

MINUTES OF THE ELIZABETHTOWN BOROUGH ZONING HEARING BOARD

May 2, 2016

The Elizabethtown Borough Zoning Hearing Board held a public meeting on Monday, May 2, 2016 at 7:00 P.M. at the Elizabethtown Borough Office, 600 South Hanover Street, Elizabethtown, PA. The meeting was attended by a quorum of the members of the Zoning Hearing Board.

The following matters were heard and oral decision rendered or other action taken:

I. Application of James Thomasson and Elite Collegiate Properties, LLC

The Board heard an appeal from the Denial of Permits for the use of the Property at 226-228 East Orange Street as a three unit apartment building, with an alternative request for Variance relief from §1905 of the Zoning Ordinance.

1. The Property is located in the R-2 Zoning District.
2. At the commencement of the hearing, the following interested individuals requested, and were granted, party status to the Application, by the Zoning Hearing Board:

Joseph Connovitch
Anne Ketchum
234 Orange St.
Elizabethtown, PA 17022

Angela Vago
525 S. Spruce St.
Elizabethtown, PA 17022

Jennifer Garver
545 S. Spruce St.
Elizabethtown, PA 17022

Kirby Kreider
233 E. Orange St.
249 E. Orange St.
Elizabethtown, PA 17022

Jill Gebhart
231 Arch St.
Elizabethtown, PA 17022

Victoria Rowe
225 Arch St.
Elizabethtown, PA 17022

3. The Applicant was represented at the time of the hearing by Eric L. Winkle, Esquire of Byler, Goodley & Winkle, P.C.
4. Objectors Joseph Connovitch and Anne Ketchum were represented at the time of the hearing by Melvin H. Hess, Esquire of Gibbel, Kraybill & Hess, LLP.
5. In addition to the Zoning Application and the documents submitted therewith (which are part of the record of this matter), the Applicant presented the following exhibit at the time of the zoning hearing:
 - a. Applicant's Exhibit "1", consisting of a Memorandum of Law, with cover correspondence from Attorney Winkle dated March 31, 2016, including attachments marked as Exhibit "A" (copy of prior ZHB Decision dated August 20, 2015), and Exhibit "B" (letter from Rodney Horton, Elizabethtown Borough, dated February 10, 2016, denying permits for use of 226-228 East Orange Street as a three unit residential dwelling).
6. Objectors Connovitch and Ketchum, by and through counsel, requested that the record of a prior hearing held before the Elizabethtown Borough Zoning Hearing Board with regard to the Property on July 6, 2015, be made a part of the record. After discussion, the Zoning Hearing Board agreed to permit the record of the July 6, 2015 hearing to be made part of the record. A copy of the transcript for the hearing held on July 6, 2015 was thereafter submitted to the Zoning Hearing Board Solicitor, via correspondence dated May 3, 2016. The record is accordingly marked as Objectors' Exhibit "1."
7. A hearing on the original appeal filed by the Applicant was scheduled for April 4, 2016. The April 4, 2016 hearing was continued at the request of counsel for the Applicant, via letter dated April 1, 2016. At the time of the request for continuance of the April 4, 2016 hearing, the Applicant also submitted the alternative request for variance relief from §1905 of the Ordinance. As part of the continuance request, the Applicant specifically waived any time requirements or restrictions applicable to the application under the Pennsylvania Municipalities Planning Code.
8. The first request for relief by the Applicant is an appeal from the Decision of the Elizabethtown Borough Planning and Zoning Director to deny permits necessary for the use of the Property at 226-228 East Orange Street as a three unit dwelling. The denial of

the necessary permits, and the reasons therefore, was set forth in correspondence from the Planning and Zoning Director to James N. and Jill M. Thomasson, dated February 10, 2016. In that correspondence, the Borough asserted the following:

- a. The previous property owners, 226-228 East Orange Street, LP, had applied for and received a variance to continue operating, beyond discontinuance, a three unit dwelling unit, at the address listed above. The Zoning Hearing Board formally issued a written decision on August 20, 2015 granting said variances.
- b. The previous property owners, 226- 228 East Orange Street, LP, subsequently returned to the Zoning Hearing Board seeking relief of certain conditions provided for in the August 20, 2015 Zoning Hearing Decision. Again, the Zoning Hearing Board considered the applicant's request and returned a favorable response to the Applicant on February 1, 2016. During the time the previous owners applied for variances to the Zoning Hearing Board, the Property was not in use as a three unit structure, evidenced by no license and/or permits having been issued or granted to the prior owners.
- c. Pursuant to Chapter 27 Part 20, Section 2008, Subsection H, "Variances", Use Variances are not permitted to transfer from one property owner to another property owner. Accordingly, the Applicant would be required to obtain the necessary variances from the Zoning Hearing Board. Furthermore, the previous property owners sought and received a variance for side yard setbacks to erect a parking space. The variance was subsequently approved by the Zoning Hearing Board in the August 20, 2015 written decision; recently the previous property owners applied for and received a zoning permit from the Borough to erect a parking space. Accordingly, the side yard variance would need to be applied for as the work was not completed prior to the transfer of the property and is therefore in conflict with §2008.H.

9. At the time of the zoning hearing on May 2, 2016, Rodney L. Horton, MPA presented testimony in support of the denial of permits set forth in his correspondence dated February 10, 2016, and stated the position of the Borough, asserting that the nature of the relief granted by the Zoning Hearing Board in its August 20, 2015 Decision was in the nature of a use variance, and was thus not permitted to be transferred from one property owner to another property owner, pursuant to §2008.H of the Zoning Ordinance.

10. The Applicant presented legal argument through its counsel, Eric L. Winkle, Esquire, with regard to the basis for the Applicant's appeal from the denial of permits. The Applicant confirmed that it had acquired title to the real estate at 226-228 East

Orange Street by deed dated February 10, 2016, a copy of which was included in the materials submitted by the Applicant. The Applicant, through counsel, asserted its contention as set forth in its Memorandum of Law that the Borough had erred in refusing to issue the necessary permits to permit the use of the property as a three unit residential dwelling, for the following reasons:

- a. Section 2008.H of the Ordinance does not apply. The Applicant contends that the granting of a variance from §2008.H of the Ordinance does not constitute a “use variance,” and accordingly, the restrictions set forth in §2008.H, prohibiting transfers of use variances, does not apply. The Applicant contends that the August 20, 2015 decision of the Board to grant a variance from §1905, “restarted” the twelve month discontinuance period for nonconforming uses as of the date of the Board’s decision (8/20/15), and accordingly, the nonconforming status of the property continues through at least August 20, 2016.
- b. Section 1901 of the Ordinance expressly permits nonconforming uses to be sold to a new owner and continued by the new owner.
- c. Nonconforming uses run with the land, as established by Pennsylvania law, and therefore, the transfer of the property to the current owner did not terminate the validity of the preexisting nonconforming use.
- d. By prohibiting the continuance of the asserted preexisting nonconforming use, the Borough has created an unconstitutional taking of property.
- e. Variances run with the land. The Applicant asserts that variances run with the land, and are not personal to any particular owner. Therefore, when the Applicant acquired the Property, any variance that had been granted by the Board to the prior owner was also transferred to the Applicant.

11. Objectors Connovitch and Ketchum, by and through their counsel, Melvin H. Hess, incorporated by reference the transcript from the July 6, 2015 hearing held before the Zoning Hearing Board. The Objectors assert that the Applicant has misinterpreted the Zoning Ordinance and Pennsylvania law; that, in accordance with the rules of statutory construction which govern zoning ordinances, the specific provision set forth in §2008.H—prohibiting the transfer of a use variance to a subsequent owner—would govern and prevail over the more generalized provision set forth in §1901 of the Ordinance, which permits transfer of nonconforming uses from one owner to another. Because the August 20, 2015 decision of the Zoning Hearing Board granted a use

variance, the Objectors concur with the position of the Borough, that §2008.H is the more specific provision of the Ordinance which governs the particular circumstances of the Application, and accordingly, the transfer of the variance to a subsequent owner is prohibited.

Greg Gobrecht, Borough Code Enforcement Officer, testified that the Property was posted in advance of the Hearing, and notice of the hearing was published and mailed to adjoining property owners. The proof of publication, proof of posting and copies of correspondence to adjoining property owners were collectively marked as Board Exhibit "1".

Following the close of testimony, the Board deliberated in Executive Session. Following the Executive Session, the meeting was reconvened, and a Motion was made to approve the Appeal from the Denial of Permits for the use of the Property as granted in the Zoning Hearing Decision dated August 20, 2015.

The motion was unanimously approved by the Zoning Hearing Board.

II. Application of Elizabethtown College

The Board heard a request from Elizabethtown College for a Variance from §702 ("Permitted Uses") to permit a change in use of the Property at 346 East Orange Street, Elizabethtown, Pennsylvania, from student housing to a college community meeting house to support and enhance diversity and multicultural services.

1. The Property is located in the R-2 Zoning District.
2. At the commencement of the hearing, Board Member Rick Jones recused himself from the hearing due to a conflict of interest. The following interested individuals requested, and were granted, party status to the application by the Zoning Hearing Board:

Evelyn Huffman
337 Orange Street
Elizabethtown, PA

Geoffrey Craig
334 Orange Street
Elizabethtown, PA

3. Testimony was presented on behalf of the Applicant by Robert Wallett, Vice President for Administration and Finance, and M. Caroline Lalvani, Director of Elizabethtown College Community Affairs.
4. The Subject Property is located at 346 East Orange Street, Elizabethtown Borough, and is located in the R-2 Residential Zoning District.
5. The Property is currently utilized for student housing of up to four (4) students.

6. There are existing permitted on-street parking spaces, but no off-street parking spaces for the Property.

7. The Property is located close to the center of campus. The College proposes to modify the use of the Property to use the building as a multicultural services community location. The Applicant describes the proposed use as “a space on campus where programming and learning come together to further the College’s efforts of positively supporting diversity among our students.”

8. The Property lends itself to community building use by having a community living room area, dining room area, and kitchen. The Property is large enough to accommodate student offices for programming, research, resources and professional offices for faculty and staff to provide learning and support opportunities.

9. Most users of the facility would be pedestrian in nature, and the proposed use would not generate any significant additional vehicular traffic.

10. The building would operate its community services from 8 a.m. to 11 p.m. each day. However, most activities would conclude by 9 p.m., and there would be no outdoor activities at all after 9 p.m.

11. All activities at the Property would be supervised by qualified college personnel.

12. There would be no residents at the Property, and no students or faculty would live in the building.

13. There would be offices for two (2) college staff members at the building.

14. The College does not anticipate that the Property will be used by large groups of people, but rather, will consist of small gatherings.

15. The individuals granted party status, Evelyn Hoffman and Geoffrey Craig, both testified with regard to certain parking concerns, but also confirmed that neither had any significant concerns with the modification in the use of the Property, particularly since it appears that most of the users of the Property would arrive on foot.

Rodney Horton, Elizabethtown Borough Zoning and Planning Officer, testified that the Borough took no position either in favor of, or in opposition to, the zoning request.

Greg Gobrecht, Borough Code Enforcement Officer, testified that the Property was posted in advance of the Hearing, and notice of the hearing was published and mailed to adjoining property owners. The proof of publication, proof of posting and copies of correspondence to adjoining property owners were collectively marked as Board Exhibit “1”.

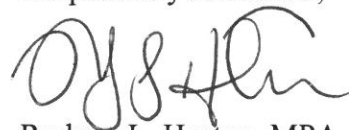
Following the close of testimony, the Board deliberated in Executive Session. Following the Executive Session, the meeting was reconvened, and a Motion was made to approve the Variance request from §702 of the Zoning Ordinance, to permit a change in use of the Property from student housing to a college community meeting house to support and enhance diversity and multicultural services, subject to the following conditions:

1. The Applicant shall comply with all other provisions and requirements of the Elizabethtown Borough Zoning Ordinance and Elizabethtown Borough Subdivision and Land Development Ordinance, if applicable.
2. The Applicant shall adhere to the testimony, exhibits and evidence presented at the time of the zoning hearing.
3. The hours of operation of the building on the Property shall be from 8 a.m. to 11 p.m., with no outdoor activities to occur after 9 p.m.
4. The Property shall not be used as a residence, student housing, or for any other residential purposes.

The Motion was unanimously approved by the Zoning Hearing Board.

At the conclusion of the Hearing, the meeting was adjourned.

Respectfully submitted,

 MRA

Rodney L. Horton, MPA
Elizabethtown Borough
Planning and Zoning Director