

**BIRMINGHAM TOWNSHIP
PLANNING COMMISSION MINUTES
JANUARY 13, 2009**

The regular meeting of the Planning Commission was called to order at 7:30 PM in the Township Building by Chairman DiMarino. A quorum of members was present. In attendance were: Nicholas DiMarino, Eric Hawkins, Janet DeCaestecker, Peter Davenport, Scott Boorse, Scott Towler, and Doug Marshall. Absent was member Debbie Hineman. Also present were PC Solicitor Frone Crawford and Supervisor John Conklin.

As this was the first meeting of the year, the first order of business was to organize. Mr. DiMarino moved for the following appointments which were unanimously approved.

Nicholas DiMarino	-	Chairman
Eric Hawkins	-	Vice-Chairman
Scott Boorse	-	Intergovernmental Liaison and West Chester Regional Planning Commission Member
Peter Davenport	-	HARB Liaison

Mr. Boorse moved to approve the November 11, 2008 minutes as written. Mr. Hawkins seconded the motion and it was approved with six in favor and one abstention. Mr. Towler abstained from voting as he did not attend the meeting. The December meeting was cancelled so there were no minutes to approve.

METRO PCS CONDITIONAL USE APPLICATION

The Township is in receipt of a conditional use application from Metro PCS to extend an existing cellular communications tower located at 1335 Wilmington Pike (Stoltzfus property) in the C-3 General Commercial District by ten feet and to install six panel style commercial communications antenna on the tower at a height of 183 feet. Metro PCS also proposes to install related radio equipment cabinets at the base of the tower on a ten foot by sixteen foot concrete pad within a fenced-in compound. A hearing is scheduled for Tuesday, February 17th @ 6:30 PM. As no one was present to discuss the application the matter was tabled until the next meeting.

BOOR SKETCH PLAN- SPRING MEADOWS

Barbara Boor, property owner, Art Sagnor, legal counsel, and Jim Fritsch, engineer, were present to discuss a three lot subdivision sketch plan on an eight acre parcel located at 1128 Dorset Drive in the Spring Meadows Subdivision. The plan, dated December 4, 2008, was prepared by Register Associates, Inc. and consists of one sheet.

Mr. Fritsch presented the application. He said that public notification was provided as a common courtesy even though it was not required for a sketch plan. The property is currently zoned R-1, which is two acre zoning. The Spring Meadows subdivision was approved under R-3 cluster zoning, which does not exist today.

Currently located on the property are the main house, a detached garage, a pool and two sheds. There are three accesses to the property. The Dorset Drive access is being used

for the house and there is an easement across the property to the old barn (Emlet Property). There is a second easement which comes off of a private drive; across the stream next to the pond; and through the open space. This access easement is currently being used by four properties that actually front Rt. 926. This easement was closed off by the Boors due to safety concerns. There is a third easement above the pond which is not in use. The subdivision proposes that lots 1 and 2 will be accessed from the easement off of the private drive and lot 3 will be accessed from Dorset Drive. However, these access locations can be changed. The Emlet property would continue to use the Dorset Drive access. Solicitor Crawford suggested that the property line be used for the access easement rather than having the access from lot 1 going through the property of lot 2. Mr. Boorse questioned why the proposal is moving the existing entrance for lot 1? Mr. Fritsch explained that the original entrance for the property in 1757 was as in the proposal.

The Township Engineer, Jim Hatfield, has reviewed the sketch plan in a letter dated December 29, 2008. According to Mr. Hatfield the proposed subdivision would yield a total open space acreage less than the total number of lots times one acre per lot, which he believes is consistent with the density and open space computation of the 1967 ZO, however he is uncertain if the 1967 ZO has bearing on the proposed subdivision. Also, the Final Subdivision Plan does not include any notes specifically restricting lots from any further subdivision. He suggested legal counsel be consulted regarding the standards to be applied to the application.

Art Sagnor presented some history on the property and the Spring Meadows Subdivision.

- Lots 59 and 56 (Emlet and Boor properties) were transferred from William Carnill to Peter and Elizabeth Haines on May 23, 1978.
- Spring Meadows deed was transferred from Carnill to G&M Realty Co. on May 23, 1978, but not recorded until May 30, 1978. The deed excludes lots 76, 75, 74, 59, 56 and 44.
- The Spring Meadows Subdivision Plan was recorded on May 30, 1978.
- The Restrictive Covenant Agreement for Spring Meadows was recorded on May 30, 1978.
- The legal description (metes and bounds) (Exhibit A) of the Restrictive Covenant was missing when recorded.
- The Restrictive Covenant does not contain a description of open space (Exhibit B).
- Lot 56 (Boor) was not owned by G&M Realty when the Restrictive Covenants were recorded. It was owned by Haines, so the lot would not be bound by the Restrictive Covenant.
- Haines conveyed Lot 56 to the Boors on July 31, 1986.
- No recorded documents have been found which contain any restrictions or prohibitions against further subdivision.

Mr. Sagnor believes that lots 76, 75, 74, 59, 56, and 44 could also be subdivided if there was enough acreage.

Mr. Sagnor hired Manito Title Company to do a title search on the property and Manito was unable to find any Restrictive Covenants.

Mr. Sagnor's position is that there are no Restrictive Covenants on the plan or recorded which prohibit further subdivision and the Restrictive Covenants that are filed are terribly flawed. There is no case law stating that the R-3 zoning stays in effect. It's Mr. Sagnor's position that the property can be subdivided, even if that wasn't the intent.

Mr. Crawford said that the intent was to include the entirety of the Spring Meadows tract in the Plan. The Restrictive Covenant does not add any additional enforcement than the notes on the Plan regarding the density limitations and note allegations as there are no restrictions against subdivision. Mr. Crawford did not think that the Restrictive Covenant adds any additional "teeth" than what exists on the Plan notes. It doesn't matter if lot 56 and the other lots are included in the Restrictive Covenant. On the Plan, lot 56 was allocated one acre of building area and the remainder of the acreage for open space requirements. Mr. Crawford said that what is important is the intent of the plan notes when they are applied and the impact of the zoning change from R-3 to R-1. When the subdivision was proposed this lot could not have been further subdivided as the plan goes through the density calculations and open space allocations. The additional acreage on this lot was added in the calculations for the open space requirements. Under the R-3 ordinance, open space could include common open space and restricted open space in the combines of private lots. How this relates to the current R-1 zoning requirements will have to be researched by Mr. Crawford. Mr. Crawford notes that there is some case law that could be reviewed which could affect this Plan. The deed being illegally recorded is a separate issue from the subdivision and the intent that there were 76 lots that were part of the density calculations as part of the Spring Meadow Subdivision Plan. Title companies are instructed on the recording procedure to make this process legal.

After the presentation by the applicant, the Planning Commission members were polled for questioning.

Mr. Boorse confirmed that all 76 lots were intended to be part of the Spring Meadows Subdivision.

Mr. Hawkins questioned if the subdivision was unlawful since there are five lots not subject to the restrictive covenants? Mr. Crawford responded that the restrictive covenants and the subdivision were to be recorded prior to the recordation of the deed. Chester County will not record a deed earlier than the first notary acknowledgment on the deed. However, this issue will not stand or fall on the recording sequence. Mr. Crawford reiterated that there is no specific restriction in the covenants. The issues are the impact of the plan notes as public documents and the property being governed by the notes on the plan. The second issue is the impact of the rezoning. Mr. Crawford said that there is similar case law that will have a bearing on this application and it will need to be reviewed. In both cases referenced by Mr. Crawford, the outcome was not in favor of the township. Mr. Crawford noted that under the current zoning, this application would comply.

Mrs. DeCaestecker asked how much of the Boor property is part of the open space calculation? Mr. Fritsch felt that seven acres of the property would have been part of the open space under the R-3 zoning. Under the R-1 zoning two acres lots are permitted.

Mr. Marshall asked about the original density calculations? Mr. Crawford explained that for every lot in the original subdivision there was one acre of open space allocated. There was no net versus gross area calculations at the time. Mr. Crawford said that there is an issue as to whether the notes on the plan carry any on-going restrictions, in and of themselves, that would survive the change in zoning from R-3 to R-1.

Mr. DiMarino said that the Township Engineer should check the net lot areas to determine if the current zoning would comply. Mr. Fritsch said that the sketch plan was prepared on GIS information. The data requested by Mr. DiMarino would require a topographic survey. This issue would be analyzed prior to a preliminary plan submission and the number of lots would have to be reduced if the plan didn't comply. The intent before proceeding with an official preliminary subdivision submission is to come to an understanding on the issues discussed.

The floor was open to the public for questions to the Planning Commission on the sketch plan.

Robert Schwan, 1114 Dorset Dr., said that he is shocked by what he has heard tonight. He bought a lot 28 years ago thinking that it was part of the Spring Meadows subdivision and that all the filing had been properly done. The value of Spring Meadows and his contributions over the years to the HOA Board appear to be "thrown out the window" and he finds this extremely upsetting. He doesn't understand how the subdivision can proceed and violate the original intent of the development which was two acres per lot, with lots under two acres permissible due to the open space allocations. He bought his lot with the understanding that the barn house and the original house would never be developed and he hopes that this open space will not be developed. Having this open space developed will detract from the view of his property and it will devalue his property. As a Spring Meadows Board member, the open space has been pristinely maintained, which includes a pond and a stream on the edge of the Boor property. The open space was an orchard at one time and it was sprayed with chemicals. Any land disturbance would impact both the pond and the stream. Mr. Schwan presented a letter to the PC expressing his concerns with the subdivision. Mr. Schwan also said that the second easement described accessed the property by a bridge, which failed. The Spring Meadows HOA installed a culvert and a guard rail at the bridge site, which is now just a foot path and it will not support vehicular traffic. The Township installed a guard rail along Dorset Drive adjacent to the pond for safety and this area would be disturbed and compromised. He feels that the only viable access is the current access being used by lots 56 and 59.

Eric Pavilonis, 1104 Dorset Drive, said that the private drive access being discussed already services four homes and is being maintained by those homes. He said that the

accesses being discussed are located in wetlands and he feels that this is an issue. He bought his house because of the pristine area and he is dumbfounded to hear that the open space behind his house could possibly be developed.

Lenore Larry, 1134 Dorset Drive and President of the Spring Meadows HOA, informed the PC that the homeowners met on January 11th to express their opposition to the development of the Boor property. The main reason is that they purchased their lots with the understanding that there were 76 developable lots in the subdivision and this info was conveyed to them in a restrictive covenant which is provided to each homeowner who buys property in Spring Meadows. Mrs. Larry said that the HOA unanimously opposed the subdivision at 1128 Dorset Drive.

Lloyd Roach, Meetinghouse Road, said that the rights of 75 homeowners needs to be considered versus the right of one property owner that wants to change the rules 25 years later.

Kathryn McDonald, 1149 Dorset Drive, asked what the net difference is in the open space from the original plan to the proposed plan? Mr. Crawford said that the open space calculations were done by the Township Engineer. The open space requirements would be lower than allowed under R-3 when Spring Meadows was approved. The maximum number of lots allowed to be built were 76. The question is whether the intent was effectively carried out.

Dan Sevick, 1141 Dorset Drive, said that he has a 1.4 acre lot. The change in zoning on the property from R-3 to R-1 has allowed for denser development than was originally allowed when he purchased his lot. Mr. Crawford said that there may be other lots that can possibly be subdivided since the restrictive covenant agreement does not effectively carry out the intent of no more subdivision and no more than 76 lots. As a result, the controlling factor will come back to the notes on the subdivision plan. Mr. Sagnor noted that lots 56, 59, and 44 are larger than four acres and that all three lots could possibly be subdivided.

Stephen Rushton, 1133 Dorset Drive, said that the residents of Spring Meadows are being victimized based on an erroneous process and technical issues. He asked for more information on the case law and the precedent of those cases? Mr. Crawford said that the case law dealt with plans approved based on assumptions and without getting too technical, the question becomes, "What is public notice to the world?" It is a legal concept which means is there sufficient documentation in the public record to constitute effective, enforceable deed restrictions?

Celeste Dwyer, 1103 Dorset Drive, asked if the decision is purely legal based or is any consideration given to the fact that the other 75 residents in the neighborhood are opposed to the subdivision? Mr. DiMarino responded that the Planning Commission is a recommending body to the Board of Supervisors yet the Planning Commission's goal is to forward a recommendation that can be followed by the Supervisors. The Planning Commission venue is the place for the voice of the residents to be heard, so that even if

there is legal precedent that has to be followed, the Planning Commission can suggest some various conditions that can be imposed and there can possibly be some compromising support in the decision which addresses the concerns of the residents. Mr. DiMarino said that the Planning Commission cannot “run rough shot over an individual’s rights”.

Paul DeJuliis, 1129 Dorset Drive, asked about the exhibits that were missing from the restrictive covenants. Mr. Crawford explained that the document makes reference to the exhibits and their absence is not fatal to the enforcement of the document and it does not create an ambiguity. The exhibits were the Description of the Spring Meadows Subdivision and the Common Open Space for Spring Meadows. Not having the exhibits doesn’t preclude the 76 lots from being incorporated into the subdivision. However, there is no language in the restrictive covenants prohibiting further subdivision. If the intent of the zoning was carried out effectively, there would have been a sentence included in the restrictive covenant which states, “No lot in the Spring Meadows Subdivision can be further subdivided.”. Documents need to be recorded to apply. A buyer of a lot is charged with the knowledge that is of the public record and available to the entire world.

Mr. DiMarino said that it is clear that the intent of the subdivision was 76 lots. He asked for no further questions on this issue.

John Robinson, 1125 Dorset Drive, asked if more than four houses would use the back access if it would become a public street? His driveway’s access is directly across from that private drive and safety would be a concern for him and his children.

Mr. DiMarino said that the next step is to have the Planning Commission Solicitor review the issues discussed at tonight’s meeting and to provide counsel to the Commission. There are some engineering issues to understand but that may not be possible until a fully engineered plan is presented. At the next meeting on February 10th guidance will be given to the applicant and a position will be formulated to present to the Supervisors.

Vincent Pro, 1183 Hampshire, asked if there is any right of appeal beyond the Supervisors if the plan is ultimately approved? Mr. Crawford said that there is a right of appeal on the basis that a plan is erroneously approved. There is also a question on whether the restrictions that exist are publicly or privately enforceable so there are some appeal options on a private basis under certain circumstances and the HOA may want to confer with its legal counsel.

The meeting was adjourned at 9:03 PM. (Boorse)

Respectfully submitted,

Quina Nelling
Secretary/Treasurer