to be prepared to offer input at the time on the notice even if the order on the agenda was shifted.

Chair O'Brien asked about Slide 52, on the topic of indemnification and defense.

Mr. Schmierer said that West Windsor does have such an ordinance.

Ms. Geevers asked how it works with a shared service agreement.

Mr. Schmierer talked about a contract between the school district and the municipality. Each of them or one of them might indemnify the other. There are police officers in the school and the municipality is insuring those police officers. If there is an incident involving them doing something in the school, the municipality would indemnify the school district, if a claim were made against those officers, since you carry the insurance. The school district can't insure the police officers because they are municipal employees. They are covered under the Municipal Excess Liability Joint Insurance Fund.

The school board might say to the municipality, when we are going to indemnify each other, we want you to indemnify your police officers for any actions while in school. You might say we want you to indemnify us if you give instructions for them to do something that you want done. This leads to a problem; and that is why we have mutual indemnification in the agreement. The police would be covered by indemnification and defense because they are employees.

Mr. Schmierer said that you are talking about a separately negotiated language in a contract that you still have to work out with the other party. West Windsor has the broadest indemnification defense you can have; so no changes are needed.

Mr. Schmierer said that West Windsor adopted defense and indemnification, which is authorized by Title 59 for people that volunteer for the township or serve in the community.

Mr. Huey had a question in regard to public comments. He said that very often you are hearing a heated application. If the crowd refuses to stay in control, does the chair have the right to say that he will end the meeting if the crowd does not behave with decorum?

Mr. Schmierer said that he does have the right to adjourn the meeting and continue hearing for a later date. Or he could suspend the meeting and reach out to a police officer to restore order.

At the conclusion of the presentation, Chair O'Brien thanked Mr. Schmierer for an interesting and informative seminar.

LIAISON REPORTS:

Environmental Commission

Ms. Mandel went to the Princeton Chamber of Commerce Environmental meeting and got a lot of information there. She spoke to Mr. Huey about pervious surface asphalt.

There is a truck fest that the parking authority is running in September. The Environmental Commission is getting involved in an effort to make the food trucks more environmentally friendly.

There may be an electric car demonstration in September.

Affordable Housing

Ms. Geevers said they did not meet in July but will meet on August 2, 2018.

She said she testified before the assembly committee along with councilwomen Jyotika Bahree and Virginia Manzari on affordable housing matters. She made comments about COAH needing to be reinstated in order to provide clarity or obligations, rather than having the courts decide these matters.

There needs to be a place in the legislature for these issues to be decided upon.

At the council meeting they talked about the cap for the third round. No township should be expected to have an obligation above 1,000 units for the third round.

She commented about townships such as West Windsor that have experienced explosive growth and need to get more school aid. She said that what has been recently worked out at the state takes you in to 2025, but growth is coming now and increased aid is necessary. Other school districts with declining enrollment should get less state aid.

Ms. Geevers said that she spent four hours at hearings and they are out there representing the township.

Mr. Surtees said the remaining meetings in August are cancelled and see you on September 5, 2018.

With no other business to be addressed Chair O'Brien adjourned the meeting at 8:50 pm.

Respectfully submitted,

Terri Jany
Recording Secretary