

Board of Zoning Appeals

1 **Special Training Meeting**

March 4, 2021

2
3 **L**

4
5 Notice is hereby given that the Orange Township Board of Zoning Appeals will hold a special meeting on Thursday,
6 March 4, 2021 at 6:00 p.m. for training purposes for zoning staff and board of zoning appeals members.

7
8 The meeting will be held virtually using electronic means and can be accessed by the public on the internet on the
9 Zoom application at <https://us02web.zoom.us/j/84788340152?pwd=TjRUaGcyVE1Pb3VkdFZBZUxISlloUT09>

10
11 The person responsible for the publication of this notice is Jeff Beard, Orange Township Zoning Department.

12
13 *Jerry Miller, Chairman*

14 *Jeff Beard, Orange Township Zoning Department*

15
16
17 *Please publish one time, on or before Saturday, February 20, 2021 in The Delaware Gazette*

18
19 Mr. Miller called the hearing to order at 6:00 p.m.

20
21 Roll Call: Jerry Miller, Rick Oster, Aaron Shipley, Punitha Sundar, Don Rife, David Boyd

22
23 Kelvin Trefz will be late

24
25 Township Officials Also Present: Michele Boni, Development & Zoning Director
26 Jeff Beard, Zoning Enforcement Officer
27 Nancy Fay, Zoning Assistant
28 Cindy Davis, Zoning Secretary
29 Brett Wiemken, Intern

30
31 The Zoning Staff introduced themselves and described their responsibilities

32
33 Ms. Boni: We recently partnered with Pete Griggs and his firm as our new legal counsel. We held a
34 Zoning Commission training last week which we think went really well; in fact, we're thinking of having
35 another one in the near future.

36
37 Mr. Griggs: I know you guys a little. I sat in on the church variance and conditional use which I think was
38 good because it gave me an understanding of how you guys operate. One thing I've learned in the past 20
39 years of doing this is everyone is different, and it's not my role to come in and change the way you do
40 things; it's just simply to provide you with the information, the tools necessary to have your decisions up
41 held in the event that your decisions get appealed. My mentor, Don Brocious, used to say if there's one
42 body in a Township that's going to get sued sooner or later, it's the BZA, and that's just by virtue of what
43 you do. For me, this is part of the favorite part of my practice, representing BZA's and defending their
44 decisions. I've not had a BZA case get to the Supreme Court yet but quite a few Court of Appeals cases,
45 and it's fun because I don't get to court a lot and this is about as close as I get to being a trial attorney.
46 We're going to try and keep it a little bit shorter than I did with the Zoning Commission, so if there's a
47 takeaway from tonight, and this may be repetitive for some of you, I want you to understand your role in
48 the grand scheme of zoning. The other thing I want you to take away from this is to be able to rationalize
49 your decisions. I think if you know those 2 things, you're ahead of the curve and I don't think you're
50 going to have any issues. I'm not going to go over a lot of this introductory material because I think that's
51 more important from a Zoning Commission standpoint, but overall, township zoning is confined to Ohio
52 Revised Code 519; that's kind of our Bible we have to look at for our power and authority and there's 2

Board of Zoning Appeals

53 big limits on that power. One is constitutional limitation. You don't really see that at the BZA level. That
54 typically happens at the Zoning Commission/Trustee levels with rezonings, but I've had a few occasions
55 where I've had appeals from a Zoning Inspector determination where they argue in front of the BZA that
56 the Code is unconstitutional. There are a few cases out there that said the BZA has no authority to decide
57 constitutional issues, so if you ever get in a situation where applicants argue constitutionality of our Code
58 and what you're doing, you don't have the authority to decide that; they need to take that to a higher
59 court. That's all I have to say about the constitutional issue; it really shouldn't be an issue in front of you.
60

61 Mr. Miller: Under d), it's Zoning – exercise of police power, that would be under Jeff as an example
62 under enforcement of the zoning laws; that wouldn't necessarily be BZA being a police power.
63

64 Mr. Griggs: Correct. That's just the police power is globally zoning but not our ability to exercise that
65 function, that police power, because you don't have to have zoning. There's probably a third of the state
66 that's not zoned. So you're right; it's not necessarily the BZA itself but it's just the zoning and making a
67 decision to zone and have zoning in place is an overall police power. The other limitation I'm going to hit
68 on briefly is what we're going to call statutory limitations, and because it's a police power, the State gives
69 us that power, we have to look at 519 and there's a bunch of limitations on what Townships can do.
70 We're not like cities, so I have a bunch of those listed out and where I typically see a BZA getting
71 involved in these is on appeals. So the zoning inspector will make a determination whether or not
72 something is a nonconforming use or structure or whether or not something is agriculture or not
73 agriculture, and the party in interest has the ability to appeal that decision to the Board of Zoning Appeals,
74 so you may be in a situation where you're trying to apply or make a determination on one of our statutory
75 limitations under 519, and I have those listed out and those could be a training system in and of
76 themselves. There's lawful nonconforming use limitation, an agriculture limitation, farm market limita-
77 tions, some tower limitations, public utility limitations. One big thing that we're seeing the last year or so,
78 really not applicable to you guys, but wind farms and solar farms are huge. Solar farms in particular in the
79 last year and a half are cropping up everywhere, but the good news for Orange Township is the land is too
80 valuable, so most of the solar and wind farms are being gobbled up in rural areas. But all those limitations
81 I think where the BZA could play a role, again, if a decision is appealed from the Zoning Inspector. For
82 example, the Liberty Township Zoning Inspector made a determination that a structure was related to
83 agriculture, the neighboring property owner appealed that determination, the BZA had to make a decision
84 whether it was or not, and then went to the Court of Common Pleas. The Court said it was AG, and it
85 went to the Court of Appeals and the Court of Appeals said it was AG. So that's where I see you really
86 playing a role in the statutory limitations and if we ever get to that situation, certainly we'll get down to
87 the nitty gritty of what those limitations are and try to provide that guidance but I really just wanted to
88 point out that there are limitations. On the bottom of Page 3, the creation and function of a Board of
89 Appeals, and this, Jerry, probably gets to more of your question on the police powers, but what you do as
90 a BZA when you hear an appeal, a variance, a conditional use permit is you are acting in a quasi-judicial
91 capacity and that is extremely important. If you look at the big picture of zoning, the BZA acts as a quasi-
92 judicial body; the Zoning Commission acts as a legislative body. Knowing that you're acting in a quasi-
93 judicial capacity is going to tell you certain things. That my decisions I make as a board are subject to a
94 direct appeal to the Court of Common Pleas. The Zoning Commission is just the opposite; there is no
95 direct appeal. Their decisions and the Trustees' decisions may be subject to a referendum but there's no
96 direct right of appeal. It tells me as a member of the body when I'm acting in a quasi-judicial capacity I
97 should not have what we call ex parte communications with applicants. So can an applicant pick up the
98 phone and call me and ask what I think about their application? Absolutely not; it's completely
99 inappropriate. Different answer with the Zoning Commission or Trustees when they're doing a rezoning
100 because it's a legislative function. The other thing it's going to tell me is do I have the ability to meet
101 privately to consider an application in front of me when I'm acting in a quasi-judicial capacity? Yes. I
102 have the ability to recess during a hearing and discuss the merits of the application in private. All the
103 decisions have to be made in public during the open session, but I have that ability. Different answer for

Board of Zoning Appeals

104 Zoning Commission; the answer is absolutely not. Everything's got to be on the record, in the open. All
105 conversations between Commission members have to be during an open session. The last thing it's going
106 to tell me when I'm acting in a quasi-judicial capacity is that I have to run my meeting and check all the
107 formalities. I consider myself to be very practical and I understand 99.9% of the time what you're
108 considering in front of you is pretty mundane and the likelihood of it being appealed is slim. But when
109 you have that case when you see an attorney walk into a room or Jeff says we're getting all kinds of
110 people emailing and sending letters in, I want you to be able to grab the reins and run a really tight ship
111 and real formal hearing, and we'll get into that. So what does quasi-judicial mean? It means you're acting
112 like judges. You're interpreting the Code. If someone appeals Jeff or Michele's decision, you have to
113 interpret the Code and render a decision. If someone files a variance or conditional use, you're applying
114 their facts to the law, and the law is a) your Code and b) the variance cases that the Supreme Court has set
115 forth on use and area variances. On private deliberations, that's a Supreme Court case and also a 5th
116 District Court of Appeals Case which 5th District covers Orange Township. Typically how that would
117 happen, say you get through everything. The applicant goes, staff goes, you ask questions, you've got
118 public comment. At that point you guys want to discuss it amongst yourself. Someone simply makes a
119 motion to recess to private deliberations for the purpose of conducting the merits of the application. Let's
120 say we're in person, you can physically go into another room and talk about where you're headed, what
121 are your thoughts, is this a thumbs up or down, what conditions do we want to put on an approval? How
122 do we want to justify our decision and it's not uncommon for members to scribble out their motion that
123 they're going to make on a piece of paper then you come back, reconvene and render your decision.

124

125 Mr. Miller: If we act as a quasi-judicial and make a motion to meet in private, the entity that's filing for
126 that BZA application, would they not complain that they don't have the right to question or further
127 convince the Board what their needs are.

128

129 Mr. Griggs: They do. The 5th District Court of Appeals, that was the argument the attorneys made and the
130 Court said no. That's the Supreme Court case we have to rely on and remember that we don't let the
131 prosecutor or defense attorney or in a civil case both attorneys go back while the judge is trying to
132 formulate his decision and have them influence the judge. That's their chance in an open meeting to
133 influence and provide evidence and testimony to you. So they do, but at the end of the day the Courts
134 have upheld the BZA's ability to do that. When you're back there you could say what about this issue?
135 We haven't really heard anything about property values. Let's ask the applicant or the next door neighbor
136 if he's actually got any type of documents that it will decrease the property value or the value of his
137 home, does he have an appraisal and you can even come back out and continue the discussion if you need
138 additional information. But they can complain all they all they want; it's our ability. And something I
139 don't recommend that you do on every application but it's those that are really complicated and you have
140 a lot of people, a lot of attorneys, it's nice to be able to step back and sit down and chat about it.

141

142 Mr. Oster: So that's just going to be the quorum and you that would attend deliberation?

143

144 Mr. Griggs: You could have counsel back there; Jeff and Michele should not come back. In a variance
145 proceeding, Jeff and Michele are actually considered adverse parties; conditional use there's really no
146 case law on it. On an appeal, most definite, they're an adverse party. I've had it happen once after the fact
147 after we were brought and we spent hours writing a brief that the BZA was biased because zoning staff
148 came back, so our advice is staff stays out of that.

149

150 Mr. Oster: I kind of read through this before the meeting and it seemed pretty clear that that would be us
151 and you.

152

Board of Zoning Appeals

153 Mr. Griggs: Yes. And I'm not going to be there all the time and if an attorney shows up and you just don't
154 feel comfortable, an attorney doesn't have to be present. But an attorney and Board members I believe is
155 really all that should be back there.

156
157 Mr. Oster: That makes sense and I always thought we should have been doing that from time to time but I
158 don't think we really ever have. I think there was one case where we did take a break but we didn't go to
159 a room and actually discuss it, take notes so I don't think we've actually gone to a private deliberation.

160
161 Mr. Shipley: We have not done that since I've been a part of the Board. We did take a break in the late
162 night but we really haven't taken a break and had a discussion about it.

163
164 Mr. Trefz: If we have questions that either the applicant or Michele or Jeff can't answer, we have to go
165 back into session and ask that question?

166
167 Mr. Griggs: Yes, that's exactly the way it's done. Just know that you have that kind of safety net if you
168 need a breather, and the decision itself has to be made in open session. Next on my list of rules governing
169 organizational meetings, you kind of have a semblance of rules of procedure in the Zoning Resolution
170 itself. I've given Michele and Jeff samples of other places. Typically I like to see it as a separate
171 document and not in the Zoning Resolution and that's something maybe we can hit when we have more
172 time. For the most part you're required by law to have them and I think the argument would be your Code
173 itself provides for those rules of procedure. Jurisdiction, this kind of gets into the nitty gritty of what you
174 do. We talked about appeals, and all these things are quasi-judicial. Say Jeff or Michele issues a permit or
175 denies a permit. Somebody has 20 days to appeal that decision and it happens. It may not have happened
176 here yet. Interpretation of a Code. How a fence is measured; is it from the grade? The type of fencing
177 that's permitted. An ag exemption. All those things can be appealed. Variances is the second broad
178 category, two types, and we'll go into them in a minute, use and area. Third major area is conditional use
179 permits. Fourth major area is variances or conditional uses for extraction of minerals. I don't know how
180 often you have that. It doesn't happen very often, at least my experience, and I don't believe your Code
181 provides for a conditional use permit for surface mining. That's a relatively new area of the law and I'm
182 not sure there's much in Orange Township anyway, but that's the statutory jurisdiction of the BZA.
183 Outside of a variance or conditional use certificate for the extraction of minerals the BZA, and your Code
184 needs to be changed with respect to conditional uses, the BZA has no authority to revoke a permit. Once
185 you issue a variance or conditional use, the BZA has no authority to revoke it, so once you make a
186 decision, once you grant a variance or conditional use, that in essence becomes the zoning for that
187 particular property or issue, and then Jeff and Michele would simply pursue it as a zoning violation, so
188 they would send a notice of zoning violation and that would have the potential to be taken to court if
189 necessary. There are times I've seen a BZA revoke a variance and you can't do that. That's a relatively
190 recent case that was decided a couple of years ago in Pickaway County.

191
192 Mr. Beard: For the conditional use, if the owner changes hands do they have to seek another conditional
193 use?

194
195 Mr. Griggs: I looked through the Code and I don't remember if we state that in our Code.

196
197 Mr. Beard: Typically that's what they do when they've had an issue with churches where a church
198 changed hands and that church didn't get a conditional use but the other one had the conditional use.

199
200 Mr. Oster: We've had that a few times, and we were always under the impression that once it changed
201 hands to somebody else, his variances didn't automatically go to the next guy.

202

Board of Zoning Appeals

203 Mr. Griggs: Let's say I have a conditional use that allows for Pete Griggs Trucking Company but then I
204 sell it to Smith Trucking Company. I think there's a very good legal argument and that conditional use
205 continues with the new owner.

206
207 Mr. Oster: It's not necessarily that we're going to say you can't do the same thing at that location, it's just
208 that they would have to apply and get the variance again on an ownership change.

209
210 Mr. Griggs: Unless your Code says otherwise or you have a really good reason, the typical rule of thumb
211 is variance and conditional uses run with the property.

212
213 Mr. Oster. So it's basically a lifetime deal.

214
215 Mr. Griggs: Could be but if I'm a new owner and I change it, then I have to come back in and modify my
216 variance or conditional use permit.

217
218 Mr. Miller: We've had some issues where someone owned some property for 50, 60, 70 years, sells it,
219 then the new owner is in violation of whatever because at the time of the original scenario, there was no
220 zoning laws for Orange Township.

221
222 Mr. Griggs: I'm trying to think of that in the context of a variance.

223
224 Mr. Miller: It could be a use variance.

225
226 Mr. Oster: I think we had that come up in old Lewis Center where there were no variances given. It was
227 just very odd in every respect and now the new people have to come in before the BZA.

228
229 Ms. Boni: Are you talking about the Unitarians?

230
231 Mr. Oster: I think we had some businesses in there too.

232
233 Mr. Beard: Our Code states in the legal non-conforming uses that if they expand or do an addition or
234 something like that, they have to get a conditional use through the BZA.

235
236 Mr. Oster: Say the monument sign is going to be in the same spot and the same size and everything, but
237 the name is going to change, they would have to come back in and do that.

238
239 Mr. Griggs: When you approve a variance or conditional use and you make it site specific or application
240 specific, I don't necessarily disagree with you but going back to the non-conforming issue, the Ohio
241 Revised Code provides the Township is required by law they must allow for the reasonable extension or
242 modification of lawful non-conforming uses and typically the entity that does that is BZA, so if I'm a
243 lawful non-conforming use that means that what I was doing was lawful before the Code existed or before
244 the Code was changed. Now I sell it and a new owner wants to come in to extend or modify that, then
245 absolutely they have to come in before the BZA and show what they're doing different. Bit what happens
246 if I'm not doing anything differently? Am I extending or modifying at all? The only thing that has
247 changed is a piece of paper and maybe a legal entity that's operating it.

248
249
250 Mr. Rife I think both of those concepts relate to what we did. One was the addition of the front monument
251 and the second was the sign.

252
253 Mr. Oster: A monument sign always has to be looked at for how many colors, the type, etc. anyway.

Board of Zoning Appeals

254 Mr. Griggs: Right. Say I issue a monument sign and I approve it as submitted and then I sell it to someone
255 else and they come in, and if in anyway shape or form change that from what we approved, then they
256 have to come back in in front of you; I agree with all of that. Let's take the swimming pool that was in
257 front of you and the application was withdrawn. Say you approved that variance for the swimming pool.
258 You're telling me if I sell my house, the new person has to come in and get another variance?

259
260 Mr. Oster: No.

261
262 Mr. Miller: If they change it.

263
264 Mr. Griggs: Right. That's what I mean when the variance or conditional use runs with the land, not the
265 person. The exception to that is if the new person or even the existing person who was approved, in any
266 way want to change something that was approved, they're going to have to come before you guys.

267
268 Ms. Boni: There might be sections of our Zoning Resolution that we'll want to clean up to clarify that a
269 little better, especially with the conditional use part; it's a bit confusing.

270
271 Mr. Griggs: I think we're all on the same page. I agree with you guys; if there's any change to what
272 you've approved, I think they have to come back in front of you but just because a property changes
273 hands and has new ownership, doesn't necessarily mean they have to come in and get a new conditional
274 use or variance.

275
276 Mr. Trefz: So if the property just changes hands, I'll use your trucking company example, and they're
277 doing a trucking company, then we don't need to see it.

278
279 Mr. Griggs: No. but let's say they want to change the monument sign or add another building to do truck
280 maintenance. I think they have to come in to get a modification from what you have approved.

281
282 Mr. Miller: But if the trucking company is sold and the monument sign is going to change only with the
283 name of the trucking company, the font, font size, color, they're still going to have to come in; they're
284 changing the sign.

285
286 Mr. Oster: Yes, they'll have to redo for the sign, but I think what he's saying is another trucking company
287 comes in, he wants to do maintenance work in one of the buildings, That may be different than the last
288 guy who used it for storage. It just depends on what they're really doing there and what they're changing.

289
290 Mr. Griggs: Correct.

291
292 Mr. Oster: It's not necessarily that you're blanket it because you're a trucking company or whatever.
293 Sometimes you're going to have to look at what is going to go on there.

294
295 Mr. Griggs: That's exactly right.

296
297 Mr. Trefz: We had a landscape company that applied to use their garage as a garage e for their company
298 at their house, and the neighbors were claiming their property values were going to go down based on all
299 the traffic and whatever else might be going on in there. That's what came before us and that is a change I
300 guess.

301
302 Mr. Griggs: Yes. Just to understand that distinction, typically variances and conditional uses run with the
303 land. Obviously if they change, then they're going to have to come in and in front of you for that review.
304 On 5 I have appeals. An appeal can be taken by any person who is aggrieved by Michele or Jeff's

Board of Zoning Appeals

305 decision. They have 20 days from the date that they make that decision. One thing I want to make sure
306 Jeff and Michele do is, particularly with violations, they include a statement that the individual has 20
307 days to appeal their decision to the BZA on a notice of violation. I think that's really important because if
308 they don't appeal it and we have to enforce the Code and take them to court, there's a legal doctrine in
309 that that strictly prohibits that individual from making any arguments as to why Jeff or Michele are
310 wrong. Any person aggrieved can appeal. Typically an aggrieved party is an applicant, next door
311 neighbor, typically not an HOA, not a Board of Trustees, so in order to be aggrieved, you have to have
312 standing and be able to show what we call special harm, harm that is not shared by the community as a
313 whole, so that's why if you're a next door neighbor contiguous or adjacent, you're going to be aggrieved
314 and you're going to have standing to appeal not only Jeff's and Michele's decisions but the BZA's
315 decisions as well. But once you get outside of that, it becomes a little more speculative and I'm going to
316 talk a little bit more about that in a minute.

317
318 Mr. Beard: When you're talking about putting that in the violation notice, we typically send two violation
319 notices before we send to the Prosecutor's Office.

320
321 Mr. Griggs: If your practice is always send two, make sure it's in the second one because if you always
322 send two each time you make a determination, theoretically the clock starts over.

323
324 Ms. Boni: And is it 20 days of the mailing date or the date of them receiving it?

325
326 Mr. Griggs: The courts are all over the board on that. Do you send certified, that second one?

327
328 Ms. Boni: Yes.

329
330 Mr. Griggs: The courts are going to be kind of liberal on when that 20 days start, so I typically run that 20
331 days from the date they received it, when they signed for it then there's no question. Conditional uses, I
332 know you guys deal with that a lot for review, and then placing conditions on it I think is a great way to
333 control. I'm sure you guys know this and the only reason I bring it up is because I've seen people do it,
334 can't grant conditional uses that you're not permitted to grant them for. Your Code provides a list of
335 things you can grant conditional uses for; if it's not one of those things, you can't grant it. Variances, use
336 variance and area variance. The legal standard for a use variance is called an unnecessary hardship
337 standard and it didn't always use to be that way. There was just one standard until the Duncan v
338 Middlefield case but what I can tell you on a use variance is that 99% of the time you should not be
339 granting them. It is an extremely high threshold to beat, it's not like an area variance where the Supreme
340 Court basically spelled it out so you put your test in the Duncan v Middlefield factors. Courts have used
341 different standards over the years and there's been 3 predominant standards and those are in the middle of
342 Page 7, b1, 2 and 3. Unlike an area variance, if you don't meet 1, 2 or 3, you have to deny it, so this isn't
343 a balancing test. It's a do I meet all three of these things and if I do, then you can grant it. If I don't, then
344 you have to deny it and the one thing that always gets people is Number 2, what they call the self-
345 imposed hardship rule and this is a famous Supreme Court case. If you know anything about the
346 Youngstown area, you know the Bartilow family who owns a lot of shopping malls, and I don't know if
347 they still own the 49er's or not, basically wanted to put in a strip mall and they had property that was
348 appropriately zoned but it just wasn't big enough. Right next to it was a residentially zoned property.
349 They knew there was no way they were going to be able to get through the City to be able to rezone that
350 residential area because people didn't want it, so they went to the BZA and had the BZA grant them a use
351 variance to allow for a commercial use on a residential property. The BZA granted it, the neighbors
352 appealed it, and the Supreme Court basically said nice try, however, one of the factors is did you create
353 your own hardship? And if you did, it should have been denied. Did you have knowledge of the zoning
354 restriction? And that standard is a known and actual known or you should have known what the Code

Board of Zoning Appeals

355 provided for. And if you did, if you're creating your own hardship, then you have to deny it and that's
356 what happened.

357

358 Mr. Oster: That's almost every one of them; they should have known.

359

360 Mr. Griggs: That's only for a use variance.

361

362 Mr. Oster: But that issue is generally always there because they try to say they didn't know but we have
363 open records and you should have checked.

364

365 Mr. Griggs: Correct and that's why I always tell BZA's that you can't prohibit people from applying for a
366 use variance, that's their right, but if the BZA really knows what they're doing, it should almost always
367 be denied. This is a rare thing. What you guys typically deal with are the area variances and that's the
368 practical difficulty standard; that's the legal test. As you know, there's a famous Supreme Court case that
369 basically says, because under the old law courts were basically saying townships had to use the
370 unnecessary hardship test for a use variance and, if you think about it, if I want to encroach my deck in a
371 side yard setback by 2', that's a really tough standard to beat. I pretty much have to deny it if I know what
372 I'm doing because that's the setback.

373

374 Mr. Miller: In regard to the unnecessary hardship, there's a statement that you have, and I'll read the end
375 of it, "one standard established for a use variance shall be fatal". Are you stating the word fatal because it
376 sets precedence because as Rick said, invariably they're going to say it's a hardship, but a hardship to
377 who? Are they only going to get 100 customers a day where they expected 325 because the sign's not
378 high enough? I can understand if it's based on topography, but I'm not getting enough traffic because the
379 sign's not high enough and that's going to be an unnecessary hardship for us.

380

381 Mr. Griggs: That statement that you pulled for hardship is only for use variances. Height of sign, that's an
382 area variance. But let's say someone comes in and what that statement of shall be fatal means is that if I
383 as an applicant cannot show that I meet 1, 2 and 3, those 3 factors, what it means by fatal is the BZA has
384 to deny it under the law; that's what that means. It's not a balancing test; I have to deny it. So going
385 before the Supreme Court, they said this is ridiculous. Area variances do not have as much of an impact
386 as a use variance would on the surrounding territory, so they came up with the Duncan factors and there
387 are 7 of them and it's a balancing test, so we have the property owner knowledge component of it that we
388 kind of saw the use variance but it's not fatal in an area variance; it's just a factor that you have to
389 consider in the overall package. What the cases have held is that you, BZA, have to consider all 7 of those
390 factors. There can be other factors that you can consider in addition to those but you have to at a
391 minimum look at those 7. Let's say, and Jeff wouldn't do this, but he accidentally allowed somebody to
392 build a shed and the shed encroached 3' into the side yard setback. They come in, they make an argument.
393 I think a Zoning Inspector mistake can be an additional factor that you can consider; I've had that happen.
394 The important thing I want you to remember is it's a balancing test. I'm going to meet some as an
395 applicant, I'm not going to meet other ones and you have to balance it. I want to spend just a minute
396 going over those 7 factors. Number 1, will the property yield a reasonable return or can there be beneficial
397 use of the property without a variance? The answer is typically yes. Typically you can still use the
398 property for what I was intending to use it for. Number 2, whether the variance is substantial. What the
399 courts have held consistently is that anything over 25% is going to be considered substantial. So if it's
400 less than that, and I think this is an easy one, if I'm coming in and that side yard deck and I'm only asking
401 a 10' deviation from that setback requirement, the applicant has requested a 10% variance to the setback
402 and is therefore not substantial; you've checked the box. I'm going to skip over 3 and come back to it.
403 Number 4, if the variance adversely affects the delivery of governmental services, water, sewer, garbage,
404 fire. We kind of have to rely on others to provide, so there have been times the fire department had an
405 issue. They're going to show up and testify or supply a letter, but a lot of times the answer is no but there

Board of Zoning Appeals

406 can be. Let's take a sign, maybe it's traffic sign issue. You get the engineer or the road department to say
407 they have an issue with it, so that could be an issue. Number 6, whether the property owner purchased the
408 property with knowledge of the zoning restriction. Again, the answer is typically yes because it's a known
409 or should have known standard. Just because I didn't do my homework and get ahold of Jeff and Michele
410 ahead of time before deciding to build my shed in the setback, that's not on them, that's not on you as a
411 BZA, that's on them, they should have known. And simply a statement that I really don't know what
412 zoning is, that's not good enough.

413
414 Ms. Boni: Jeff and I do meet with potential applicants frequently in hopes to avoid for them to come to
415 BZA. That's typically the worst case. Sometimes there are applicants that are very adamant that they're
416 going to come in and take the chance and go for it, but we really do try and work with them and show
417 them the options prior to this. I think if we didn't do this, if they didn't talk to us, you'd be seeing a lot
418 more.

419
420 Mr. Miller: If an applicant meets with you and the thought process is that it's a reasonable request, you
421 have a 50/50 chance, and I'm just using that arbitrarily because based on experience with working with on
422 the Zoning side and BZA side, you don't typically give a percentage of this will pass/won't pass, but I
423 before you came, Michele and Jeff, it was done and they would meet with the attorney or zoning and it's
424 yes, it'll get passed, etc., and it gets before the Board and it gets turned around that it's rejected then the
425 applicant says you just wait, I'm going to get ahold of media and this actually happened.

426
427 Ms. Boni: I was there. It was a very massive deck and he was going to call Channel 10 news.

428
429 Mr. Oster: I remember the swimming pool.

430
431 Ms. Boni: I think it's inevitable to not face upset applicants. When they take a step back, they can't be too
432 surprised about a denial because we do warn them, this is a substantial request, I can't guarantee what the
433 BZA will decide on but you're requesting 3 times as much, we try to give them warnings. I don't know if
434 I'm answering your question or not, Jerry.

435
436 Mr. Griggs: That's a no no; staff should not be giving recommendation to you guys, they shouldn't be
437 saying you've got a good shot or it's 50/50.

438
439 Mr. Miller: I'm not pointing fingers at Michele or Jeff; this was pre-Michele and Jeff.

440
441 Mr. Oster: I think they do a fantastic job because I was doing this before Michele and Jeff and it was, I
442 can't even really describe it. We always should have had something like this going on that really
443 explained a lot to us but Michele and Jeff, you guys have done a great job as far as lining them up and
444 explaining them and every aspect of this is better since you guys came.

445
446 Mr. Miller: I agree.

447
448 Mr. Beard: We're just trying to make it better for you guys.

449
450 Mr. Oster: As I've said a few times, it's unbelievable from before and the after.

451
452 Ms. Boni: I appreciate that but I think there are still some things Jeff and I need to work on like as far as
453 when you guys make a decision, I think we need to do better in the detail and Pete, I don't know if you
454 were going to discuss that a little more. There's definitely some improvement that we need to make but I
455 believe we have improved significantly since my time with the Township but we're still a work in
456 progress, but we're getting there.

Board of Zoning Appeals

457 Ms. Sundar: It is so different than before you guys came in. You have done an amazing job. I know when
458 you first started I felt like you were really trying to fix whatever happened before you came and it's really
459 an amazing transformation. Thank you for doing all this.

460

461 Mr. Griggs: The Duncan factors that I went through are kind of the easy ones. If you ask me where the
462 battles are at, I would look at Number 3 and Number 7, and I think that is truly the crux of what you're
463 trying to get at. What I'm doing, will it **substantially** alter the character of the neighborhood and whether
464 or not the spirit or intent of the Code would be observed, and that's where it's difficult.

465

466 Mr. Trefz: 25% rule again, substantially?

467

468 Mr. Griggs: I'm not seeing anything that specifically tie those 2 together but I think you could say yes but
469 I think it's a little broader than that.

470

471 Mr. Trefz: I do too. We've had several cases come up and they're normally in the backyard, pool, deck,
472 something most of the neighbors will never see, so to me, that's almost a wash. If no one is seeing it, how
473 does that affect the character? And Number 7, is it in the spirit? I don't think so usually. So what it comes
474 down to is the variance substantial.

475

476 Mr. Griggs: It's going to come down to all 7 factors.

477

478 Mr. Trefz: Right, but you check mark all of them and the only one you're really concerned about is that
479 one; does that tip the balance?

480

481 Mr. Griggs: Number 2?

482

483 Mr. Trefz: Yes.

484

485 Mr. Griggs: What I really do think, because I think we're getting to something else, I want to bring up
486 about precedent and I hear this a lot in what I do and what I always say, in my opinion, on the record,
487 don't use the word precedent.

488

489 Mr. Miller: But almost every time where Joe Blow down the street has more or they have about the same
490 as we're asking, etc., so precedent is a major factor, especially with businesses along 23.

491

492 Mr. Oster: But they're claiming that, they're saying there's a precedent; that's not us.

493

494 Mr. Griggs: But they have to show you. They may be looking at that particular angle of it and maybe
495 that's the essential character component of it, but there still are other factors and there may be a situation
496 where there was a reason why that variance was granted up the street. Maybe it was because, and this is
497 just in my mind, it has nothing to do with the application in front of you, let's take the retention pond. Is
498 that a factor that you as a BZA decided to allow an applicant to encroach further into the setback?

499 Whereas in this particular case, this individual doesn't have a retention pond and they just want their sign
500 to be seen better or it looks better or whatever, so that's why. I understand that in the back of your mind,
501 Jerry, you're always going to have that precedent issue out there and there's no way, you're just like a
502 judge, you're going to bring real world experience with you when you're deciding these cases but what
503 I want you to focus on is considering each application on its own merits and the burden of proof is
504 on the applicant to show that this balancing test tips in their favor.

505

506 Mr. Miller: I fully agree with you but some will say it's a hardship if I don't have equal to Nationwide or
507 Joe Blow Sign Company or whatever it may be.

Board of Zoning Appeals

508 Mr. Griggs: What I would say at the conclusion of their statement is you show me how, tell me why,
509 provide evidence that it will be a detriment; your statement means nothing.

510

511 Mr. Rife: With our property here tonight with Ninja Express, we're faced with everything we've talked
512 about. I've faced with you guys or I'm yet to face you guys and it's very interesting and a right on point
513 that I think about as a business owner in this area. So these are the correct issues and exactly what I've
514 dealt with. And yes, Jeff and Michele are fantastic.

515

516 Mr. Oster: So what you're saying is we need to check 4 of these 7 boxes to not allow, so if we only do 3,
517 we should consider allowing it.

518

519 Mr. Griggs: Yes. I think that's what you're weighing but 3 and 7 are in my opinion the crux of the issue.

520

521 Mr. Oster: I think they're the vaguest.

522

523 Mr. Griggs: They are. Certainly with being substantial that's an important issue but what I think you're
524 really trying to figure out is how all these other things influence 3 and 7.

525

526 Mr. Boyd: It kind of sounds like Rick is implicating that we'll weigh each of the 7 Duncan factors, but
527 that's not necessarily so, is it? You can weigh the totality of the 7 factors; it doesn't necessarily have to be
528 that they meet 3. Maybe 2 is very important but they meet all the other factors and you can decide against
529 that application?

530

531 Mr. Griggs: That's a better way to put it.

532

533 Mr. Boyd: I just want to make sure I'm getting it right. It doesn't have to be a math formula; you can
534 decide if 1 is very important, the essential character of the community is violated even though they meet
535 every other factor and denied based on that.

536

537 Mr. Griggs: There may be some times where nobody provides any testimony what so ever on some of the
538 factors. That's a better way to think about it, I agree. That's why I said earlier that 3 and 7 I think are
539 really the heart. A court is going to look at is was your decision reasonable and I think a court can say
540 what they're trying to do here is really going to change the essential character of the neighborhood and it
541 may be because some of these other factors come into play; it is a 60% variance request. It is going to
542 affect the delivery of government, so I agree with you, those are really subjective.

543

544 Mr. Boyd: And it's hard to do a reasonability test with ordinary sensibilities.

545

546 Mr. Griggs: Right, but I think if you ask me what the 7 factors are really trying to get at, I would say 3
547 and 7 are really what they're trying to get at.

548

549 Mr. Oster: Are you saying they are more heavily weighted?

550

551 Mr. Griggs: I would. If I were a BZA member, I'm looking at 3 particularly in my opinion in trying to
552 make that determination. What am I doing? Am I really going to alter the character of the neighborhood?

553

554 Mr. Oster: Number 7 to me is vague and ambiguous just because the spirit and intent of the zoning
555 requirements are meeting the zoning requirements, so anything that is outside of the requirements....

556

557 Mr. Griggs: But why do we have the requirement I guess would be the question.

558

Board of Zoning Appeals

559 Mr. Oster: That's because that's the essential character that we want in that area which goes back to 3.

560

561 Mr. Griggs: Right, I can't tell you you're wrong. I understand and you could go to every BZA that I
562 represent and everyone is going to have a difference of opinion or they're going to bring their own answer
563 on how they analyzed those factors. I agree that 3 and 7 are fuzzy, and my own personal opinion is 3 is
564 kind of the key for me, but there may be a situation where a variance is substantial, that it is going to
565 affect the delivery of governmental services or create a traffic hazard. While it may not necessarily alter
566 the essential character of the neighborhood, there may be those other factors that I have to weigh heavily
567 now as opposed to that one. So what I want you to do is go through and really think about those 7 things
568 and I think this is great conversation we're having because I think you guys are kind of in your own
569 minds figuring out what those things mean and applying to the facts of that application.

570

571 Mr. Oster: I know Number 4, we're always looking at accessibility by the Fire Department and sometimes
572 even ask them to look at that and make sure that access will be possible for the delivery of their service.

573

574 Mr. Griggs: So those are things you should be considering on every application now. Again, I'm very
575 practical and I think if I'm you guys I would want to get in the habit, even in the most mundane area
576 variance cases, of running down those factors just real quick and then making a motion based upon the
577 above factors. I would get in the habit of that and I think it's a good habit and it doesn't take that long. I
578 don't know if Jeff sent you where it lists the factors out like a scripted statement and I would just get in
579 the habit. And then particularly, if I don't have a lot of attorneys in the room and I'm going to deny
580 something, I would definitely give the reasons of denial, so I would never just make a motion to deny. It's
581 got to be these are the factors that we need to consider, here is why the applicant has failed to meet his
582 burden, and based on those factors, I make a motion to deny the application.

583

584 Mr. Miller: As a Board that is something that we are very careful about, whether it's approvable or not
585 just on that; we don't want to get burned.

586

587 Mr. Oster: Actually, I would like to see Jeff put those 7 items in our paperwork on each one so that we
588 could go through it and we make notes.

589

590 Mr. Beard: They are in our Staff Reports in the motion that's drafted at the end of the Staff Report. It's
591 based on what's in our Zoning Resolution, and Pete did send us some example motions that we'll try and
592 incorporate into our Staff Reports.

593

594 Mr. Trefz: I have a question about the factors. We have them in front of us and I go through and say yes,
595 no, no, yes, whatever. Is that list that I've now checked a part of some permanent record?

596

597 Mr. Griggs: It depends. If you just want to be able to verbalize it and it's just your personal notes, then no
598 but some BZA's actually, particularly when they're together, have the completed form and they hand
599 write that in there, the answer is yes, that would be part of the official record.

600

601 Mr. Oster: I think the main thing is going through these each time and make my own note as to whether I
602 think it's substantial or whatever and then coming to my conclusion as to whether it's a yes or no and it's
603 always going to be most important when it's a no.

604

605

606 Mr. Griggs: Sometimes the BZA will place conditions on a variance or conditional use and that's
607 perfectly permissible. I've been in a couple of cases on just conditions where we've approved conditions
608 but the applicant appealed because they didn't like the conditions. It obviously has to relate to what
609 you're considering and there has to be some basis of why you're placing the condition on it. I'm really

Board of Zoning Appeals

610 fascinated as to your lighting condition and can you explain to me just so I know why you put that
611 limitation on or what that's based on?

612

613 Mr. Miller: Ohio State Planetarium on the south side of Delaware. 4,000-5,000 Kelvin really throws the
614 planetarium off kilter.

615

616 Mr. Trefz: Also, when it's reflected out to cars and stuff, that's a very glaring light, and it can cause
617 people not to be able to control their vehicles.

618

619 Mr. Miller: Think of it this way, about 5 or 6 years ago you were driving at night and all of a sudden you
620 see those bright, bright blue lights and the glare is killing me; that's the reason.

621

622 Mr. Griggs: How did it come up? I'm assuming at some point in time the BZA never required this and
623 then....

624

625 Mr. Trefz: It's still not a requirement; it's a condition we put in.

626

627 Ms. Boni: It was our previous legal counsel that suggested doing that.

628

629 Mr. Oster: He was the one always telling us that that was the one thing we wanted to adhere to.

630

631 Mr. Griggs: And that's fine; I've just never seen that before and I wanted to know the genesis behind it.

632

633 Mr. Beard: And it's not in our Code, so if a wall sign comes in and meets the standards, I can't enforce
634 the Kelvins. I'm not sure what they do on the monument signs, so it does change and you can have a
635 brighter sign on the building then you can a monument sign.

636

637 Mr. Griggs: I just have never seen that and I didn't even know what a Kelvin was.

638

639 Mr. Miller: The blue lights in a car, the safety issues abound with it, so it's a combination.

640

641 Mr. Griggs: Again, going back to using the word precedent and saying we always do something can
642 sometimes be dangerous.

643

644 Mr. Miller: When we do a condition, we make the statement that the Kelvin is a combination of a safety
645 factor along with the planetarium, and that's another reason why they don't have street lights in Lewis
646 Center. Brightness, safety. You would think it would be the opposite but it's just the way it is.

647

648 Mr. Griggs: But our Code says it's okay.

649

650 Ms. Boni: Our Code doesn't have anything on it.

651

652 Mr. Oster: Should we go away from that? Should we just mention it and say we'd appreciate you keeping
653 it at 3,000 Kelvin and just hope they abide?

654

655 Ms. Boni: I almost think we should just amend our Zoning Resolution and include that as a standard if
656 we're so adamant about it.

657

658 Mr. Trefz: That and the number of lumens.

659

Board of Zoning Appeals

660 Mr. Griggs: I don't want to change your practice; I just think if the Township as a policy thinks this is a
661 good idea, then maybe we should be amending our Code.

662
663 Mr. Miller: 2 or 3 years ago there was an applicant that came forward that wanted digital signage; it was
664 just going to be plain lettering. Code had that you couldn't have digital signage. In this day and age,
665 digital signage is the future.

666
667
668 Ms. Boni: I know I've been saying this for a long time, but we are going to be revisiting our signage code,
669 hopefully this year.

670
671 Mr. Oster: I thought the big thing was digital moving and rotating and color changing.

672
673 Ms. Boni: That could be anything, fuel price; those numbers do change.

674
675 Mr. Oster: I think it was the ones that move constantly and then I found out the school has one; zoning
676 has allowed it already.

677
678 Mr. Beard: That wasn't zoning; that was through the Board of Trustees.

679
680 Mr. Miller: The station that told us in the drawings that it was going to be a chalkboard only to find out it
681 was going to be an 80" video monitor; they were pitching a fit that it was their mode of advertising. That
682 was right there on 23 and it would be very unsafe to have moving billboard graphics.

683
684 Mr. Oster: I think a lot of the moving stuff is eye catching and as soon as it catches your eye, you turn
685 your head.

686
687 Ms. Boni: As far as conditions go, how do we feel about doing conditions on a Conditional Use? If they
688 satisfy all the criteria, is that a concern if we add conditions to that?

689
690 Mr. Griggs: If there's a reason for it, I don't have a legal reason to have concern because there may be a
691 situation that the Code doesn't cover and that's the whole purpose of a Conditional Use; it's a use that
692 may be permitted but we're not going to permit it until we have enough opportunity to review it because
693 it may have special impact, so we just need that additional review. It's not uncommon in my opinion to
694 put conditions on a Conditional Use but I think the key is that you make sure it is related, is necessary and
695 that it's justified.

696
697 Mr. Rife: I can give you a perfect example in Westerville. They did not want wrecked cars on our auto
698 body lot and obviously we have wrecked cars on an auto body lot, so they asked us to face the damage to
699 the vehicle away from the road.

700
701 Mr. Oster: We had one where the guy wanted to open up a mechanic's garage in Lewis Center in that old
702 neighborhood and we had issues as far as contaminates, leaking oil, anti-freeze and gasoline, and the
703 church was a few houses away and they were on a storm drain system.

704
705 Mr. Griggs: If the Code doesn't address it and you see a potential issue, I think you could place a
706 condition just as long as it's justified and there's some basis for why you're doing it.

707
708 Mr. Miller: According to our last counsel, if we know it's an issue of contaminants for an automotive
709 place as an example, we're not supposed to drive by a place before we have it come before us and I was
710 told that's because we're quasi-judicial, not regular zoning legislative. That also puts us in a quandary that

Board of Zoning Appeals

711 we don't have the ability to see on a day to day basis how it would be impacted by approving or not
712 approving a particular thing that's brought before us.

713

714 Mr. Griggs: The applicant is required to show you that he's entitled to a Conditional Use; the burden of
715 proof is upon him and if you believe on the basis of his type of views that there could be a contaminant
716 issue, he needs to show you that there's not.

717

718 Mr. Miller: I'm sure that in one point in time there is an applicant that may not tell all the facts and may
719 lie about x, y and z. They say they're opening up a health facility and come to find out it's a massage
720 parlor. I'm not saying that against legitimate businesses, but non-professional type would be the way to
721 put it. So with our inability to go by to take a look at the surroundings, it puts us in a quandary of the 7
722 factors that we're supposed to consider.

723

724 Mr. Griggs: You can require them to submit the information and not just take their word for it. Say they
725 need some type of environmental specialist. Have you had anybody and can you provide a report. Another
726 thing, and I've done it a handful of times, is you have the ability to judicially view the property.

727

728 Mr. Miller: As a group?

729

730 Mr. Griggs: As a group. I've done that before; that is fine, so you have that ability. That's certainly
731 acceptable. It's a rare circumstance but you have that ability. Members may drive by, you drive through
732 the Township; you live there. What you don't want to do is make a statement that I was out there on the
733 property or in front of the driveway at your place and this is a lie. There are other ways to do this.

734

735 Ms. Boni: So if the Board goes collectively to a site, how is that handled as a public meeting?

736

737 Mr. Griggs: Typically when we want to view the site, we will continue the hearing to a time, date, place
738 certain and then we will actually open up the hearing and say we're going to reconvene at the site.

739

740 Ms. Boni: And then I just do a public notice and record it?

741

742 Mr. Griggs: Absolutely. You can do that in those rare circumstances. Again, I think you need to be
743 practical. I have on Page 10 a couple things I want to point out. You swear people in; that's perfect.
744 Limiting testimony, don't do. Don't tell somebody that they can't testify. You have to theoretically allow
745 for cross-examination. Typically you'll only see that when attorneys are involved but there could be a
746 situation. A property owner has the right to represent themselves. Say I'm an applicant and I file for a
747 variance and the next door neighbor wants to cross-exam the applicant, they have the right to do that.
748 Most people don't know that so it's not going to happen but I was in an appeal, and typically it's just
749 attorneys, not too long ago where the neighbor had an attorney, the property owner had an attorney, the
750 Zoning Inspector had an attorney, and the BZA had an attorney. So when the Zoning Inspector got called,
751 the neighbor's attorney cross-examined her, the property owner cross-examined her then the BZA's
752 attorney also asked her questions, so you have to allow for cross-examination. You don't have to say do
753 you want to do it but if an attorney, applicant or adjacent property owner says they want to, you have to
754 permit it.

755

756 Mr. Miller: What we do, if the applicant gets up and states their case, we will ask is there anybody else
757 who would like to talk in regard to this particular matter. And people do go back and forth and there have
758 been a couple of testy scenarios where Susie says one thing and Johnny says another.

759

Board of Zoning Appeals

760 Mr. Oster: That gas station deal was kind of involved. So if we have someone who wants to cross-exam
761 them, should that person that is testifying at the time come to the other side of the podium and face them
762 in the chairs rather than us?

763

764 Mr. Griggs: No. Whoever is conducting the cross-examination, I would kind of bring them up.

765

766 Mr. Oster: Bring them up front?

767

768 Mr. Griggs: Bring them up front.

769

770 Mr. Trefz: We need to make sure their mic'd or someway to be heard.

771

772 Mr. Griggs: Correct. The only people who have the ability to cross-exam is someone who can appeal your
773 decision, so if it's a contiguous or adjacent property owner, I would let them cross-exam but if it's
774 somebody a mile away that's upset about a gas station going in, they don't have the right to cross-exam.
775 So I don't think it's okay for just the average resident questioning the applicant. I would ask them where
776 they live and try to determine if they have standing to appeal your decision. If they are contiguous or
777 adjacent, I would let them cross-exam. If they are outside of that radius or outside of the 200' notification
778 limit, I wouldn't let them engage in this back and forth. It's not appropriate and we need to control the
779 hearing. So it can get pretty tricky. When I tell you to let everyone testify and don't put time limits on it,
780 you're only truly concerned with those people who have the ability to appeal your decision, and here's
781 why. If you don't allow people who don't have the ability to appeal your decision to testify or put a 2
782 minute limit on it or you don't allow them to cross-exam, don't swear them in and they appeal your
783 decision and they say judge, they didn't let me cross-exam or they only gave me 3 minutes, the judge then
784 is required by law to open up the record and conduct another hearing. So what you're trying to do as a
785 BZA is to tie the Court of Common Pleas hands and find his review to the record you've created and if
786 you do all the things appropriately procedurally, what a judge has to do is look at that record and say was
787 their decision reasonable and justified? If they did, I can't over turn it, but if you don't do those things
788 procedurally, then he has to open the record and the property owner gets another bite of the apple.

789

790 Mr. Miller: In regard to the items on the top of Page 10, you've got a reporting podium court reporter.
791 Since we do face time live, that is considered a legal document per se.

792

793 Mr. Griggs: It's a public record, yes.

794

795 Mr. Miller: So do we need a court reporter as well?

796

797 Mr. Griggs: No. My advice on court reporters is only if you know it's going to be one of those hearings
798 where you know your decision is going to be appealed either way because you have that many people
799 upset, I would get a court reporter in even if you're doing face time live.

800

801 Mr. Miller: And with us having to do everything remote until coming up in the next month or two, since
802 we're doing everything from a home office, no need for a podium?

803

804 Mr. Griggs: No.

805

806 Mr. Miller: Number 3, multiple meetings, are you referring to multiple meetings for the same case?

807

808 Mr. Griggs: Yes. You're not under any requirement to hold this thing in one night and finish it all up. I
809 also want to make sure we understand there is a difference between a continuance and a tabling. A
810 continuance is I'm continuing to a time, date, place certain; I know when that application is going to be

Board of Zoning Appeals

811 back in front of you. A tabling is I don't know when it's going to be brought back up. So an applicant
812 may say I'm probably going to need 3 months before I get that information back to you so I'm going to
813 request we table it. The downside of tabling it is Jeff and Michele are going to have to re-notice
814 everything again. With a continuance, we don't have to do that. I just want to make sure you understand
815 the difference between the two and again, perfectly acceptable to continue and have multiple meetings
816 and once you're done, let's say you're in one of those situations where you need to get me or the
817 Prosecutor involved, we get everything we need, we meet privately, then they say, why don't you put
818 something together for us and make sure you have this thing really rock solid. You can come out and
819 close the hearing down and you can render a decision later. Actually your Code says 30 days; that's not
820 the law. It's the law because you say it is now but you just have to decide a case within a reasonable
821 period of time. That's why I have multiple meetings up there, just to kind of hit on a couple of things.
822

823 Mr. Miller: Individual versus mass swearing, we're very careful that people, and I don't remember us
824 ever missing one, but if someone does get up to talk or ask a question, we always ask them to state their
825 name and address, etc.
826

827 Mr. Griggs: And if they were sworn in. Perfect. If you do a mass swearing in and then you just say you've
828 been sworn in, proceed. That's perfectly fine and the reason why we do that is because there is a list of
829 things the judge can open the record for, and one of those is the individual's testimony was not provided
830 under oath, so that's why we want people to do it under oath; so we can say judge, we've met this
831 requirement; you can't open up our record.
832

833 Mr. Miller: And based on our history, if Rick misses, I pick it up or Ms. Sundar or Kelvin picks it up; one
834 of us is very conscious of that.
835

836 Mr. Oster: We've had people who didn't swear in in the beginning and then once the thing got a little
837 heated or whatever, they wanted to testify.
838

839 Mr. Boyd: Going back to the cross-examining, say we determine they are likely qualified and they want
840 to do cross on the applicant and the applicant doesn't respond or refuses to respond to the cross questions,
841 what position does that put us in? What's our responsibility in regard to that?
842

843 Mr. Griggs: Hopefully the chair would say answer the question and ultimately you don't have the ability
844 to hold him in contempt.
845

846 Mr. Oster: We could state that they refused to answer the question on the record, right?
847

848 Mr. Griggs: Correct. You make a statement then that the applicant refused to answer a question and I
849 think what that ultimately goes to is the credibility of that witness or applicant.
850

851 Mr. Boyd: Also, when we swear people in, if we have someone who appears to be so far removed from
852 the process, like a non-citizen of Orange Township, commenting on an issue that's appearing in the
853 Township, what's our responsibility there? Do we still allow all testimony?
854

855 Mr. Griggs: If you're 100% sure they're not a resident of the Township and they have nothing at stake,
856 you don't have to permit them to testify. My former partner Don was the Chairman of the Bexley BZA,
857 and they would have like 20 variances every single meeting, and he would actually on every single case
858 limit those who could testify to those who had standing just to be able to get through things, so you could
859 do it, so what I would tell you is Townships are an awesome form of government and if they're a
860 Township resident, I would let them testify. If they're a non-resident and you have a lot of people who
861 want to, I would not and then if you know they live on the other side of town, they're still a Township

Board of Zoning Appeals

862 resident and they don't have standing, I'd probably let them give their 2 cents and if they continue to drag
863 on, I'd probably shut them down. I have a sample hearing format in here; everyone does it different, but
864 the one thing I want to note at the bottom of 10 is deliberate renders a decision, so remember one of
865 those things is a judge can open up a record. The statute actually states that did the BZA issue findings of
866 facts that includes them all? So if you don't issue those, the judge has the ability to open up the record.
867 Now what we've seen in cases if you don't use the magic words findings of facts and conclusions of law,
868 courts will kind of extrapolate from the record that that's what you've done. So again, if we get into that
869 really nasty hearing, we're going to have you issue findings of facts and conclusions of law, and we'll
870 check that box. Appropriate evidence, the civil rules of procedure that you would see down at the Court of
871 Common Pleas don't apply. So if someone makes an argument that under the rules of procedure, that
872 doesn't apply. Your rules of procedure are contained on Page 11 to the top of Page 12. That's what you
873 concern yourself with. Those are the things that I just told you that a judge can open up the record.
874 Outside of that, but we're not going to get into the hearsay rule or anything like that, but I want you to
875 really think about the type of evidence you typically hear, the type of testimony you typically hear; most
876 of the time it's speculation. You can't put this garage next to me because it's going to decrease my
877 property value. Is that fact or is that speculation? That's opinion. Or it's going to be too noisy, going to
878 increase traffic. The real good people, the ones that know what they're doing, are going to have some type
879 of report provided by some sort of expert. They're going to hire an appraiser. They're going to do a traffic
880 study. They're going to provide you statistical evidence that what they're saying is true. The example that
881 I want to give is Jerome Township off 33 between Marysville and Dublin as a conditional use they allow
882 for transportation facilities, distribution centers. FedEx came in and wanted to put in a distribution
883 facility. So the residents said traffic, noise, property values, light pollution. FedEx, as you can imagine,
884 knows what they're doing, walked in with expert after expert who provided reports on traffic impact.
885 They actually had a noise and light expert from MIT provide an analysis that it wouldn't impact. That's
886 an extreme case but I think it serves a purpose for what we're talking about tonight. You can have
887 residents say it's going to do those things but when it gets down to if a decision is going to be appealed
888 either way, there really needs to be some type of substantive evidence to support what they're saying. We
889 had a lady on a storage case hire a real estate agent and an appraiser who both came in and she was just an
890 average resident. They testified that if this goes in, it's going to decrease her property value and the Board
891 relied heavily on it and denied the request for conditional use. So it's that type of thing that carries
892 weight.

893
894 Mr. Oster: Fact versus hearsay.

895
896 Mr. Griggs: Or opinion, speculation. Poorly worded zoning resolutions. If a code is ambiguous, a tie goes
897 to the applicant for free use of the property. That's what a court will decide. ??? is just a fancy legal word
898 that simply says I can't keep filing the same application over and over in front of you or if I keep filing
899 the same variance request, you don't have to hear it, only if there's a substantial change in circumstance
900 or in my application do you have to re-hear it. Typically what we've seen is courts follow along in that
901 Duncan factor in the 25% threshold. Let's say I want to build an accessory structure and you deny me,
902 they're done; they can't come back and file the same application again unless let's say they reduce the
903 size of that structure by 20%/ That's a substantial change in circumstance and you can hear it now.
904 Failure to appeal. You render a decision, it typically happens in denial, they don't appeal it to the Court of
905 Common Pleas, they're done. They're going to have to comply with the Code. Another type that you see
906 is what I call the ask for forgiveness situation. I've already built it and now I'm asking for forgiveness and
907 the BZA denies it and I don't appeal it to the Court of Common Pleas, they're done. Jeff and Michele
908 have to enforce the Code. Reconsideration, you actually have the ability to reconsider your own decision
909 until your decision is appealed or the 30 day time limit to appeal your decision expires. You won't find
910 that in statute; that's more out of cases and I don't see it very often. I've probably had it 2 times in my 20
911 years.
912

Board of Zoning Appeals

913 Mr. Miller: In that regard, and I'm not going to name the entity, but I felt I was bamboozled by an
914 applicant. They made a great case but after the fact when I saw their building, I thought I can't believe I
915 let that get approved or I voted for that, and I actually apologized to the Board for it. If I don't agree with
916 something after the fact after I see the building or whatever, I have 30 days to where I can request it?
917

918 Mr. Griggs: Your reconsideration should be based upon some form of new evidence and typically where
919 I've seen it in the couple cases I've had is where the applicant provides additional evidence or provides
920 something that they didn't provide before and it usually comes in a letter format and says I have
921 additional evidence and I want the Board to reconsider the decision. I think if you have new evidence, you
922 can reconsider your decision. I don't think if you have buyer's remorse if you will that that's a legitimate
923 reason to reconsider.
924

925 Mr. Miller: I wouldn't call it buyer's remorse but the way the picture was painted and the drawings were
926 provided we need this because we're so far away from this particular roadway and that's why we need
927 this color and this font size, and come to find out, and again this goes back to a scenario of us not being
928 able to drive by, I felt like a jerk.
929

930 Mr. Oster: I felt more sad about the 2 churches that wanted to put up digital signs and we kind of shot
931 them down and then come to find out there's already a couple digital signs at the schools and other
932 businesses, and I kind of thought we should have gone back and said we've looked at that again and even
933 if there wasn't a time limit on it because what they were doing wasn't egregious in size or anything like
934 that; it was pretty much the digital signs.
935

936 Mr. Griggs: For that particular applicant, I think I would be hesitant to reopen it unless I had some new
937 evidence that wasn't brought before me as part of the hearing.
938

939 Mr. Oster: Like I said, I later realized that we did have the same type of signs with moving LED's at a
940 school.
941

942 Mr. Griggs: Understand that schools are different. Here's the rule of governmental entities. They are
943 subject to zoning but they only have to make a good faith attempt to comply with it.
944

945 Mr. Miller: They didn't even go through zoning; they went straight to the Trustees.
946

947 Mr. Griggs: What the case law basically says on that is the good faith attempt doesn't mean they have to
948 request variances or conditional uses, so blame the courts.
949

950 Mr. Boyd: If we would be able to codify it that would help us though, right? Then we could say they're
951 either conforming to what's the Code or they're not. Same with the font size thing, we could say is this
952 visible at a distance of 500'? When can you first read the sign kind of thing, and if we had that standard
953 then they couldn't bamboozle you because it's fact.
954

955 Mr. Griggs: Typically they want to be a good neighbor and work with you but I had a nasty case in
956 Pickerington with a bus transportation facility and they just basically gave the Township the middle finger
957 and did what they wanted to.
958

959 Mr. Miller: It was against Code to have a digital moving signage, so that's what hurt them.
960

961 Mr. Griggs: And they'd probably win if you took them to court because they're a governmental entity.
962

Board of Zoning Appeals

963 Mr. Oster: My thing is that I don't buy into the government being able to do whatever they want and then
964 you hold everybody else to a stricter standard. If it's already been done, then I think we should let
965 everybody do it.

966
967 Mr. Griggs: What I would like to do ultimately is, and I'll talk to Michele about this, is maybe have an
968 ethics training with the Zoning Commission and BZA so we can just simply talk ethics but what I want to
969 tell you, here's the upshot, you can't take bribes, so that's easy. The hard part is that what the ethics law
970 say is that you cannot use your position to secure anything of value that would have a substantial and
971 improper influence upon you as a public official. What that means is a thing of value is to you, your
972 family, or your business associates. A thing of value can be a benefit or a detriment, so this is an easy one;
973 family means your parents, your kids, step-kids or adopted kids, your siblings, or anyone who resides in
974 your residence. Your third cousin, he's okay. The question that's typically presented for BZA members is
975 when am I prohibited from hearing an application? When would something have a benefit or detriment to
976 property that I own or a family member owns? If a property is contiguous, adjacent or nearby, but they
977 did give a little guidance. Nearby from written formal opinion is 150', so if I'm contiguous or adjacent to
978 an application to my property, I need to recuse myself. And recusal means I can't talk to any other Board
979 members; I need to step away.

980
981 Mr. Oster: So if it's a neighbor in the neighborhood but they're several houses down the street and not
982 right next to you, then you can hear it?

983
984 Mr. Griggs: Correct. Assuming you have a distance requirement in your Code, which you guys do, the
985 law basically says contiguous and adjacent property owners should receive notification. But a lot of times
986 Townships will put a distance requirement in addition to that and you guys put a 200' requirement, people
987 are going to be notified 200'. If you receive a notice from the Township that a hearing is going to happen,
988 I would recuse myself because the purpose of that notice is basically telling you is you have potential to
989 have special harm from this application or be impacted by this application. Just because you're a member
990 doesn't mean you give up rights. You can certainly request variances, if you want to show up at a
991 rezoning and say I'm opposed to this as a resident, you have that ability, identify yourself as Pete Griggs,
992 average Orange Township resident and not Pete Griggs Orange Township BZA member. That's where
993 you get in trouble, identifying yourself as a BZA member, simply you're a concerned Orange Township
994 resident. But you have the ability to show up; there is nothing wrong with you showing up as a resident
995 on a zoning matter. I have Trustee attendance at BZA hearings 99.9% of the time. The Township does not
996 have standing to appeal your decision unless it deals with Township property or impacts Township
997 property; they don't have standing. So what I would tell the Trustees is stay away; you appointed these
998 guys to do a job, let them do their job.

999
1000 Mr. Miller: But you're also saying this goes both ways, that if we go to a Trustees' meeting, just because
1001 we're interested to see if the Trustees are going to approve something, that we shouldn't do it.

1002
1003 Mr. Griggs: No, what I'm telling you is you can show up, say I'm Pete Griggs, Orange Township
1004 resident, and I'm opposed to this. Me personally, if I was on, and this is just my own personal opinion, I
1005 wouldn't, but that's just me. I got my start working for the Senate for a long time and that's just my
1006 political brain working, but there's nothing politically wrong with you doing that as long as you're
1007 identifying yourself as a regular resident and not a BZA member. So that's just about what I wanted to
1008 point out. If I get a notice from the Township about an application before the Board, just recuse yourself.
1009 What I would do is re-arrange your agenda and put that last and then have everything heard and then
1010 when it comes to that say Mr. Chairman, I have a conflict with that application, I'm going to recuse
1011 myself, everyone have a good night. Down the line maybe we can do more education and make it a little
1012 more pointed but I wanted to throw a lot at you tonight.

1013

Board of Zoning Appeals

1014 Mr. Beard: I have a couple of things. Sometimes the Board gets kind of caught in the weeds, gets off topic
1015 and starts discussing things that really isn't in the application or how something is designed. What role on
1016 my part can I step in? Typically the chairman steps in and I don't want to over step my bounds on what
1017 I'm allowed to do to cause issues if we get an appeal or something like that.

1018
1019 Mr. Griggs: That's a really tough question. If you're basically saying I'm not sure that's part of the
1020 application or I don't know if we should be considering that; I don't know your relationship with the BZA
1021 well enough. From a legal perspective I don't think it's going to cause any heartburn if you do that. Just
1022 try in a nice way to bring them back around but that's generally upon them to know their role and their
1023 duty but I don't think it's going to kill us one way or another if it gets appealed.

1024
1025 Mr. Beard: If the Board tries to negotiate with the applicant.

1026
1027 Mr. Griggs: And that's another tough one. It's their application and it's their burden of proof to them to
1028 prove their entitled to it. The ones that really know what they're doing are going to get a read of the Board
1029 and are going to know when they should be trying to figure it out and it coming from them rather than
1030 coming from the Board. But I think big picture I don't like negotiations yet if I think it's applicant driven,
1031 that's okay but I don't want any preconceived standards coming from the Board to the applicant.

1032
1033 Mr. Miller: We try to stress that we're not here to negotiate nor is it our position to negotiate. We do
1034 stress that we will try to give some guidelines to help the applicant but that we're not there to negotiate.

1035
1036 Mr. Griggs: And I think that's the right way to do it and again, it's got to be applicant driven. If it comes
1037 from the applicant and they say we'll reduce this by "x", I don't necessarily want you to say okay. It's
1038 upon them to basically say I'm going to reduce my application by "x" and then you guys can make a
1039 decision and if you're still at 50% variance request and you're only reducing it by 30, it's still substantial
1040 in my opinion. If they say they're going to amend their application and reduce it another 10% to bring it
1041 to 18%, now it's not so substantial. So again, if it's applicant driven, that's difficult because we're kind of
1042 playing poker and those applicants who know and do a good job can read the Board and move in that
1043 direction. But again, no preconceived notions or standards and not that you guys have done this, but it's
1044 always got to be "x" and we have this precedent and it's always "x" and unless you're going to agree to
1045 "x", we're going to deny your application. That can get you in trouble if that decision were appealed.

1046
1047 Mr. Shipley: I don't have any questions but, Pete, the information Jeff sent us in the package is fantastic
1048 information and tonight was quite helpful and thank you for your time.

1049
1050 Mr. Oster: I agree. It's long overdue to get us on track.

1051
1052 Mr. Griggs: If you guys have questions, get ahold of Jeff or Michele.

1053
1054 Mr. Beard: On the sample decisions you sent us. If they do the denial, would they just fill that in at the
1055 hearing and then just write that in.

1056
1057 Mr. Griggs: Yes, understanding the context and how you're operating and assuming you don't have a
1058 bunch of attorneys in the room, I think you can.

1059
1060 Mr. Beard: Does it matter who does that? When we do stuff like that the staff usually does that and fills
1061 that in.

1062
1063 Mr. Griggs: It should be articulated by one of the Board members. Remember Jeff, you could be thought
1064 of and typically are as an adverse party.

Board of Zoning Appeals

1065 Mr. Beard: Typically we just work on it like the secretary at the meeting but then we would make them
1066 read it, what conditions they put on it and make them read it or we can make the Chairman do it.

1067
1068 Mr. Griggs: It can be any Board member. A lot of places will just take turns on making motions.
1069 Whatever the Board wants to do.

1070
1071 Mr. Miller: If there are no further questions, the meeting is adjourned.

1072 Second

1073 Meeting adjourned at 8:30 p.m.

1074
1075 Minutes prepared by Cindy Davis, Zoning Secretary

1076
1077 On September 16, 2021, Mr. Miller made a motion to approve the March 4, 2021 minutes of the Orange
1078 Township Board of Zoning Appeals for Special Training Meeting with the following corrections:

- 1079
- 1080 • Lines 84 and 85: "ag" should read "AG"
 - 1081 • Line 544 should read: "And it's hard to do a reasonability test with ordinary sensibilities"
 - 1082 • Line 698 should read: "...so they asked us to face the damage to the vehicle away from the road."
 - 1083 • Line 731: remove the comma from "Members"
 - 1084 • Line 968: "mixed" should read "ethics"
 - 1085 • Line 968: "aspects" should read "ethics"
 - 1086 • Line 972 should read: "A thing of value can be a benefit or a detriment..."

1087
1088 Seconded by Ms. Sundar

1089
1090 Vote on Motion: Mr. Miller-yes, Mr. Oster-yes, Mr. Shipley-yes, Mr. Trefz-yes, Ms. Sundar-yes

1091
1092 Motion carried

1093