



**VILLAGE OF SHOREWOOD
BOARD OF APPEALS MINUTES**

May 4, 2021

FINAL

1. Call to Order

Mr. Paulson called the meeting to order at 5:31 p.m.

2. Roll Call

Members present: Adam Burns, Michael Paulson, Jon Toutenhoofd, April Toy. A quorum was noted present.

Others present: Village Attorney Nathan Bayer, Planning and Development Director Bart Griepentrog

3. Statement of Public Notice

Clerk Bruckman stated that the meeting had been posted and noticed according to law.

4. Approval of April 13, 2021 meeting minutes

Mr. Toutenhoofd moved, seconded by Ms. Toy to approve the April 13, 2021 meeting minutes with the recommended spelling changes. Motion carried 4 – 0.

5. Attorney to Review Standards by which the Board of Appeals must abide.

The memo is included in the packet.

The Board did not have any questions of Attorney Bayer.

6. Consideration of request for an appeal of the Plan Commission's approval of parking special exception for a proposed multi-family redevelopment at properties 2416, 2420, and 2428 E. Capitol Drive.

Mr. Paulson noted the emails the Board of Appeals received should be admitted as part of the record.

Mr. Paulson explained the Board of Appeals should proceed with a certiorari review of the four factors of evaluating whether the Plan Commission, based on the existing record, kept within its jurisdiction and proceeded on a correct theory of law, acted in a manner that was not arbitrary or unreasonable based upon its role rather than judgement and reached a reasonable conclusion based on the evidence in the record. The Board of Appeals has discretion to affirm, reverse or remand with recommendations for further analyses and findings as a matter of final determination by the Board.

Mr. Paulson explained that the appellants want a remand back to the Plan Commission in order to provide an opportunity to be heard and present their arguments and evidence in a de novo review. Mr. Paulson noted he views this matter should be remanded back to the Plan Commission for certiorari proceedings. He noted the Plan Commission did not articulate the reasons for its decision. The record did not reflect how it considered the factors that are set forth in §535.51(a) and there is no finding of a special exception is not inconsistent with the applicable provisions set forth in §535.51.

Mr. Burns explained after watching the full Plan Commission meeting he agrees with Mr. Paulson's comments and does not feel they articulated the 13 factors for the special exception.

Ms. Toy explained the Board is conflating a few issues. For the purposes of getting to the decision where the Board finds there was not appropriate fact finding at the Plan Commission, the Board is bypassing the standard of review issue and going directly into a certiorari review. She explained her understanding of the submitted documents: The Board of Appeals is being asked not to perform a

certiorari review but first to decide whether this is a de novo review or is a certiorari review. If it's a de novo review then it wouldn't matter if the Plan Commission didn't make appropriate findings, because then the Board of Appeals could take evidence. She explained the Plan Commission does not need to go through each and every element in §535.51(a) but the standard is whether there is any substantial evidence that supports the administrative body's decision. She noted the Plan Commission considered all the applicable factors or discussed them. She explained after watching the video she would like to hear from the appellants which factors they felt were not discussed because it's unclear what factors are being argued. She noted the Plan Commission is not a judicial body, they are a fact-finding body. They should not be held to a legal standard of making sure they set forth on record on unequivocal terms, the law does not say it has to be that mechanical of an approach.

Mr. Paulson explained if there were to be a remand, the issue of whether a special exception for parking should be granted is the issue before the Plan Commission and they can take the record as received, give the parties an opportunity to be heard and make a decision without being bound to their prior decision. They are not bound by any decision by the Board of Appeals on a remand. This gives the Plan Commission an opportunity to start over and make the findings that are required for the grant for a special exception for parking.

Attorney Bayer clarified the applicant sought the parking special exception from the Plan Commission before proceeding with anything else associated with the development. The underlying proposal does not need a conditional use permit or any other special exception from any of the other body.

Ms. Toy explained there is not consensus among the Board on the strategy on how to proceed. She views the Board has to address the standard of review before they can make any decision. She would like a hearing if the Board remands the decision. The Board needs to decide if it's de novo or certiorari review.

Mr. Paulson explained as the is code written, it does not permit a de novo review.

Mr. Toutenhoofd agrees with proceeding with a certiorari review.

Ms. Toy agrees the village code does not grant the Board of Appeals to do a de novo review.

Mr. Burns agrees with proceeding with a certiorari review.

There was consensus to proceed with a certiorari review.

Mr. Paulson explained the consideration of the four elements of review.
Did they Plan Commission have jurisdiction to grant the special exception?
Did the Plan Commission proceed under the correct theory of law, what legally were they required to consider?
Did the Plan Commission consider the exception in a due process manner?
Was there substantial evidence upon which to reach a reasonable conclusion?
Agreement on jurisdiction was noted.

Mr. Paulson explained he does not feel the Board of Appeals knows on what basis did the Plan Commission make the determination to grant the Special Exception. He feels there needs to be something explicit in the record where the Plan Commission discusses each of the factors and how the factor applies as set forth in the code.

Ms. Toy noted she would like to hear from the parties themselves to hear what factors were not discussed or addressed.

Attorney Cincotta explained the Plan Commission did not provide any factual information that addressed the factors.

Dan Walsh explained this is a rezoning of this property and dramatically changes what a developer can do on this property. This special exception allows them to build a substantially different project than what would otherwise be permitted by the zoning code. There is not one piece of data provided by the developer, there is no traffic study, there is no parking count. The counts provided by the planner are inaccurate and wrong. There was no comparison or research done from other projects. He noted there was no input from the neighbors.

Attorney Cincotta noted he objects to the inclusion of any new facts into the record given the ruling on the nature of the review.

Attorney Taylor explained the agenda was properly noticed for Plan Commission so nothing was hidden from the neighbors. All residents from the Village had an opportunity to attend the Plan Commission meeting and express concerns. It was noted that stating there were no facts discussed at the Plan Commission meeting is a false statement. The 36-page meeting minutes are posted on the Village website.

Mr. Baade explained the application listed all thirteen items and he attended the meeting to answer any additional questions. He noted there are multiple inaccurate pictures being spread on what the building will look like.

The Board did not have any additional questions for the attorneys.

Ms. Toy explained if the board is going to remand, the board should go through and make findings on each of the factors and if they were considered by the Plan Commission. Ms. Toy went through each of the 13 factors.

1. The effect the granting of the exception will have on adjacent parking and traffic conditions. Discussed very thoroughly at the Plan Commission
2. The effect the granting of the exception will have on the appearance and character of the applicant's property, adjacent property and neighboring property. She noted this factor was discussed the most during the Plan Commission meeting. It was noted at the meeting the space in front of your house is not property you own, it's public.
3. The effect the granting of the exception will have on the property values of the applicant's property, adjacent property and neighboring property. Possible gap, may not have been discussed.
4. Whether the granting of the exception will serve a public or desirable or useful purpose.
5. Whether the spirit and intent of the requirements of this article are being carried out. Discussed throughout the full discussion at the Plan Commission meeting.
6. Recommendations of any boards or committees to which the Plan Commission refers the application for advice. Not applicable.
7. Intensity of use, deviation from typical use classifications, access to transit, and physical constraints to meeting parking requirements. Was discussed throughout the meeting.
8. If senior housing is proposed, the number of employees on site, the type of senior housing, the parking needs of the residents, if any, and the ratios from the Institute of Transportation Engineers parking generation report ratios for senior housing should be reviewed. Not applicable.

9. Historical conditions and whether additional parking requirements for new or expanded use may be satisfied with incremental increase commensurate with new or expanded use. Unsure it was discussed.
10. Evidence that actual parking demands may be less than code requirements. This maybe a gap area of discussion.
11. Availability of shared parking, including satisfactory documentation of shared parking to satisfy the parking demand. Information in the materials that was submitted.
12. Alternative transportation that has been reasonably shown to reduce the need for parking. Public transportation was discussed.
13. Such other matters as the Plan Commission deems relevant and material.

Ms. Toy noted the Plan Commission kept within its jurisdiction and proceeded on a correct theory of law, they followed code §535.51, they acted in a manner that was not arbitrary, oppressive, or unreasonable, and it's her opinion they reached a reasonable conclusion based on the evidence in the record.

There was board discussion on how detailed does the request for a remand back to the Plan Commission need to be. Attorney Bayer explained that is up to the body, they can choose to be vague or very specific.

Mr. Burns explained if the board decides to remand, the board should be a little specific on what was lacking of the thirteen items.

Mr. Paulson explained he would like the Plan Commission to provide linkage to all of the facts and arguments they did consider and their conclusion that the special exception should be granted.

Mr. Toutenhoofd and Mr. Burns agreed the Plan Commission needs to provide linkage to the factors.

Attorney Bayer clarified the motion would be to reopen the proceeding, permit further evidence and make a further determination as to the appropriateness of the special exception.

Mr. Paulson moved, seconded by Mr. Toutenhoofd to accept the appeal and remand the matter back to the Plan Commission to reopen the matter, including further public hearing, to explicitly consider the applicable provisions set forth in section 535.51(b) of the Village Code, including, if it so finds, an explicit determination of how the granting of a special exception is not inconsistent with the applicable provisions as set forth in section 535.51(d) of the Village Code. Motion passed by roll call vote, 3 – 1 with April Toy voting nay.

Mr. Toutenhoofd moved, seconded by Ms. Toy to adjourn the meeting at 7:10 p.m.

Respectfully submitted,

Sara Bruckman, CMC/WCMC, Village Clerk