

**VILLAGE OF GERMANTOWN
BOARD OF ZONING APPEALS
MEETING MINUTES
February 10, 2016**

CALL TO ORDER: The meeting was called to order at 5:55 p.m.

ROLL CALL: Chairperson White, Members Filla, Hansen, Fritsche and Schleif. Attorney William Dineen, Counsel for the Board, were all present. Community Development Director/Village Planner and Zoning Administrator Retzlaff, Clerk Goeckner and Deputy Clerk Dobratz were also present.

APPROVAL OF MINUTES:

Schleif stated the second variance request his motion was specifically was that they maintain the same foot print of the original deck as discussed. **MOTION (Schleif/Fritsche) to accept the minutes of the January 13, 2016 meeting as amended, carried.**

Chair White read the policy and procedures of the Board of Zoning Appeals.

PUBLIC HEARING:

Chair White read the public hearing notice. The hearing is to hear any and all parties, their attorneys or agents, for or against the APPEAL as filed by **ROGAHN KELLY**, on behalf of **JBK COMPANIES, INC., AGENT for HERITAGE PLACE JOINT VENTURE**, appealing the decisions of the Village of Germantown Plan Commission from December 14, 2015, regarding the site plan application for the proposed six-building, 172-apartment residential development known as Saxony Village, for the property located at: **Tax Parcel GTNV# 224-992 located at approximately N116 W16200 Main Street (south of Main Street @ Park Avenue) totaling approximately 22.73 acres.** (The hearing was transcribed by a court reporter)

Attorney Dineen spoke to Member Filla and it is his understanding that based upon her appearing at a prior meeting involving the appellant, she is going to recuse herself from participating in this hearing. Filla confirmed this is correct. Attorney Dineen stated Filla will not be participating but can sit in the audience. The Board does have a quorum and does not have an alternate to take Filla's place at this meeting.

Chair White opened the public hearing at 6:00 p.m.

Attorney Sajdak spoke on how to proceed tonight in order to give the board background. The Village Planner has a power point presentation similar to what was presented to the Plan Commission. Attorney Dineen clarified with Attorney Kelly that he is seeking a certiorari review of the Plan Commissions actions. Attorney Kelly is requesting the review provided by statute that says any review of a plan commission's decision on a site application is heard by the Board of Zoning Appeals. The ordinances do not specify whether that is a certiorari review or de novo. Attorney Kelly said the preference is the board review the record as it was created by the Plan Commission.

Attorney Dineen discussed the powers of the Board of Zoning Appeals at 17.5293(a) that specifies they can hear and decide appeals when it's alleged there is an error. It's his understanding that's what the appeal is about and the appellant is looking to the board to exercise its powers under that section and 3(e) in which the board may reverse affirm, wholly

PUBLIC HEARING Cont.:

or partially or modify the requirements. Language in the Germantown ordinance is a version of the powers that the Wisconsin statutes grant to the Board of Appeals. Attorney Dineen asked Attorney Sajdak if he thinks the ordinance provision limits the board's power under the statute or if they're intended to be the same. Attorney Sajdak agrees they appear to be similar or identical to what the statute authorizes.

Community Development Director/Village Planner and Zoning Administrator Jeff Retzlaff was sworn in by Chairperson White. CDD Retzlaff presented the Village's information. The Saxony Village is owned by Heritage Place Joint Venture. He explains location, zoning, site development building and site plans for a proposed 172 unit multi-family apartment community called Saxony Village on Main Street. Gave background information, it's classified as village mixed use which in part calls for a for higher density residential use to support the Main Street commercial area. Gave background of the entire project, sewer service, storm water, signage, traffic impact study, staff recommendation and Plan Commission five amendments. Same presentation, same slides that were given to the Plan Commission.

Attorney Kelly examination, questions CDD Retzlaff regarding his testimony. Attorney Sajdak examination, questions CDD Retzlaff regarding his testimony. Attorney Kelly questions CDD Retzlaff again. Attorney Sajdak questions CDD Retzlaff again. Member Hansen asks for a definition of the density per net acre, was it eight units per acre or six units per acre based on the net area or overall area. CDD Retzlaff explained the definition of net that was used in the calculation for this project did not exclude un-buildable land. There was no exclusion of portions of the land from the density calculation. Attorney Dineen asks CDD Retzlaff if his interpretation of the density for the plan is consistent in the way he has been doing it in the past and on other projects. CDD Retzlaff states yes, consistent with the way it's been done.

Attorney Kelly calls Scott Bence to testify, sworn in by Chairperson White. Scott Bence, W178 N9912 Rivercrest Drive, Germantown, WI. Attorney Kelly questions Bence about the developments of his company. Mr. Bence gave background on his company, himself and explained the Saxony Village project proposal. Attorney Sajdak questioned Bence about the environmental contamination on the properties. Bence responded they have put together a contingency plan that has been submitted to the DNR and their green team met with the DNR as well as four other agencies that will work with the contamination issues. Attorney Sajdak questions on ground water issues and sewer. Bence is working with the Village Public Works Department.

Member Schleif asks Bence about water lines and sprinkler protection. Bence shows where connection would be and buildings require sprinkler protection. Chair White clarifies with Bence the number of units and the conditional approval.

Attorney Kelly has no other witnesses. Attorney Sajdak would love to call the Plan Commission members who are present here in the room this evening or any number of other individuals in the room today, the fact of the matter is that this is a review of the record before you. The Village does record Plan Commission meetings and do have the full meeting recorded. It can be played if the Board would like to hear, it is over an hour not including the public comments that took place in the beginning. So with that, nothing further.

Took a break before public comment, back on the record at 8:08 p.m.

PUBLIC HEARING Cont.:

Chair White spoke regarding public comment, the proceeding tonight is an appeal of the decision of the Plan Commission, evidence of what happened. It is not appropriate to comment on whether you support or agree with the Plan Commission or if you like or don't like the project. If anyone has testimony they want to give on what happened at the Plan Commission that will be accepted. With that understanding, is there anyone who wishes to speak. Attorney Dineen agrees with Chair Whites statement. Attorney Kelly stated he probably won't have any cross examination.

Chair White invited anyone in favor of the appeal to speak. No one present wished to speak.

Chair White invited anyone opposed to the appeal to speak. Dick Kent, Hilbert Lane, Germantown was sworn in by Chair White. Mr. Kent spoke about the importance of a property's geography to the deliberations of zoning and how it would bear upon tonight's issue. Talked about ingress and egress of the property.

Daniel Wing, N116 W16044 Main Street, was sworn in by Chair white. Mr. Wing spoke about the comprehensive 20/20 plan and how it talks about maximizing density. A thick file on this property can be viewed. Attorney Dineen stated there was nothing in the Plan Commission minutes that relate to what is being discussed. Chair White clarified what testimony can be given and can only consider the evidence that was before the Plan Commission. Wing stated as to what he presented at the Plan Commission meetings and there is a videotape of this. Comp 20/20 plan, maximum density. Attorney Kelly objects to Mr. Wing's testimony. Chair White understands and the board understands that its role is to review the evidence that is in the record and not to accept new argument and opinion from people.

Art Zabel, N97 W15737 Burr Oak Road, was sworn in by Chair White. Mr. Zabel is a trustee with the Village of Germantown and sits on the Public Works Committee. Zabel spoke regarding the Village has agreed to put in the developer's agreement to accept some of the costs of the sanitary sewer and water main connection. Some financial cost the Village and Planning, Public Works Committee has agreed to be part of the developer's agreement with this. It was not necessarily the total cost of the developer.

Attorney Kelly gave closing argument. Three specific aspects of the Plan Commission's decision that are being challenged; reduction in the number of units from 172 to 142, limitations on the number of buildings and the placement of building six and the requirement that there be gable roofs as opposed to flat roofs. After the Plan Commission made its decision, they requested that they reduce the decision in writing as is required both by statute and by Germantown's Ordinances. In Section 17.43(7), it says, "Upon request, the Plan Commission will provide in writing the reasons for its decision." That was asked for to consider whether an appeal would be appropriate. A follow-up letter was sent and asked again, they opted not to provide it. The only record they have is the minutes from the meeting. Spoke of the minutes included personal preference, did not identify an ordinance or other lawful provision. Asked the Board of Zoning Appeals to reverse the Plan Commissions decision on the three limitations.

Chair White asks Kelly if he takes the position that this was a denial of the site plan. Attorney Kelly does not, it was an approval with the addition of certain limiting factors. The Board of Zoning Appeals has the authority to look at each of those limitations and reverse

PUBLIC HEARING Cont.:

them. Chair White understands the appeal really is two components. The first has to do with the reduction in units. The argument is that as matter of law, this property is zoned in a way so that it would have be permitted 172 units on the parcel and the Plan Commission is powerless to re-zone the property to reduce the density. An error of law that they are asking to correct? Attorney Kelly said correct. The second issue relates to the removal of building six and the replacement of the flat roofs with gable roofs? Attorney Kelly said yes, they must base their decision on the facts, and the decision must be a product of judgment, not will. Chair White confirmed the argument is that they should of in response to your request, given a written explanation in detail, as the ordinance states, for their action. Because they didn't do that, then they are limited to the minutes. Attorney Kelly stated, exactly.

Member Hansen asked about the comment on having the provision in the Architectural Review Board about roofs and limitations to be stated all of the aspects of the design that they could provide requirements on or do they have discretion to make requirements that aren't stated in the items? Attorney Kelly responds there's a sliding scale between being narrowing tailored versus something broad that the landowner no authority in designing their property. Hansen asks if they are looking for the board to request or require a written determination of the Plan Commission action. Attorney Kelly responded they are not, they are requesting the removal of the three limitations. Plan Commission had an opportunity to do that and they chose not to. Now the appellant is bound by law to a 30 day deadline to appeal. Reason for enforcing that a 30 day requirement is because that is meant to assure that the board's decision is final. The Plan Commissions decision is final.

Chair White calls on Attorney Sajdak to speak. Attorney Sajdak stated code provision within the Germantown code doesn't say anything about 30 days. Chapter 68 states that it must be done within 30 days but that's 30 days upon request. As it relates to that particular issue, Chapter 68 doesn't apply here. The Plan Commission has the power, upon receipt of the site plan, to review, to determine whether it is in the proper form and contains all the required information and show compliance with this and other ordinances and plans of the village. The minutes are a highlight of what took place.

Member Fritsche stated that their decision has to be based on whether or not they believe the Plan Commission acted legally in making their decisions. Asked Attorney Sajdak if he believes that the powers granted to the Plan Commission for the determination of density would indicate that they have the ability to approve up to that. Attorney Sajdak stated that this district would allow for development in this case eight units per acre. It is different in every zoning district. Just because it says we're willing to go that high, it doesn't mean that you give the ability to automatically do that. Density is an introductory paragraph that states the RM2 residential district is intended to provide for multi-family residential development at densities not exceeding eight dwelling units per net acre. Nothing within the permitted use that says you automatically get eight units per acre.

Chair White stated it would be helpful to him in making a decision as to what the Plan Commission considered would be to have the transcript of the meeting. His preference is to have the village prepare the transcript. Adjourn the hearing, allow the members to get the transcript in advance of the next meeting, bring the parties back and proceed to deliberation then. Member Fritsche said that he would like to see the video footage of the meeting.

Attorney Dineen states they could watch the video without being at a public meeting;

PUBLIC HEARING Cont.:

however, it can't be discussed amongst themselves. You can watch it by yourself, review it to prepare before coming to the next meeting but not discuss with anyone else.

Chair White closes the evidence. Neither Attorney Kelly nor Sajdak have an objection to closing the evidence tonight.

Art Zabel asks a question about the material that is being asked from the Plan Commission, does that include all the backup material that was handed to the Planning Commission members the night of the meeting as a means to make a decision or just what occurred during the Planning Commission meeting? Attorney Kelly objects to it as the evidence has been closed and the appeal is based on the record. Chair White stated it is not necessary, not their job to look through the documents.

Member Hansen asks if it's not appropriate to look at publicly posted information. Attorney Dineen stated each of the members are going to watch the video, come back to the next meeting having watched that video and made whatever notes. You cannot discuss it amongst yourselves or with anyone else. Members are to watch a video of the hearing that was before the Plan Commission. Do not go seeking other documents unless you come back here and have a meeting to discuss what those documents are going to be in front of the parties so everyone you will know what is being done.

Attorney Sajdak states that the continuation of the hearing will not require publication of a new notice. Attorney Dineen agreed this is a continued hearing and does not have to actually be published in the paper. It will be publicly posted and everyone who is here at this meeting will hear when this is going to be continued. Member Fritsche is not available at the next regularly-scheduled meeting on March 9, 2016. Attorney Dineen recommends to keep the same four members. Chair White stated the hearing will be continued on April 13, 2016 at 5:30 p.m., same place.

ADJOURNMENT:

MOTION (Fritsche/Schleif) to adjourn the meeting at 10:34 p.m., motion carried.

Jilline Dobratz
Deputy Clerk