

MINUTES

PRESENT: M. DeSapio (8:27 PM)
 T. Kratzer
 P. Lubitz
 R. Phillips
 S. Stryker
 J. Kopen, Attorney

ABSENT:

CALL TO ORDER

The meeting was called to order by S. Stryker at 7:04 PM.

NOTIFICATION

In order to ensure full public participation at this meeting, all members of this Board, and members of the public are requested to speak only when recognized by the Chair so that there is no simultaneous discussion or over-talk, and further, all persons are requested to utilize the microphones which are provided for your use by the Township. Your cooperation is appreciated.

Notification of the time, date and place of this meeting has been faxed to the Hunterdon County Democrat and Courier News and has been posted in the Kingwood Township Municipal Building at least 48 hours prior to this meeting and has been filed with the Municipal Clerk.

NEW AND PENDING MATTERS

Well Sub-Committee on Well Ordinance

J. MacConnell, Well Sub-Committee chairperson, reviewed the proposed changes.

Section 153-24(a) - removed a seasonality limitation if the well produced 10 gpm or more;
 - provided for three different types of testing to determine yield;
 - remediation plan for non-potable water to be approved by the hydrogeologist and County Health Department;
 - provides for a water storage plan for wells that have 1 gpm or less yields;

Section 153-24(b)(1) - added "copies of the forms";

Section 153-25 - shall be amended by adding the language of 153-28(a)(1) and 153-29(f);

Section 153-27(g) - revises the date to clearly define the time frame for seasonality to July 1 – October 31;

Section 153-28(a) – to be provided by the applicant on forms available from the administrative authority;

Section 153-29(f) – to increase the response time to ten days;

Section 153-29(k)(7)(c)- the proposed wording will, hopefully, eliminate the creeping subdivisions;

Table #1 - deleting footnote #3 in its entirety;

Section 153-35 - deleting existing subsection "b" and adding a new subsection "e" for the professional review of water storage plans;

T. Stover, well driller, was present this evening. He inquired about the requirement of "no well shall be down gradient of a septic system". He stated every well is down gradient from a septic system because it does not start at 50' in the ground. He hasn't seen much septic contamination in a well. He suggested the testing in the field be done but the remediation be based on the water test at the time of the Certificate of Occupancy, after the well has stabilized.

Yard Properties – Block 17, Lot 16.04 – Required Testing

M. Textores of Van Cleef Engineering was present this evening representing the owner of Block 17, Lot 16.04. Approximately a year ago, approval was granted for a septic system. The testing showed mottling above the permitted 24" level. The Board enacted a condition to require the applicant to provide a water quality sampling and testing for BOD, total choloform, nitrogen and TSS, for three years. An initial sampling before the system is used at all four ports, semi-annually for the next two years and the last two on an annual basis. The office has been occupied for approximately a year and there was no water in the ports so there was no effluent to test. The original intent was to test the ground water to see if the quality of the ground water was affected. The pipes are approximately 5' in depth and at the bottom of the zone of treatment.

It was moved by T. Kratzer, seconded by P. Lubitz and carried to accept water quality data when it is able to be collected. If testing cannot be performed, the Board requested a status report. All members voted **AYE**.

Block 22, Lot 17.05 – Bunker Hill – Request to be listed on Agenda

D. Daines, of Hill Wallack, was present this evening to discuss the letter to the Board of Health of October 19, 2009. He is present this evening to give the Board an opportunity to learn some of the facts about the status of this subdivision that it may not know or have knowledge. The subdivision was approved in 2005 with final approval granted in 2006 for a 10 lot subdivision. As part of the approval process before the Planning Board, the applicant had to go through the wetlands. The original application was for 11 lots. Bonds were posted in the amount of approximately \$500,000 to cover the improvements necessary for the 10 lot subdivision, which included grading, surface water management, contours of the streets and street elevations. All of the improvements were based on a 10 lot subdivision and were in compliance with the septic systems and well ordinance at the time it was approved. Since that time, Bunker Hill purchased the property in 2006. The subdivision was recorded in October of 2006. The development proceeded and the improvements were installed according to the T. Decker's specifications in December of 2007. Almost 70% of the improvements have now been installed, completed and accepted by Kingwood Township. The facts are not up for debate. They are documented. The performance bond has been reduced. There is approximately \$150,000 of improvements left to complete on the subdivision, approximately 30%. Mr. Severino, the applicant, has completed and sold one home and has a model home with a temporary Certificate of Occupancy (CO). The reason for the temporary CO is due to the fact the model home requires a detention basin. The economy has devastated the real estate market. He stated the applicant wanted to build a new speculation home designed for today's market. The new well ordinance applied to the remaining 8 lots. They have met with Ms. Kopen and Mr. Decker. The applicant has the inability to reconfigure this now already improved subdivision to comply with the ordinance. Mr. Decker agreed that the wells need to be placed on the highest point on the lot. With the finished elevation it is not possible for that placement on the 8 lots. The design specifics cannot be satisfied with the current layout. Since it is now the end of October, the seasonality and 3-part pump test cannot be complied with at this time. The applicant is shut down. The applicant cannot market the homes since he cannot tell a prospective purchaser when he will be able to obtain a building permit. D. Daines has reviewed the minutes of the Board of Health from the website. At the March 18, 2009 meeting, Deputy Mayor Burke referencing the ordinance stated it could be fairly overly punitive. He had spoken with Ms. Kopen who stated the ordinance provides recourse for an exception if there was a hardship situation. Due to the partial completion of the subdivision, it is not fair or equitable to apply the well ordinance to this applicant. The Board should weigh the equity and the facts. The applicant is requesting the Board look at the subdivision and the 8 lots and agree with the applicant that this is one of those extraordinary hardship situations. He stated the applicant is shut down and has several millions of dollars that are locked in to these 8 lots. The applicant is unable to do anything. All of their proofs are documented, the recorded subdivision, the original performance bond, the partial release and acceptance that 70% of the improvements are completed. He is requesting the Board respond or engage in a discussion with the applicant.

F. Severino stated prior to filing the map, he was required to tender \$64,000 for the offsite work to the benefit of the Township. There has been \$100,000 of taxes paid on a buildable lot. When he submitted for his third building permit in June, he was told he would have to do a pumping test to determine the suitability of whether or not he can build on the lot. He is not in a place to test the suitability after spending those funds. In his approval, if he complied with all the requirements of the resolution, he would be able to obtain a building permit. Should he have to perform another test to see if he can build another home? He is unable to sign a contract with a prospective purchaser, since he cannot tell them

when he can deliver the house. His business is shut down. He made a big investment with the subdivision approval. There has been a lot of money spent on that reliance and money that went to the Township.

J. Kopen stated the Board was copied with her response to T. Carroll in regard to the F. Severino's comment on the general applicability of the well ordinance to this already approved subdivision. She has checked the case law as well as the DCA in regard to the applicability. The type of ordinance that does not apply after a subdivision has been approved is one for a change in zoning. In regard to ordinances for public health and safety and police, case law indicates that the ordinance does apply. In terms of the applicant's request for a waiver or hardship application, she did point out to D. Daines that the well ordinance does provide for an avenue for the Board to take action if the permit was denied. The applicant would need to apply for a permit and be denied. She advised D. Daines that if he wanted the possibility of the Board to take any action under the way the ordinance is written, the applicant should make an application for a well permit. She does not believe the procedure was followed.

D. Daines stated there are court cases specific on the point of grandfathering of vested rights. The court cases support, under the facts, an equitable estoppel for a hardship exception. Everyone will be in litigation. The Board will be sued and the mortgage will go into default. It will be a protracted litigation. Under the doctrines of equity, the ordinance does not have any grandfathering provisions for previously approved substantially completed subdivisions. Under the courts, a property owner does not have to come before the Board in order to seek equitable estoppels or a hardship exemption. The ordinance does not have those provisions. The fact that the ordinance does not provide for a hardship exemption or an equitable estoppel, does not mean the Board does not have the right to grant that request. He is just giving the Board an opportunity to try and do something so that the dog running away with the bone is not the only one making money on this matter.

F. Severino stated he is being put into the category of a subdivision. Since it is an improved subdivision, he is not in the same category of a subdivision. He went through all the designs and approvals from a dozen different organizations. Compliance with the approval grants him the right to the building permits and Certificate of Occupancy. It is not fair to require him to comply with the ordinance for a single lot.

P. Lubitz stated as it stands a remedy was outlined for you to apply for the well permit and be denied. The denial might have allowed us to take some sort of action. He stated what he is hearing is that the Board disregard the advice of their counsel.

D. Daines stated there was an application for Lot 17.06 of which the requirements were not completed. The inconsistency of the position of saying you have eight individual lots, however, if you apply for and get a denial of one lot, the Board would allow an appeal for the other seven lots. It is internally illogical and inconsistent. P. Lubitz responded the Board was not drawing that conclusion.

D. Daines indicated the applicant had applied for a well permit. J. Kopen responded Bunker Hill had applied for a well permit for Lot 17.08, however, the application was incomplete and not accompanied by the correct escrow check. J. Kopen further stated F. Severino was advised of the deficiency. The Township waited for a period of time for the escrow check to arrive. It did not arrive and the Township returned the application and fee. After the application and fee was returned, the escrow check arrived. The Township telephoned your client and spoke with F. Severino's son. He responded he would be forwarding the application but that he would have to locate the application. The application was never resubmitted. The actions of the Township were not to be construed as a denial of the application.

D. Daines stated it is the role of an attorney to advise the Board as to law. The attorney does not tell the Board the substantive conclusions on the merits of the questions based on the facts. He stated J. Kopen was crossing that line. She is rendering opinions that this Board is obligated to make by providing certain facts that are not a legal opinion. It is the same as a hardship waiver. Her responsibility is to look at the facts and render an opinion. She should not be providing a legal conclusion. The Board should look at the facts and situation and make a determination. Is this an exceptional circumstance that has an applicability for equitable estoppel? The Board should be making that decision.

J. Kopen disagreed with D. Daines comment. She has stated what her advice to the Board is and will stand by it.

F. Severino stated he submitted an application for a building permit. He was advised to go to the Township website to review the ordinance. He stopped the application for the building permit. Does he have to wait to see if a neighbor is happy with their well? He cannot comply with the ordinance because all of the engineering has been done. The engineering in the ordinance does not suit him. He needs to address the matter to the whole Board. When is the Board going to deny the permit? He is still stuck on the seasonality. It will put him out of business.

D. Daines stated the Board does not want to discuss the inequities J. Burke mentioned. He stated if it is the Board's decision then it is the wrong decision.

T. Kratzer inquired about the time frame for the houses. He stated there are two in place. F. Severino responded one of the houses is occupied and the other is a model, which is for sale. On the model, he has to install a basin. The well and septic have been approved. F. Severino stated he was very cautious and did not close on the property until the plat was filed. F. Severino stated the third building permit was rejected due to the new ordinance. F. Severino stated no testing has been done on the property.

P. Lubitz inquired as to what is the hardship for not doing the well testing. D. Daines responded they were focused on two inequities, seasonality and suitability on 8 lots. He stated it is a substantially completed improved subdivision with two well permits under the prior well ordinance. He heard from the Board's counsel and secretary that the applicant will have to comply with the 2009 amendment and it will apply to all eight lots. The applicant does not know what conditions, impacts or feasibility will result from those tests. The water quality at the pump is affixed to the well head and is a controlled source. If the new ordinance wipes out these eight lots, it is an economic hardship we will argue. There are court cases that will support their argument. It is a hardship that the applicant is equitably stopped from developing the eight lots.

F. Severino stated he is not concerned that the well will not show capacity but notifying the neighbors. The neighbors received notification of the subdivision when the application for subdivision was done. He has all this money invested and concerned if someone states they are not getting enough water he will not be able to build. He would rather have done the testing up front. The wells would not be approved until they pass a chemical analysis. 99% of the wells do not pass and need to be treated. He inquired about how he would get a passing water quality test until he installs a treatment facility in the house. He has a situation on the lots that would prevent him from locating the wells at the high point of the lot and the distances between the wells and septic on the adjacent lots.

D. Daines stated there are several millions of dollars accumulating interest that are frozen. He has not received an official determination by the Board.

F. Severino stated he only builds a house when the lot is sold. The ordinance provides only a small window for the year. He is shut down. He cannot sell a house if he doesn't know if he can get a permit. There are a lot of obstacles in the ordinance. He inquired why he should do the 3 part test. It is \$7,000 for the well and \$1,500 for the witness fees. It is \$10,000 being spent when he knows it will not get him to where he wants to go.

D. Daines stated a building permit has been denied. There are unique facts that the ordinance does not apply to this subdivision.

P. Lubitz stated it is not a hardship but a disagreement. D. Daines commented it is an equitable estoppel disagreement. P. Lubitz stated the ordinance is in black and white. The Board would like to accommodate his concerns but a route was given to where this might have been able to be resolved and the applicant chose not to take it.

D. Daines stated the permit extension act answers the question about why the lots are not sold. It is the economy.

P. Lubitz stated the seasonality was a minor portion. It is a terrible economy. He wished the applicant would have performed the well test and given the Board the opportunity to rule on the high point of the lot. The Board never had that opportunity.

F. Severino said he had the log of the two wells that had been drilled and they were done in the seasonal testing period.

D. Daines stated is it an official final decision of the administrative body that the 2009 ordinance applies to this subdivision after a deliberation of the facts?

J. Kopen responded it is her advice to the Board that this ordinance does apply to the subdivision. She does not think this is a hearing on any application because they have failed to take the proper administrative remedy available to them.

D. Daines stated equitable estoppel does not require administrative remedy. It is whether the Board deliberates the facts and determines equitable estoppel.

Approval of September 16, 2009 Minutes

It was moved by P. Lubitz, seconded by R. Phillips and carried to approve the minutes of September 16, 2009. All members present voted **AYE**, except T. Kratzer, who abstained.

Reserve Septic Test Sites – Letter from T. Decker, Twsp. Engineer

The Board reviewed the letter from T. Decker. The Board requested additional information such as the advantages, disadvantages, cost benefit, cost for homeowner and if any delay was involved.

Well Ordinance

P. Lubitz stated since some discussion was had with regard to a workshop on the ordinance, possibly the professionals could attend and the well subcommittee.

E. Niemann stated she is concerned that if the other committees be invited to come, an announcement be made that it is a working session between the subcommittee and the Board. A comment period would be allowed after the discussion. If a large amount of members attend with a lot of questions, it might tie up the time of the professionals.

J. Kopen stated she can provide a revised draft ordinance that reflects the comments made this evening.

It was requested the changes and/or amendments be highlighted.

CORRESPONDENCE

M. DeSapio announced S. McNicol has obtained the septic reports for the 3rd and 4th quarter of 2008 and the first half of 2009.

PRIVILEGE OF THE FLOOR

S. McNicol commented on T. Decker's letter regarding reserve septic systems and inquired about the certification at the time of subdivision, cost on a reserve septic field testing and T. Decker's recommendation of adding a reserve septic site.

P. Lubitz requested a brief outline of the ordinance for the Board to review.

There was further discussion on the well ordinance and the need for the well drillers to have the well permit in hand prior to digging the well.

A. Belle commented the agenda was not the website for this evening's meeting and requested it be posted in a timely fashion.

ADJOURNMENT

It was moved by M. DeSapio, seconded by P. Lubitz and carried to adjourn the meeting at 9:27 PM. All members present voted **AYE**.

Respectfully submitted,

s/Diane Laudenschach

Diane Laudenschach, Secretary