

**PENNINGTON BOROUGH
PLANNING BOARD MINUTES
REORGANIZATION AND REGULAR MEETING
JANUARY 8, 2020**

REORGANIZATION

Mr. Schmierer, Board Attorney, called the meeting to order at 7:30 p.m. and announced compliance with the provisions of the Open Public Meetings Act.

The following were given the Oath of Office by Mr. Schmierer: Eileen Heinzl, Class I, Mayor's Designee, Deborah Gnatt, Council Representative and William B. Meytrott, Class II, Borough Official all for the terms 01/01/2020 –12/31/2020; Douglas Schotland, Class IV for the term 01/01/2020 – 12/31/2023.

Ms. Mistretta called the roll. Board Members Present: Nicholas Angarone, Deborah Gnatt, Eileen Heinzl, William B. Meytrott, Katherine L. O'Neill, Cara Laitusis, Alt. 1, James Reilly, Douglas Schotland. Absent: Mark Blackwell

Also Present: Edwin W. Schmierer, Mason, Griffin & Pierson, Planning Board Attorney; Michael Bolan, Acting Borough Planner; John Flemming, Zoning Officer; Mary W. Mistretta, Secretary.

Mr. Schmierer stated that a nomination was in order for Chairman of the Planning Board.

Mr. Meytrott made a motion to nominate James Reilly as Chairman, seconded by Ms. O'Neill and the Board unanimously agreed by voice vote. Mr. Reilly thanked everyone and requested a nomination for Vice Chairman. Ms. Heinzl made a motion to nominate Nicholas Angarone as Vice Chairman, seconded by Ms. O'Neill and the Board agreed unanimously by voice vote.

Ms. Gnatt made a motion to appoint the following professionals and secretary, seconded by Mr. Angarone and the Board agreed unanimously by voice vote:

Edwin W. Schmierer, Esq., Mason, Griffin & Pierson, P.C. was appointed Planning Board Attorney for the year 2020.

James Kyle, PP/AICP, KMA, (Kyle-McManus Associates) was appointed Borough Planner for the year 2020.

Brian Perry, P.E., Van Note-Harvey Associates, PC was appointed Planning Board Engineer for the year 2020.

Mary Mistretta was appointed Planning Board Secretary

The **Hopewell Valley News** was designated the official daily newspaper for the Planning Board. **The Times of Trenton** was designated the official daily newspaper to be used only when through no fault of the applicant or the Board, publication of the Legal Notice was not possible in the Hopewell Valley News.

Planning Board Meeting Dates were approved as follows: Feb. 12, Mar. 11, Apr. 8, May 13, Jun. 10, Jul. 8, Aug. 12, Sep. 9, Oct. 14, Nov. 12, Thursday, Dec. 9, Jan. 13, 2021.

The following were appointed to the Application Review Committee: Kate O'Neill, Eileen Heinzl, James Reilly, Nicholas Angarone, Deborah Gnatt, Alternate.

Mr. Angarone made a motion, seconded by Ms. Heinzl to close the reorganization meeting.

REGULAR MEETING

OPEN TIME FOR PUBLIC ADDRESS – Mr. Reilly asked if there was anyone in the public who had comments or questions regarding anything that was not on the agenda, there being none the public address time was closed.

MEMORIALIZATION OF RESOLUTION

Greg Fontaine applicant for William B. Alexander and Dorothy A. Borresen, Block 906, Lot 22, 7 Ingleside Avenue, R-80 Zone, received variance approval to replace a garage. Mr. Angarone made a motion to adopt the resolution, seconded by Ms. Laitusis. Voting yes: Angarone, Gnatt, Meytrott, Laitusis, Reilly. Not voting: Heinzel, O'Neill, Schotland. Absent: Blackwell.

APPLICATIONS

Jonathan Bichsel, 9 E. Curlis Ave LLC, 11 E. Curlis Ave LLC, Block 801. Lot 21, R-80 Zone. Application No.19-005. Appeal to Zoning Officer's Decision, continued from the October 10, 2019 meeting. Use Variance application, if needed.

Mr. Flemming, Zoning Officer, gave a brief review of the appeal and his testimony given October 10, 2019. He stated that there is a question regarding the legitimacy of the second unit at 9-11 Curlis Avenue and when it was created. Mr. Flemming feels that the second unit was created in the late 1980's or 1990's and the applicant feels it was created before the zoning in 1978. There is clear evidence that when the sewer system was installed in the Borough the property was not recognized as having two units because the configuration of the sewer lines would be different. The applicant's testimony is that the two units existed back in the 50's. Mr. Blackwell had stated that he remembers the area below the apartment was clearly a garage around the '60's. Mr. Flemming stated that there have not been any approvals for the conversion of the garage to living space which would have made a second unit for number 11 E. Curlis. Mr. Flemming stated that if the Board agrees with the applicant's testimony that 9 and 11 existed before the zoning ordinance and is a preexisting nonconforming use, there is no question that it was an expansion of a nonconforming use and would require a use variance. If the Board agrees that the unit is a totally legal unit, he would be happy to sign off on it.

Ryan Kennedy, attorney for the applicant, stated that they have dug through the history of the property with the important date being 1978 when the zoning was put in place. He clarified Mr. Flemming's statement and noted that there was not any "zoning approval, but there were construction permits from the 1990's and early 2000's. Mr. Kennedy reviewed the testimony from the October meeting which included testimony from the neighbor next door that this was an existing use since she lived there and it was not a detriment to her. He stated that they are not looking to change anything, but are looking to keep the current configuration that has been the same for at least 16 years and the two family units that have existed since the '50's. Mr. Kennedy stated that they followed up on the article obtained from the Hopewell Valley Historical Society which was presented to the Board at the October meeting. The article referred to a resident at 11 E. Curlis (Trenton Times, Dec. 5, 1957). Mr. Neary still lives in Pennington, but is in Florida at this time. Mr. Kennedy obtained a signed affidavit from Mr. Neary which was marked Exhibit A-1 and distributed copies to the Board. Mr. Neary's affidavit stated that he lived in the apartment known as 11 East Curlis Avenue from June 1956 through August 1960. He stated that it was a separate unit from the owners who lived in 9 East Curlis. Also included with the affidavit were copies of newspaper articles dated from the '50's referring to 11 E. Curlis as the residence of Mr. Neary.

Mr. Kennedy requested that the application be bifurcated. He would like the Board to first determine whether there was a two family residence on the site prior to 1978. Mr. Reilly asked if any members of the Board had questions for Mr. Kennedy. Ms. O'Neill asked if Mr. Neary was living with the owners at the time of the first newspaper notice. Mr. Kennedy responded that Mr. Neary's affidavit stated that he lived there for three years in a completely separate apartment. Mr. Flemming had questions regarding the previous deeds that were presented at the October meeting. The site now has two deeds since it was changed into condominiums and there are two owners. Mr. Reilly asked if there was any proof that Mr. Neary paid rent or utilities to prove he was an official resident and not a guest. Mr. Kennedy responded that they did request those items since Mr. Neary stated he was living in a separate unit. Mr. Bichsel stated that he purchased the property under the assumption that it was a two family house and he made them into condos in 2019, but found out that the second unit was illegal when he applied for a zoning permit for another driveway. Mr. Flemming stated that he did not think that condominiums were a bad thing since they were usually owner occupied, but the question comes down to service. It's clear that there was one electrical service until the '90's and there is only one water line and one sewer line coming into the house. There are now two electrical services. Mr. Flemming explained the standards to be considered a separate unit including a separate entrance with access from outside and the second unit meets those standards. Mr. Bichsel was asked what the garage is now used for and he stated that it is used as a big open living room. Mr. Flemming explained that if someone comes in to get permits for an internal renovation they are not required to get zoning approval and questions were never asked regarding the construction of the second unit. Mr. Flemming stated that units can be changed into condos without any approvals from the Borough.

Ms. Heinzl asked Mr. Schmierer to clarify the applicant's burden of proof to demonstrate that this was a preexisting two family house prior to the zoning ordinance. Mr. Schmierer stated that based on the affidavit and the materials that Mr. Kennedy presented, he did not feel that it would be difficult for the Board to find that this was a preexisting use through 1978. The affidavit shows that it was used by Mr. Neary and his wife and that it was a separate living unit. Mr. Schmierer stated that the next step would be to determine if it was an expanded nonconforming use, as you cannot enlarge a preexisting nonconforming use without a use variance.

Mr. Reilly asked Mr. Bolan, Acting Borough Planner, if he would comment on the application. Mr. Bolan stated that it would need a d(1) variance, but if the Board made a determination that the unit existed before the zoning ordinance, he felt that it would then need a d(2) use variance for expansion of a nonconforming use. Mr. Bolan stated that the d(2) still meets the same super rules needing five affirmative votes, but the nature of the proofs are much less intensive. Mr. Reilly stated that the first thing the Board must determine is whether two units existed before August 1978 and if they felt that it was the same configuration. He then asked the Board for their comments. Mr. Meytrott stated that after reading the affidavit and newspaper articles he felt that it was clear that it was a preexisting use and noted that there was no mention that it was the same configuration that it is today. Mr. Reilly asked if the unit was still being used in the '60's and Mr. Kennedy responded that they did not know what happened after the Neary's moved out. Ms. O'Neill asked if the apartment was accessible from the larger part of the house and Mr. Bichsel stated that there was one small section that at one point could have been used as a pass through, but it was not there when he purchased the property. Mr. Schotland agreed that the affidavit was very compelling and was wondering if the house was built with the idea of having a unit over the garage. Ms. O'Neill stated that she had a problem with the fact that it may not have been continuously used. Mr. Kennedy stated that there has to be intent to abandon the use and it would still be considered a separate use even if a family member uses it. The rest of the members agreed that the affidavit and newspaper articles were convincing and that the use appeared to be before the 1978 zoning ordinance and is a preexisting nonconforming use. Mr. Schmierer agreed that if the unit had been left dormant it is not enough to say that the use was

abandoned. Mr. Schmierer suggested that the Board make a motion regarding the appeal, stating that in considering the appeal, evidence was presented that the expansion of the preexisting nonconforming use took place after 1978 without zoning approval and if they wanted to continue the use they need a d(2) use variance. Ms. Gnatt made this motion, seconded by Mr. Meytrott, to grant the appeal from the Zoning Officer's decision. Voting yes: Angarone, Gnatt, Heinzl, Meytrott, O'Neill, Schotland, Laitusis, Reilly. Absent: Blackwell. (Mr. Meytrott and Ms. O'Neill certified that they listened to the cd for the hearing on October 10, 2019.) Mr. Reilly pointed out that the use variance would be heard by the Zoning Board and there would only be six members eligible to vote. Mr. Kennedy asked if he could have a few minutes to confer with his client and the Board Attorney. Mr. Reilly stated that the Board would take a 10 minute break. Mr. Kennedy stated that he has conferred with his applicant and they would like to ask the Board to carry the application to the February 12th meeting so they can have a full Board. Mr. Angarone made a motion, seconded by Ms. O'Neill to take jurisdiction of the application and carry it to the February 12th meeting and the Board unanimously agreed. The hearing ended at 8:45 p.m.

Borough of Pennington, Block 1003, Lot 15, 275 S. Main Street (Hopewell Valley Regional School District) Minor Subdivision (3/4 +- acre to the rear portion of the Toll Gate School property to develop Howe's Arboretum).

Mr. Reilly stated that there was a lack of eligible voters for this application, but the Board could take jurisdiction and hear the application since there were members of the public that came to hear the application. The application could then be carried to the February 12th meeting when there would be a sufficient number of eligible voters. Mr. Meytrott stated that he was an employee of the Borough and recused himself and stepped down. Mr. Schmierer stated that this was a minor subdivision to create a small lot behind Toll Gate Grammar School. Municipalities usually have a courtesy review by the Planning Board with no need of noticing, but the administration decided that they wanted to give notice to the people within 200 ft. so that the neighbors and other interested parties would know about the application. Mr. Schmierer announced that the noticing was complete and the Board could take jurisdiction.

Ms. Heinzl explained that the Environmental Commission and volunteers in town came up with the idea of what is known as the Howe's Habitat on the land in the rear of Toll Gate School and they felt it would be great if the Borough would be able to develop something that would be accessible to the public and could also be used by the students at Toll Gate School. Exhibit A-1 Site Plan was entered into evidence. The Environmental Commission received a grant from ANJEC (Association of NJ Environmental Commissions) and hired Michael Van Cleef from FOHVOS and he put together an arboretum plan for the area known as Howe's Habitat that comprises approximately 2.8 acres at the rear of the school property. They then went to the Hopewell Valley Regional School Board and after discussions it was determined that the best way would be for the Borough to buy the property so that they could develop and maintain it. The Borough is now under contract with the school district to purchase the lot and it first has to be subdivided. The Mercer County Planning Board has approved the subdivision plans and they are now here as a courtesy matter for Board approval. The Borough would then move forward and purchase the property with funds from the Borough's Open Space funds and Green Acres. Ms. Heinzl stated that the plan is to put up a fence along the line shown on the plan to delineate the line between the school's property and the Borough's. The school wants to make sure that the public does not go on the school grounds when school is in session. A little bird blind is already on the property that students from the district built which will be incorporated onto the Borough lot. The arboretum will have access from Curlis Avenue and will have a loop trail. There is also a plan to put in two exposures which will be cleared and planted with native species. About twenty-eight trees are targeted to be removed which have been identified as either suffering from Emerald Ash Borer or other diseases. It will be a multiyear project and will

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require a lot of attention. The advantages of the Borough owning it, is it will be maintained and available for the public to use. There will also be a collaboration with the school so that the students can continue to use it. Mr. Reilly asked if the Board had any questions, there being none, Mr. Reilly opened the hearing to the public for their comments or questions.

The following were all sworn in by Mr. Schmierer:

Michael Muir, 25 E. Welling Avenue, stated that he lived next to the dividing line and he is glad the habitat will be preserved. He stated that the presence of a fence between the school and arboretum was unnecessary and unacceptable. Mr. Muir asked what would the public be allowed to do after the subdivision that they were not allowed when it was the school's property. Mr. Reilly asked why Mr. Muir was so opposed to the fence. Mr. Muir responded that he did not feel that the people using the habitat would have any interest in wandering on to the school grounds. He also stated that there are animals in the arboretum area and he does not see any reason to confine them. Ms. Heinzl stated that the fence would only be placed between the properties and the school would erect it on their property. He stated that if a fence was approved he would like to see it aesthetically pleasing and as small as possible. Ms. Heinzl stated that there has not been any decision on how the fence will look, but she will relay the comments to the school board. In response to Mr. Muir's question regarding the use, Ms. Heinzl stated that they would be using Open Space and Green Acres funds which means it will have to be open to the public. She noted that the school prefers to be able to restrict the school property during school hours. The arboretum will also be maintained by the Borough. Mr. Angarone stated that it will be deed restricted and will be limited to passive recreation at the most.

Eliot Feibush, 31 East Welling Avenue, stated that he lived adjacent to the site and asked if natural plantings could be used instead of a fence. He also asked who they should contact regarding the design of the site. Ms. Heinzl stated that once the Borough acquires the property there is an arboretum committee that has been formed and they will be having discussions regarding the site at a later time. People that are interested should reach out to her in Borough Hall or e mail her, ehinzl@penningtonboro.org, and she will forward it to the committee chairperson. Mr. Feibush suggested that maybe the larger enclosure could be moved further away from the residents. Mr. Feibush asked what the Borough's approach was in using pesticides, especially since this area had open streams. Ms. Heinzl stated that it will be treated like the Borough parks. They will be removing invasive species and most likely herbicides will be used. Mr. Feibush also suggested that there be some consideration to buffering the existing homes when the replanting is done.

Susan Perris, 41 East Welling Avenue, had concerns about security and asked how the boundaries would be established for neighboring properties such as hers to discourage people from trespassing into their yards. A lot of kids from the school go along the creek and play there, which is fine, but she had concerns about adults going through her yard. Ms. Heinzl stated that this is something that the committee would have to discuss. Ms. Perris also felt that it was a good idea to have the main entrance on the south side of Curlis where there are no houses.

Toni Lewis, 20 East Welling Avenue, stated that she lives across the street, but close to the arboretum. Ms. Lewis stated that she is on the Board of Health and feels that human health is important to the environment and felt that it would be nice if they worked together on a project like this. Ms. Lewis also wondered how this use was better versus another use and how was this decision made. Ms. Heinzl stated that it was a collaboration with the Environmental Commission, Shade Tree Commission and the Parks and Recreation Committee. Mr. Angarone, a member of the Environmental Commission, stated that the Commission applied for a grant from ANJEC in 2017 and had a presentation from FOHVOS who presented the concept

of an arboretum. The grant from ANJEC helped put together the conceptual plan. Ms. Gnatt stated that the Open Space Committee also donated funds. Ms. Lewis asked where the funds would come from for maintenance of the arboretum. Ms. Heinzel stated that Borough's plan is to ask for funding from Green Acres to help in the beginning and there is a balance in our open space funds. Once the Borough owns the property they will look at grants and other funding that is available and the Public Works Department will maintain the area. Ms. Lewis also pointed out that the park in Hopewell Borough does not have a fence with the adjacent school and would like them to reconsider the fence.

Ms. Heinzel thanked everyone for coming out and their comments are most welcome. Mr. Reilly asked if there was anyone else in the public who had comments, there being none the public portion of the hearing was closed. Mr. Schotland made a motion, seconded by Mr. Angarone to continue the hearing without further notice to the February 12th meeting when there will be enough eligible voters and the Board agreed by voice vote.

OTHER BUSINESS

Mr. Schmierer, Board Attorney, gave a review of conflicts of interest and reminders of what to avoid and other things that come up during the year. Mr. Schmierer reminded the Board that as far as the Local Government Ethics Law they are defined as Local Government Officers. A part of this is the requirement to fill out the Financial Disclosure forms every year. Another part of it is avoiding conflicts and conduct which would involve members or their immediate family when they are doing their duties as members of the Planning Board. The Local Government Ethics Law stresses that the Planning/Zoning Board members are quasi-judicial boards meaning you are like judges for land use. The standards that Board Members are expected to meet are relatively high. The Land Use Law states "that no local government officer or a member of his or her immediate family shall have an interest in any business, organization or engage in any business activities or transactions which would substantially conflict with a proper discharge of your duties in the public interest." Mr. Reilly asked if it was better for people to step down when they have to recuse themselves. Mr. Meytrott mentioned that when he recuses himself he always steps down into the audience, but has also been told when you have to recuse yourself you should not even be in the same room. Mr. Schmierer stated that if you have a conflict sitting in the audience is fine, but if it was a contested matter his advice would be to step down and go out of the room and go home if it was at the end of the meeting. Mr. Schmierer pointed out that it's easy to know that you have to recuse yourself if you are on the certified list of people within 200 ft. of an application, but sometimes there is a question as to whether it is considered a conflict. Mr. Schmierer advised Planning Board members to contact him before the meeting if they had any inkling that they might have a conflict and may not be able to participate in the hearing. He would question them regarding the circumstances and decide if they should recuse themselves. Mr. Schmierer stated that if he decides that you can go ahead and hear the application and his advice was wrong he is your safe harbor. If you relied on his advice and someone objects and there is a law suit, you are protected because you relied on his advice as the Board Attorney.

Mr. Schmierer stated that complaints and appeals can be filed with the Local Finance Board if someone thinks the government official did something wrong. They publish their opinions about different instances and his office can go in and check to see if there is anything similar to the situation being questioned. He stated that most of the time the Local Finance Board is conservative, especially with quasi-judicial people as they make important decisions and that they are not in any conflict. Mr. Schmierer stated that the law regarding conflicts is people using common sense in most cases.

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Mr. Schmierer stated that Board members should be aware that they should not have any conversations out of the hearing with neighbors, friends or other Board members. He stated that often times people are not aware that someone is on the Board and start a conversation about the application. The best practice is to put your hands up and apologize saying you cannot discuss it with them because you would disqualify yourself from going to the next hearing. There should not be any communication by phone or electronic discussion going on regarding a hearing that is coming up or being heard. Mr. Schmierer also stated that it was not a good idea to discuss that applicant after the hearing either because as a quasi-judicial body they draw an analogy. Everything is on record where anyone can check the file or minutes. Members also have to be careful when they do a site visit and not get involved in a conversation with the owner or neighbors. Mr. Schmierer suggested that it is a good idea to put on the record at the hearing if you have visited a site and note that you did not have a discussion with the homeowner.

Mr. Schmierer also warned members not to do their own research on an application. The application is supposed to be decided on what is submitted. There's no problem to checking on Google where it is situated or a similar question you have, but you should not look into other alternatives to suggest to the applicant. You can ask the applicant if there are any alternative ways to doing a project or if there was some reason why they didn't do it another way that may be a better alternative. Mr. Schmierer also noted that he has been at meetings where Board members are constantly looking at their pads or their phones during an application and it appears rude since they are not paying attention to what is being said. He noted that this was not the case with this Board, but it is happening more and more.

Mr. Reilly thanked Mr. Schmierer and stated his comments were very helpful.

MINUTES – Ms. O'Neill made a motion, seconded by Mr. Angarone to approve the November 13, 2019 minutes with corrections and the minutes were approved.

Mr. Angarone made a motion, seconded by Ms. Laitusis to approve the December 11, 2019 minutes with corrections and the minutes were approved.

Mr. Angarone made a motion, seconded by Ms. O'Neill to adjourn the meeting at 10:15 p.m.

Respectfully submitted,

Mary W. Mistretta
Planning Board Secretary