September 18, 2014

A regular meeting of the Allendale Planning Board was held in the Municipal Building on September 18, 2014. The meeting was called to order at 8:02PM by Mr. Quinn, Chairman, who announced that the requirements of the Open Public Meetings Act were met by the required posting and notice to publications.

The following members answered to roll call: Mr. Quinn, Mr. Sasso, Mr. Walters, Mr. Sirico, Ms. Sheehan, Mr. Zambrotta, Mr. Scherb, and Ms. Checki.

On a motion from Mr. Zambrotta, seconded by Ms. Sheehan, the minutes from August 21, 2014 were approved.

The matter before the Board was a concept review for a minor subdivision located at 848 West Crescent Avenue, Block 1501, Lot 21. Mr. Leonard Mazzone was the applicant. Mr. Dunn stated that there would be no swearing in as the Board was not hearing testimony as it was an informal proceeding. Under the MLUL the Board is allowed to hear a concept review so the Board can provide feedback and the owner can ask questions or ask for alternatives. Mr. Quinn said that before the Board starts he wanted everyone to know that there have been some legal issues that have been debated and the review is being challenged by a neighbor who has counsel representing the family tonight. Mr. Quinn asked Mr. Dunn to explain what the legal matter was in relation to the concept review.

Mr. Dunn explained that the neighbor whose last name is Schroeter resides at 856 West Crescent Avenue and whose property is adjacent to the Mazzone property. The Schroeters have an easement with the applicant giving them access or the right of way across the lands of the applicant. The Schroeters have hired an attorney Bruce Whitaker from McDonnell & Whitaker located in Ramsey. Mr. Whitaker is here tonight to state his objection on record to the concept review plan. Mr. Dunn continued with the fact that the Board's interest is limited in a concept review application. He said that the Board does not need to hear about lighting, drainage, configurations, traffic flow, or landscaping for a concept review. He also did not need to hear objections from other parties. The concept review is not a formal hearing and there will not be testimony or evidence given. It is indirectly in the statute under the Municipal Land Use Law (MLUL) if an entity is the owner of the land or a developer of the land and requests the time of the Board, the Board shall hear a concept review for a particular piece of land because it is informal and no evidence is heard. It is not binding on the Board which can decide entirely differently when the application comes before the Board. The applicant also doesn't have to come back with the same plans. It is really an informal review. He brought this to the Board's attention because there is opposition to the concept review and the Board has received communication from Mr. Whitaker. The Board does not wish to participate in a dispute between neighbors. The Board's focus is to benefit the community when it comes to development and to

be consistent with the Zoning Ordinances and the Master Plan. Mr. Dunn asked Mr. Whitaker to state his objection and focus on the legality of the process.

Mr. Walters said that before Mr. Whitaker started that he wanted the Board to know that he may need to recuse himself. He knew both Mr. Mazzone and Mr. Altieri (counsel for the applicant) through his line of work. Mr. Dunn responded that just because you know someone does not automatically disqualify you from sitting on the Board. He added that Mr. Walters could recuse himself if he felt uncomfortable. Mr. Walters decided to recuse himself. Mr. Dunn suggested that Mr. Walters sit in the audience so he could participate in the rest of the agenda. But there was nothing else on the agenda that evening so Mr. Walters left the meeting. Mr. Whitaker said that Calvary Lutheran Church was also on the agenda but Mr. Quinn said it was not as the Board worked on the Resolution at the August meeting. Mr. Dunn stated that he would send Mr. Whitaker a copy of the Resolution of Memorialization.

Mr. Whitaker said he was representing Ryan and Kelly Schroeter who live at 856 West Crescent Avenue. His clients became aware over the past two days that a conceptual review application had been submitted to the Board which will adversely affect their proprietary rights. The property was subject to a proposed subdivision which Mr. Dunn labeled as minor and Mr. Yakimik labeled as major. Mr. Dunn interrupted and said he would stand corrected and defer to Mr. Yakimik on whether he thought it was a major or a minor subdivision. Mr. Yakimik added that it might be a major depending on what was being proposed. Mr. Whitaker declared that the Board did not have the jurisdiction to hear the concept review application under the MLUL. Mr. Whitaker remarked that the Board did not have the authority to listen to the application tonight as it will create legal liability on the Borough of Allendale and should not be considered at this point. He said the MLUL says that an applicant is able to bring an application before the Board and a developer is defined as the owner of the property or anyone who has proprietary interest. The Schroeters have a proprietary interest and it is a matter of record as it is on the survey that there is an easement across the property. Without their consent to this application the Board does not have jurisdiction or the legal authority to discuss it. Mr. and Mrs. Schroeter have not given their consent. In discussing this application or in giving any direction at all results in disparaging the property rights of his clients and will create loss and liability. They will have to defend their rights in connection with any action on what you discuss tonight. Under the law it is called an ultra vires act and it means that if you do not have the jurisdiction you do not deal with it. That is what his first letter stated to the Board. The Schroeters have proprietary rights based on the 1949 deed and the finding in the engineer's report. The Borough engineer has acknowledged in his report to the Board that the Schroeter property is involved. Mr. Whitaker told the Board to look on page three under paragraph five in Mr. Yakimik's report where he states that lot 22 which is the Schroeter property would be part of this major subdivision. Mr. Whitaker questioned how the Board dare even consider hearing an application when a person who owns the property is not involved. He did not understand how the application got filed or processed as he felt this was fundamentally wrong. Mr. Whitaker said that as a land use attorney

the mistakes that were made with this matter were appalling. There is no question that Mr. and Mrs. Schroeter are a developer under the definition and a developer must consent even to a conceptual. They have not given their consent and will not give their consent to this application.

Mr. Whitaker was also upset that when he visited the Planning Board office around 12:15PM that day to see the plans that they were not on file with the Planning Board Secretary. He stated that this violates the MLUL and the Open Public Meetings Act and there are severe penalties when the documentation is not available. How does a property owner who obtains counsel see a plan that involves changing their rights, lot, and property when the office does not even have a copy? This is a very serious charge that can't be taken lightly. Mr. Whitaker questioned how the plans even get reviewed and noted that the application fee wasn't even paid yet. Mr. Whitaker said he was disappointed as he was not used to these types of problems happening in Allendale. He told the Board honestly and cautiously that there should be no discussion about the application because the property owner who is being affected and has a proprietary right on the property has not even seen the plans yet. He reiterated that the Board had no jurisdiction, that hearing the plans violated the MLUL and Open Public Meetings Act, and that the concept review should not be on the agenda tonight. He respectfully requested that the Board not consider the application or make comments on the concept review as any comment would create a substantial detriment to his clients' property rights. Mr. Whitaker declared that it had nothing to do with the dispute between neighbors but rather the Planning Board not having the right to make comments about someone's property when they have not applied to the Planning Board.

Mr. Quinn asked Mr. Dunn to respond to Mr. Whitaker's comments especially over the term developer. Mr. Dunn said he had reviewed everything and he respectfully disagreed with qualifying the clients as a developer under the MLUL. They may be a developer as a developer does have to participate in the application process but he did not agree with the Schroeters qualifying under the term developer. The Statute defines different classes of developers including the owners of properties and the holder of an option or contract to a property. Proprietary interests can be enforced or defended. There is an easement on the property that goes back to 1949 about access. Mr. Dunn felt Mr. Whitaker placed his client under the term developer and therefore they must participate in the application process. Mr. Dunn disagreed with this statement as he said it was erroneous and that it lacked legal standing. He continued with Mr. Whitaker suggests that an easement holder who doesn't consent to an application for development by an owner of lands can preclude that owner from qualifying as a developer, but this appears to be stated without any legal support. He referred to the case of Hartz Mountain Industries versus Ridgefield Park which went to the Superior Court Appellate Division. It is reported at 27 Municipal Law Review, Number 2, page 169 of June 2004 and on Cox under section 27-2. Hartz applied for a development tract which was not owned by the applicant but the significant bulk of the site was owned by the applicant. They needed the lot for access to the street and felt they had a proprietary right and it had to be included in the application. The Appellate division said that it was not to be interpreted that way. The trial Judge concluded that

the applicant was not a developer within the meaning of the statute since it did not own all of the land needed for development. The Appellate Division held that the word any as set forth in the stature is not interchangeable with the word all. The Court gave significance to the fact that the applicant was the owner of the majority of the land to be included in the development. Mr. Dunn stated that there are many easements on properties including utility companies, drainage, etc., and not all of these have to give consent to an application coming before a Board. Ordinarily an applicant would just notify those groups not ask for their consent. Mr. Dunn said that according to the case the application can be heard. He understands that there is an objecting neighbor and he was not underestimating the seriousness of the situation. He said the impact could be very significant. But to preclude the Board from hearing or commenting on the application seems to defy the intent of the Land Use Law with regards to the concept review. He advised the Board that we may have to address these issues in the future. But he didn't agree with Mr. Whitaker on the part that the Board lacked jurisdiction to hear the conceptual review. The Planning Board is required to hear concept reviews and nothing should detract from that requirement.

Mr. Dunn said that when Mr. Whitaker went to the Borough Hall Planning Board Office the application wasn't there. He wanted to know how the engineer was able to make a report without the Town having a copy on file. There were a number of copies originally and all Board members received copies. One copy was retained for the public and the town. Mr. Yakimik had the Town's copy when Mr. Whitaker came to visit today. If this is a requirement of the Open Public Meetings Act we need to make sure there is compliance at all times so that members of the public can see the plans. Mr. Dunn said Mr. Whitaker said they were in violation of both the Open Public Meetings Act and the MLUL but Mr. Dunn didn't see the violation of the latter. Mr. Dunn felt the concept review was different than an application for development. The MLUL does not say how many copies an applicant should submit especially with a concept review. Mr. Dunn said that under the MLUL sections ten through twelve were all about meetings and applications and that this is very defined in fact. Concept review is not defined under section three but it is defined under section 2.1. At the request of a developer the Planning Board shall grant an informal review of plans for development for which the developer intends to prepare and submit an application for development. Mr. Dunn said if he had thought added copies would have made a difference he would have suggested it years ago. The Open Public Meetings Act is different than the MLUL. Mr. Dunn concluded that unless he overlooked something he felt a concept review was different than a regular application for development and therefore not having the copies was not in violation of the Open Public Meetings Act.

Mr. Whitaker said he was appalled with the decision and told the Board that they were walking on thin ice. He stated he would give the Board a hypothetical circumstance. Mr. Quinn has property in town that a developer decides to build on and submits plans to the Board. Mr. Quinn only finds out from a neighbor that someone is looking at his property and he goes to the Borough Hall and finds that they do not have copies for him to look at there. Mr. Whitaker said that the Board is saying that anyone can submit a review without all property owners' consent

and infringe on the property owners' rights by discussing the plans. Mr. Whitaker noted that if any of this happened to any of the Board members they would be shocked and upset too. Mr. Whitaker remarked that when plans are not there for the public to look at but the engineer writes a four page report about the subject and everyone but the property owner has the plans that something is completely wrong. He asked Mr. Yakimik to confirm whether or not the Schroeters property on lot twenty-two would be affected. Something will have to be done to the Schroeters property in connection with the application regardless of the easement. The easement is an issue in and of itself. The Board doesn't have the right to eliminate an easement that has been in place since 1949 which Allendale approved. We believe this plan talks about the Schroeters property being part of the development plan. To hear that you would accept the procedure because it is a conceptual review without having plans downstairs to inspect violates a lot of laws. It has to stay on file downstairs. This is not the procedure that this Board has ever used or should ever use. My client has not consented to a conceptual review. He asked Mr. Yakimik again if lot twenty-two would have some improvement made on it and Mr. Yakimik said yes and that it will be important to this application. Mr. Yakimik added that there was development on the concept review on lot twenty-two. Mr. Whitaker and Mr. Dunn discussed whether the easement should be brought into the subject that evening. Mr. Dunn said he wasn't interested in how terrible his client feels about the plans. Your example of someone coming in and deciding he is going to make an application on someone else's property without knowing what is going on is not what this situation is about here. Mr. Whitaker argued that it was about this part. Mr. Dunn asked what the grievance would be. Mr. Dunn said that if we put this off a month to allow your clients to review the application and then hear it, is this your objection, and Mr. Whitaker agreed that giving his clients a chance to review would be what his clients would need. His clients are owners whose rights are affected and whose property would require development according to Mr. Yakimik. Mr. Dunn retorted do we need public service approval and Mr. Whitaker said you aren't listening to me. Mr. Dunn said he was listening. Mr. Whitaker said that Mr. Mazzone lived on lot twenty-one and his clients live on lot twenty-two. In order for his proposal to go forward work must be done on lot twenty-two. Lot twenty-two is as important as lot twenty-one. Mr. Dunn asked how he was supposed to know about it and Mr. Whitaker responded that Mr. Yakimik said it five minutes ago. Mr. Dunn said that he has it by virtue of reviewing an application that you say we can't hear. Mr. Whitaker replied because it requires development work on lot twenty-two and the Schroeters do not consent to it. Mr. Dunn said you are looking at the report that our engineer designed to make that determination and Mr. Whitaker retorted that it is all I can read because I haven't seen the plans. Mr. Whitaker suggested pushing it off a month so he could review the plans. If after analyzing he would send other reasons why jurisdiction doesn't apply. Mr. Dunn said we can't start litigating this before we even hear it. Mr. Whitaker responded that this is not about a utility company but a person who owns the property next door where work would have to be done on their property. You need their consent to even talk about it. That is why the word developers can be as wide and broad as it is under the

MLUL. Mr. Dunn wanted a provision from the MLUL that would say that he had the right to come in and see the concept review but Mr. Whitaker didn't respond.

Mr. Dunn said he was not concerned about the jurisdiction issue but he was concerned about the Open Public Meetings Act and the documents not being present. He left it up to the Board. Mr. Quinn said he thought this was unfortunate that there was no copy in the office and a mistake that needs to be rectified. He said he didn't know if it was because there are new personnel or not but it is only fair to anyone coming in from the public to be able to see that copy. He was personally concerned about that part. Mr. Yakimik said that for the record he had taken the Borough's file and failed to let the secretary know that he had it. She called immediately after Mr. Whitaker came to the office and asked if he had it and he said yes and he would get it back to the office as soon as he possibly could. He felt the document was on file with the Borough and gave the example of the Open Public Records Act that when requests are given, the Borough has a few days to get copies of the documents to people. Mr. Whitaker said it wasn't just a casual neighbor looking at the plans. Mr. Quinn said that all the dates for the plans seem to be in the last seventy-two hours which gave no one including Board members time to analyze the plans before the meeting. Mr. Quinn said he was concerned about moving forward this evening due to the rush of the situation and he didn't want to pursue any further action and put the Borough potentially at risk. He added although Mr. Whitaker says it is not a threat it is a threat. Mr. Dunn said that due to fairness and due process that all parties have an opportunity to see what is being proposed. Mr. Quinn felt that was the best way to go and some Board members agreed. Mr. Quinn suggested that the Borough have two copies of the plans for municipal workers and one that sits in the office and the other could be used for the checklist or reports. He continued that this would not be difficult to accomplish. Mr. Yakimik said that he has asked the Land Use Committee to increase the number of copies from ten to fifteen for all plans including concept reviews. Mr. Quinn reiterated that one copy should never leave the office.

Mr. Dunn said that there is no forty-five day requirement with a concept review application. Mr. Dunn said that they will have to eventually address the issues stated that evening because the same arguments will take place. It might not apply to a concept review, but it would apply to a regular application. People can make applications to their Boards but we will have to resolve this eventually. He suggested postponing the review. Mr. Quinn said the Board is not interested in getting involved in disputes between neighbors. Most members agreed with Mr. Quinn that they should not go forward with the proceedings that evening.

Mr. Mazzone said he started the concept review because he is trying to resolve issues between him and the neighbors. He didn't mind postponing it for a month. He asked Mr. Whitaker for his clients' consent but Mr. Whitaker said they will not consent to the application. Mr. Dunn recommended that Mr. Mazzone get an attorney. Mr. Mazzone was trying to avoid the legal aspects and escalating the situation. Mr. Quinn said the next meeting will be Monday, October 13, 2014.

On a motion from, Mr. Sasso, seconded by Ms. Checki, the meeting was adjourned at 9:07PM.

Respectfully submitted,

Diane Knispel