

LOWER MACUNGIE TOWNSHIP  
ZONING HEARING BOARD MINUTES  
April 27, 2011 (revised 6/9/11)

The April 27, 2011 continuation of the Zoning Hearing Board hearing regarding the Thomas Streck, et al, (Appeal #10-017) substantive challenge was called to order at 6:35 p.m. by Acting Chairman, William Royer. Members present were William Royer and Brian Higgins. Also in attendance were Mark Malkames, Esq., Solicitor to the Zoning Hearing Board for Appeal # LMZ 10-017, James Lancsek, Zoning Officer, and Bobbie Brown, Keystone Consulting Engineers, Inc. The hearing was held at the Lower Macungie Township Municipal Campus, 3400 Brookside Road, Macungie, PA 18062.

Others present included, Robert Rust III, Esq., representing the appellants; Peter Lehr, Esq. and Richard Somach, Esq., representing Lower Macungie Township; and Joseph Zator, Esq. and Andrew Hoffman, Esq., Zator Law Offices, representing David Jaindl.

Atty. Malkames asked if he could go over the exhibits previously submitted at the last hearing in order to ascertain that he has all of the exhibits.

- Exhibits submitted by the appellants at the April 13<sup>th</sup> hearing were: A-1 thru A-6, A-7 was the petition and, A-8 (a copy of the MOU from the website, which was not formally submitted at the last hearing).
- Exhibits submitted by the Township include: R-1 thru R-6
- Exhibits submitted on behalf of Jaindl include: J-1 thru J-20 (submitted at the January 17, 2011 hearing), J-21 and J-22, and J-27 thru J-30.

Atty. Zator then submitted Exhibit J-23 which includes the following:

- Letter to Zoning Hearing Board from Atty. Malkames, dated March 17, 2011.
- Motion to Dismiss Portions of the Petition to the Zoning Hearing Board.
- Petition of the Appellants to the Zoning Hearing Board
- Notice of Land Use Appeal
- Order of Court, signed by Judge Varricchio, dated 1/31/11.

Atty. Zator cited Sections 909.1 and 1002.A of the MPC to explain that substantive issues would be processed by the zoning hearing board, but procedural issues would go to the Court of Common Pleas. He also cited Section 3 of the appellant's Grounds for Appeal of which a certain number of these arguments are procedural and should not be before the zoning hearing board. He then submitted Exhibit J-25 – 3 pages of the petition and court appeal and states that paragraph 30 of the petition and paragraph 32 of the court appeal are identical.

Atty. Zator then stated that there are nine separate claims raised by the appellants, **three of which raised exclusively** for this board. The remaining six claims must find homes, they cannot both be looked at by the Board and the Court. He explained procedural matters and substantive matters. He presented an illustration by using nine binders labeled with each of the nine titles, as follows:

1. Diminished Property Values (Procedural) \*\*
2. Irrational, Arbitrary & Capricious (Substantive)
3. Improper Methodology **in Enactment** (Procedural) \*
4. Improper Public Notice (Procedural)
5. DeFacto Adoption/**Due Process** (Procedural)
6. Failure to Amend Comprehensive Plan (Procedural)
7. Environmental Impacts (Substantive)
8. Spot Zoning (Substantive)
9. Contract Zoning (Procedural)

Therefore, there are 3 issues left. The Court Order has the Procedural issues for the court to decide. He submitted Exhibit J-26 – copy of the court order. The appellant’s attorney will submit a brief next week and Jaendl brief will be argued in Court in June. Mr. Zator submitted Exhibit – J-31 – a one-page memorandum to further illustrate the issues that will be before the Board and the others before the Court. Judge Varricchio has already ruled that the six procedural issues will be decided by the Court and not this Board.

Atty. Rust stated that this Board represents these citizens of the Township as it relates to their property rights. He agrees that the Judge has accepted a number of these issues as procedural, however, some of these issues should be looked at by the Board to see if any aspects of these items are substantive. This land was protected for more than 30 years as agricultural land and in a short period of time under circumstances where the public had very little, if any, input we went to a new set of ordinances, both zoning and SALDO.

Atty. Malkames stressed that it is very important for the parties to understand that if they wish to create a record of correspondence as submitted to Atty. Malkames, Mr. Royer or the Board, to mark them as exhibits so that the Court will not have a problem following the events of these hearings.

Atty. Rust questioned whether he could offer some exhibits pertaining to the motions being discussion tonight. They would include an affidavit from Atty. Miles regarding Act 167 and an affidavit from Atty. Miles regarding a letter Atty. Rust wrote to the Board of Commissioners questioning their methods prior to adopting the ordinance. Atty. Zator suggested it might be more appropriate to submit these exhibits during the argument phase of this appeal. Atty. Rust will hold them until later.

(\*) Note: The Board later determined this item as Substantive (See page 4)

(\*\*) The Board was not sure if this item is Procedural or Substantive. It decided to leave the argument in (See Page 4).

Atty. Lehr submitted, as Exhibit R-7, a true and correct copy of the brief of the respondents he represents. He stated that the Petition contains nine grounds for relief, three of which are unique to the petition. The other six are listed in the Order from Judge Varricchio dated **January 31, 2011**. He cited in his brief that the Court of Common Pleas has the ability to determine what is within the Board's jurisdiction. He also spoke about piecemeal litigation followed by piecemeal appeals. He concluded by saying the Board has the authority to hear and consider the substantive arguments.

Atty. Rust stated that if the Board feels there are some substantive issues in the other six items list by the Court as procedural, they should be allowed to look into the substantive issues and have the ability to make a determination.

Atty. Zator rebutted by stating that once the Court of Common Pleas took jurisdiction, the Board no longer has jurisdiction.

Atty. Rust stated that the Board needs to look at the equities and values and ask the question "Are there substantive issues in the six binders put before you?"

Atty. Zator state that because the Court has determined the six binders as procedural, the Board is bound by that decision.

**There was a 10 minute recess.**

Atty. Malkames stated that the Board requested an executive session with him. He asked Atty. Rust to explain to the Board his reasons for substantive rights of the appellants for each of Atty. Zator's "binders". Atty. Rust explained his thoughts regarding the six issues.

A motion of Mr. Higgins, second of Mr. Royer, and a unanimous vote, to go into executive session to discuss points of law with Atty. Malkames.

**Executive Session from 8:05 to 8:35.**

Mr. Royer called the meeting back to order. Atty. Malkames stated that the Board went into executive session in order to ask several questions of him. He stated that there were no votes taken in executive session.

Atty. Malkames explained that this is a difficult issue. The Board is left to determine what was intended by a judge's **order**. The concern is that some of these issues are duplicative. The distinction between planning and substance is very unclear. Some things cannot be defined as substantive or procedural. This is a unique process. He feels that the Board, having heard from counsel is able to address the issues tonight and provide the parties with guidance as it pertains to the motion to dismiss. The Board

should not hear matters on procedural issues. He recommends that the Board go through each of the six allegations of the petition, as indicated in Exhibit J-31, and strike some of allegations. #3 and #6 are procedural as acknowledged by everyone and #7, #8 and #9 are substantive.

The Board gave their decisions per the Memorandum issued by Atty. Zator as Exhibit J-31, as follows:

#1 - Improper Public Notice: Mr. Royer stated that he views this item as procedural and Mr. Higgins agreed. A motion of Mr. Higgins, second by Mr. Royer, and a unanimous vote, to dismiss the argument of Improper Public Notice. The allegations of paragraph 31 and 33 of the petition are dismissed.

#2 - Defacto Adoption/Due Process: Mr. Royer and Mr. Higgins believe this item is of procedural nature. A motion of Mr. Higgins, second of Mr. Royer, and a unanimous vote, to dismiss paragraphs 30 through 35 of the petition.

#4 - Improper Methodology in Enactment: The Board determines this item to be a substantive issue. A motion of Mr. Royer, second of Mr. Higgins, and a unanimous vote, to deny the request that paragraphs 43 and 44 be dismissed from the petition.

#5 - Diminished Property Value: The Board believes Paragraph 46 should stay as is. A motion of Mr. Higgins, second of Mr. Royer, and a unanimous vote, to deny the dismissal of paragraph 46 from the appeal.

#3 – Failure to Amend Comp Plan and #6 – Contract Zoning: A motion of Mr. Royer, second of Mr. Higgins, and a unanimous vote, to accept failure of #3 and #6 as being procedural and dismiss those counts from the zoning appeal before the Board.

Judge Varricchio should make a ruling on June 20, 2011 and there will be more information after that ruling.

Atty. Lehr asked the Board to issue a decision for the Township to respond to the subpoena for information to the appellants. The Township will provide the documents requested by May 17<sup>th</sup> so that all parties would be able to address them by the May 26<sup>th</sup> meeting.

Mr. Higgins suggested that the next motion be discussed at the May 9<sup>th</sup> meeting and then the parties would be able to discuss the documents from the subpoena at the May 26<sup>th</sup> hearing.

Atty. Malkames asked if the subpoena was issued. Mr. Royer will sign the subpoena tonight and Atty. Lehr will issue it as an exhibit. Atty. Malkames said to offer it as an exhibit at the next meeting.

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This hearing will be continued on Monday, May 9, 2011 at 6:30 PM to be held in the regular meeting room in the Township building at 3400 Brookside Road, Macungie PA 18062.

These minutes are to be a summary only of the events of the meeting. The transcript should be consulted for completeness and accuracy.

Respectfully submitted,  
Bobbie Brown, Board Secretary

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