

The regular meeting of the Delaware Township Board of Adjustment held on the noted date, was called to order by Chair Cline at 7:30 p.m., in Township Hall, Sergeantsville, New Jersey, as supported by the virtual meeting procedures via ZOOM.

Ms. Denise Filardo was introduced as the person to become the Administrative Officer for both boards, Planning Board and Board of Adjustment. It was noted that she is currently employed in Clinton Township and has performed similar duties there, for 17 years.

PLEDGE OF ALLEGIANCE

STATEMENT

Chair Cline read a statement noting that the requirements of the Open Public Meetings Act had been met.

ROLL CALL

Present: Buchanan, Emmons, Fowler, Gilbreath, Kenyon, Manley, McAuliffe, Warren, Cline

Absent:

Also present: Board Attorney Goodell, Board Engineer O'Brien, Board Planner Kyle

MINUTES: June 9, 2022

The Board discussed the minutes, noting changes and typographical errors. It was moved by Member Manley to approve said minutes. Member Emmons seconded the motion. Said motion was approved by voice vote, with an abstention by Members Kenyon, McAuliffe, Warren.

June 30, 2022

The Board discussed the minutes, noting changes and typographical errors. It was moved by Member Manley to approve said minutes. Member Emmons seconded the motion. Said motion was approved by voice vote, with an abstention by Members Kenyon and Warren.

Chair Cline noted that a Certification of Absent Members has been signed by each member that was absent at a meeting for this application. Said certification notes the meeting that a member missed and the verification that said member had listened to the meeting recordings.

It was noted that Member Warren is in attendance via Zoom. Attorney Goodell asked Member Warren to certify that he had listened to the recording of the meeting that he had missed. Member Warren stated that he will sign the certification when he is able to get to the office. Attorney Goodell asked Member Warren to verify that the statements of certification are true, subject to punishment if found not to be. Member Warren agreed.

It was noted that there is a full Board present, with both alternates present. Administrative Officer Klink noted the alternates, #1 is Cullen McAuliffe and #2 is Seth Buchanan.

Chair Cline presented a plaque and gift to Administrative Officer Klink for her 44 years of service with the Board of Adjustment and for all of her service in her additional positions with the Township.

MEMORIALIZATIONS - none

APPLICATIONS

Brant Switzler, Block 55, Lot 2, use variance approval requested for tennis training facility, continued from 04.29.21 special meeting; and regular meetings of June 10, 2021 and July 8, 2021; continued from special meeting of July 22, 2021; adjourned from November 11, 2021 and February 10, 2022 meetings; continued from the March 10, 2022, April 14, 2022 meetings, and special meeting of May 19, 2022 and special meeting of June 30, 2022.

Chair Cline stated that all testimony has been completed. He stated that the Board heard from members of the public and he thanked all members of the public who spoke. He noted that each public comment was valuable to the Board members for the deliberations.

Attorney Goodell began his charge to the Board. He noted that the Board has heard this application for about one and one-half years. He noted that all facts have been submitted by all parties. He noted that these facts will be applied to the law and determined if applicable.

Attorney Goodell stated that the beginning place is what is zoning and what is the power to zone. He noted that zoning represents a restriction by the government on landowners' property. He noted that the municipality must comply with MLUL requirements and guidelines. He further noted that three municipal bodies/documents implement zoning restrictions, being the Planning Board, the Township Master Plan and the Township Governing body, the Township Committee. He noted that the Land Use ordinance sets the requirements for the zones. He noted that the applicant has the burden of proof to meet all requirements in order to grant a variance.

Attorney Goodell stated that Court case concepts are useful in interpreting land use. He noted that land use is by ordinance rather than by variance. He noted that the governing body cannot be usurped. Attorney Goodell noted that the Zoning Board through local conditions has wide latitude in delegated discretion. He reminded the Board that the variances run with the land, not with the property owner or applicant.

Attorney Goodell noted that in this particular application, the subject property is a 30-acre lot in the A-1 zone which has permitted agricultural and residential uses. He noted that a tennis training facility is not permitted in the A-1 zone. He noted that this is a bifurcated application in which the applicant has asked the Board to consider the use before any subdivision or site plan application. It was noted that if approved, all subsequent approvals must be obtained.

Attorney Goodell discussed the requirements for a use variance, per the MLUL. He noted that the positive and negative criteria must be satisfied. He noted that the positive criteria for particular cases must have shown special reasons why a variance should be granted in a district restricted against such a use. Attorney Goodell noted that the negative criteria concerns the land use and specifies that no relief can be granted unless it is shown that there is not substantial detriment to the public good, or to the intent and purpose of Zoning Ordinance or zone plan.

Attorney Goodell noted that the positive criteria should include special reasons when considering this application for commercial use. He noted that the *Medici vs PBR*, a NJ Supreme Court case, is the most commonly used court case referenced in use variance applications. He noted that for an application for a use variance, the applicant must satisfy the statutory special reason standards, as related to zoning, per Section 2 of the land use law. He noted that promotion of the general welfare amplifies special reason for a typical use variance especially to certain users for development of a site in a community for the requested use.

Attorney Goodell noted that Mr. Simon has referenced the *Price vs. Himeji* case, another NJ Supreme Court case that follows *Medici*. He noted that this case emphasized detailed factual findings that demonstrate the need for the proposed use. This case also resulting in a decision that if no findings can be made available, such results could "sink" the application.

Attorney Goodell noted that the negative criteria require that there be no substantial detriment to the public good; nor any detrimental effect on the surrounding properties. Mr. Goodell also noted that that there be no detriment to the zone plan and zoning ordinance. He noted that the variance cannot be inconsistent with the intent and purpose of the zone plan. He noted that a use variance requires enhanced quality of proof and does require five affirmative votes.

Attorney Goodell further noted that the Board Member comments and opinions will help to show that the burden of proof has been met.

Chair Cline stated that this is the time for Board deliberation. He noted that there will be no comments from members of the public, the applicant's group, or the objector's group. He noted that he would give his comments first.

Chair Cline stated that there have been a number of hearings for this application. He noted that it is one of the more difficult applications for which the Board must come to a final decision. He stated that the Board has heard much testimony and there has been considerable time and testimony concerning the Master Plan. He noted that the applicant and his family have been part of the property for many generations. He noted that as proposed, the family farm would be used for a performance training facility to develop players to higher levels of play. Chair Cline noted that there was no data about how many would come from Delaware Township.

Chair Cline noted that #20 of the Township Master Plan references the need to encourage recreational facilities to meet the needs of all Township residents. He stated that he supports that goal. He noted that for the positive criteria, the site needs to be suited to such use and that the municipality will benefit from that use in that location. Chair Cline noted that there was no review of any other properties for suitability of the proposed use. He noted that Cane Farm is a property with small commercial enterprises and should have been looked at for suitability of this proposed use. Chair Cline noted that the application did not demonstrate this site to be particularly suitable for the proposed use.

Chair Cline noted that there has been significant input from the public. He noted that for the positive criteria, more Township children could benefit from this use. He noted for the negative criteria that the neighbors will be directly affected, in more negative ways than positive ways.

Chair Cline noted that there are several goals of the Township Master Plan that apply to this subject proposal. He noted that Goal 1 is to preserve land in its natural state and to protect natural resources; he noted that farmland preservation has not been discussed for this property. He noted that Goal 7, encourages agricultural diversity to provide a viable agricultural economy. He noted that Goal 8 is to foster farmland preservation. He noted Goal 21 is to continue recreational development of the Dilts Farm in a manner that will provide opportunities for the greatest number of residents.

Chair Cline referenced Goal 23, which is to provide public safety. He noted that there was much testimony from the neighbors about safety concerns with this proposal. He noted that the traffic expert stated that the road can handle the extra traffic. Chair Cline stated that he did not find this witness to be credible.

Chair Cline stated that Goal 29 is to maintain the rural character of Township roads. He expressed his concern that this was not thoroughly demonstrated in the engineering testimony.

Chair Cline concluded by stating that the applicant is a positive influence for Delaware Township, but stated that this property is not suited for this proposal.

Member Manley stated that he has spent much time going over all materials presented during the meetings. He noted that zoning is a system to develop land in an orderly fashion to prevent conflict with different uses. He noted that in a residential zone, residents look for that and have a reasonable expectation about how the town will develop. He noted that these zone expectations help everyone know what they are getting into when they move into town.

Member Manley noted that a commercial business in a residential/agricultural zone is a conflict requiring the request for a use variance. He noted that such a use variance request, AKA as a 'd' variance is granted in

exceptional cases. He noted that there needs to be shown that the site is particularly suited, with special reasons provided. Member Manley opined that no such suitability has been demonstrated.

Member Manley also noted that this is a rural lane with no commercial properties. He noted that the proposed use would become a destination for increased traffic. He noted that the objectors noted the increase in traffic. Member Manley stated that there was no actual traffic study nor were there any studies for similar facilities presented as a comparison.

Member Manley stated that the cumulative effect of the testimony presented is that there will be substantial detriment if this proposal is approved. He opined that the proposal does not enhance the zone plan or zoning ordinance.

Member Manley concluded by stating that he is voting against the application.

Member Gilbreath stated that she agrees with the comments of the two previous members. She stated that she tried to do the pluses and minuses of the application. She expressed an additional concern about the apartment within the proposed facility that would be the size of a house. She stated that the proposal seems to be a detriment to many ideas discussed and expressed her concern of the future use of the remaining land.

Member Gilbreath noted that there have been no marketing studies, especially targeting younger children. She stated that this proposal appears to be more of a high-end tennis facility. She noted that the road is a problem and spoke to her own experience with getting in and out of sports complexes with her own children. She opined that traffic is a problem.

Member Gilbreath stated that she is very supportive of the applicant, but cannot support the application at this location with a lack of particular suitability for this site.

Member Emmons stated that he can appreciate the desire to start a business. He also noted that he is one of several generations of his own family within the Township. He stated that he thinks that a tennis facility would be a valuable service to the Township. Member Emmons continued by stating that there has been a lack of proof of direct benefit to Township residents. He noted that for a use variance, there need to be proofs that the people of the Township will be directly benefited.

Member Emmons stated that there seems to be no feature on the property suited to this use. He expressed his concern about traffic on a rural road and noted that this use would be more suitable on a state or county road. He also expressed his concern about the impact of lighting and extra noise.

Member Emmons concluded by stating that this is not the proper place for this proposal.

Member Fowler stated that he is happy to be part of this process and a part of this community. He noted that many emotions have been expressed throughout this application. He noted that he is empathetic to the proposal due in part to his own exposure and experience in sports activities in Delaware Township and other nearby communities.

Member Fowler noted that the challenge of this application is related to the subjectivity of the reasons. He noted that the Board works objectively. He noted that the lack of proof in such cases makes approval difficult. He further noted that the Board could impose restrictions and conditions but felt that too many would be needed for this proposal.

Member Fowler concluded that this is not a particularly suited site for this proposal.

Member Kenyon stated that she agreed with all that has been said. She stated that she has empathy for the applicant and his family, who are lifelong residents, and as parents who want to help their son. She noted that the lack of a business plan for the tennis facility makes her feel doubtful that the idea is credible.

Member Kenyon stated that the Board has to follow law and not emotion. She also noted that bifurcation caused a lack of information with no site plan that could be used to fully assess the impact of the proposal. She noted that for the positive criteria, no evidence has been given to show that the property is particularly suited. She noted that the road is a quiet, country lane with no data to show that the road could support the proposal. She stated that the negative criteria has not been satisfied that the variance can be granted without substantial detriment to public good. She referenced the lack of a site plan and detailed information.

Member Kenyon stated that she has scrutinized the master plan, the Zoning Ordinance and the presented information. She stated that the application has not satisfied the positive or negative criteria for the grant of a use variance.

Member Warren apologized that he was unable to be present in-person. He stated that he agreed with all previous statements. He also stated that it appears to him that the proposed commercial establishment will be a substantial detriment to the public good with a negative effect on the neighbors. He further noted that the subject proposal as presented is not open to the public and therefore the information presented is not significant to warrant the requested use variances.

Member Warren stated that he will be voting no.

Member Buchanan agreed that there has not been enough proof that this property is particularly suited to this use. He noted that this is a unique use and a creative solution for preservation. He opined that he would rather see this than a development. He noted that there are many conditions that could have been imposed by the Board.

Member Buchanan stated that the apartment proposal presents some difficulty for approval considering the lack of detail. He noted that the traffic information seemed lacking considering two county roads are within one-quarter mile of the proposed use. He stated that from a recreation standpoint, there could be benefit to the Township.

Member McAuliffe echoed most of the Board member comments, including those of Member Buchanan. He stated that he appreciates the applicant's attempt for this request.

Member McAuliffe stated that the A-1 Zone does not offer anything comparable to this proposal. He concluded by stating that there has not been enough evidence to outweigh the negative aspect of the proposal.

Chair Cline thanked all Board members for their comments. He stated that it is laudable that the applicant wants to promote recreational activity within the Township, but agreed with all that this is the wrong spot.

Member Fowler made a motion to deny the application as presented. Member Kenyon seconded the motion.

Roll Call Vote

Aye: Emmons, Fowler, Gilbreath, Kenyon, Manley, Warren, Cline

Concurs: McAuliffe

Nay, None

Does not concur: Buchanan

Absent: None

Chair Cline noted that the matter is concluded, the application is denied. He again thanked all for their attention to this matter.

Five minute break

Planning Board Update: Liaison Cline

Liaison Cline reported that the Planning Board met on July 5. He noted that there was an application presented for a minor subdivision, but stated that Board Attorney Goodell noted that the application should be for a major subdivision.

Liaison Cline noted that work continues on the Reexamination of the Master Plan and that it is very close to being done.

Correspondence

Administrative Officer Klink stated that the application for Block 23, Lot 6, GTG Builders has been scheduled for August 11, 2022. The Board asked Ms. Klink to remind the applicant that revised maps are needed.

ADJOURNMENT: 8:28 pm

It was moved, seconded, and carried to adjourn at the noted time.

Respectfully submitted,

Kathleen E. Klink

Administrative Officer
(signing off!)