

**BIRMINGHAM TOWNSHIP PLANNING COMMISSION
MINUTES OF THE MEETING OF MAY 12, 2009**

At 7:30 Chairman Nick DiMarino declared a quorum and called to order the regular May meeting of the Birmingham Township Planning Commission. Present in addition to the Chairman were Debbie Hineman, Mary Pat McCarthy, Pete Davenport, Doug Marshall, Scott Towler, Eric Hawkins, Solicitor Frone Crawford and his Associate Andrew McReynolds.

Minutes of the April 14 meeting were approved after correction of the name McFadden (Par. 2) to McCarthy. (Hineman, Davenport)

Chairman DiMarino announced that the only item on the agenda was a Sketch Plan for subdivision of the Boor property in Spring Meadows (Lot 56). Mr. DiMarino explained that, since it was a sketch plan (and not a preliminary plan), the role of the Planning Commission was to look at it and possibly make comments, but not make any decisions and that a sketch plan does not start a clock for decision-making. Mr. DiMarino asked that anyone speaking from the audience state their name and address for the record. He then asked Mr. Crawford to state his conclusion from his research of the property history.

Mr. Crawford said that, when the sketch plan was submitted, the township engineer asked if there were any provisions in the township Zoning Ordinance that would preclude the subdivision of Lot 56. Mr. Crawford found that the subdivision of Spring Meadows preceded the law pertaining to "common interest communities." Adhering to the Zoning Ordinance of that time, the subdivision was a combination of cluster development and lot averaging, so it allowed one house for every two acres after subtracting the rights of way (streets, etc.). The maximum density was allowed and less than fifty percent was designated common open space. Land areas within individual lots exceeding the one-acre minimum were also considered "open space", so the Boor lot was credited with seven acres of "open space". The Restrictive Covenant did not, however, require that oversized lots were restricted from further subdivision; it did say that the lots would comply with the Zoning Ordinance as it would be amended. Therefore the Boor plan must comply with today's Zoning Ordinance and, since the plan will be examined in that light during the coming process, Mr. Crawford made no attempt to deal with anything except the Restrictive Covenant. Mr. Crawford cited recent relevant case law in which the owners were permitted to subdivide because further subdivision was not specifically prohibited by their Restrictive Covenants. The covenants were narrowly construed and not interpreted by inference. Because of this, Mr. Crawford concluded that Lot 56 may today be legally subdivided.

Jim Fritsch of Regester Associates spoke as a representative of Mrs. Boor who was unable to attend the meeting. Mr. Fritsch thanked Mr. Crawford for his Memorandum of April 13, 2009 (also received by the Planning Commission) explaining what Mr. Crawford had just stated, and asked that it be made part of this evening's record. Mr. Crawford re-stated that the subdivision plan must adhere to the current

Zoning Ordinance provisions and that it could not “pick and choose” from the original and the current ordinances.

Mr. DiMarino emphasized that there will be many other issues to be addressed to ensure that the plan adheres to the letter of the current ordinance. He noted that the Planning Commission has not yet received a formal plan but that, in his opinion, any plan for subdivision of Lot 56 would not comply with the original intent of the subdivision Restrictive Covenant.

Cynthia Emlet, 1130 Dorset Drive, whose five-acre property borders the Boor property, asked why the extra acreage of Lot 56 was not part of the open space. Mr. Crawford replied that it is open space, but not *common* open space. The Zoning Ordinance has changed: permitted density is now higher. There are no subdivision restrictions on the Emlet lot, so unless there is an additional restriction on the Emlet lot, it is in the same position as Lot 56. *Common* open space is restricted and can't be developed. A homeowner may have a private right of action; e.g., if you believed there was a restriction when you purchased, if everyone in Spring Meadows thought there could be no further subdivision. Mr. Crawford assured the group that he had diligently searched for a way to implement the intent of the original plan.

At this point, Chairman DiMarino emphasized that Solicitor Crawford was there to advise the Planning Commission and would not provide private counsel to individuals.

Dr. Robert Schwan, 1114 Dorset Drive, spoke representing the Board of the Spring Meadows homeowners organization. Dr. Schwan said the homeowners have been functioning with the belief that the Restrictive Covenant prohibiting subdivision applied to *all* lots in Spring Meadows. The group wants the Restrictive Covenant to remain in effect and wants it to be part of future approvals for *all* lots.

Eric Bovard, 1122 Dorset Drive, asked how the current density rules differ from the rules in effect at the time of the original Spring Meadows subdivision. Mr. Crawford said the calculation for cluster subdivisions now would be approximately one dwelling per 80,000 square feet; the base density now is higher, but now the developer has to “net out” the steep slopes and wetlands, etc. [Note: the precise formula is 0.6 du's per “net” tract area.]

Dan Sedick, 1141 Dorset Drive asked if the Boor plan would have to include an engineering study of the entire subdivision, or just of Lot 56. Mr. Crawford said he did not know, but felt that requiring the larger study would be a reasonable position for the Township to take.

Matt Tucker, 1124 Dorset Drive, asked which came first: the Zoning Ordinance or the rules regarding steep slopes and wetlands. Mr. Crawford replied that they had come at about the same time, in the 1980s. The current practice of subtracting environmentally sensitive lands from the total should be applied to the entire Spring Meadows subdivision, but keep in mind that current practice also allows greater density. Mr.

Tucker asked whose responsibility it was to follow through to ensure that the Township's intent to restrict was applied to all the lots. Mr. Crawford said he did not know how it was done at the time of the original subdivision but that today it is the responsibility of the Township Solicitor. Mr. Crawford wondered if, rather than an omission, the lack of restriction for certain lots may have been negotiated.

Lenore Larry, 1134 Dorset Drive, asked if the original two-acre calculation isn't grandfathered. Mr. Crawford answered that the grandfathering is in favor of the individual; unless the action is specifically restricted, the property owner can take advantage of the change. Mrs. Larry asked if the Restrictive Covenant is still in force; it says 76 lots. Mr. Crawford said the Restrictive Covenant is still in force and that Lot 56 and its "daughter" lots could be subject to it.

Cindy Emlet, 1130 Dorset Drive, asked why Lot 56 doesn't now fall under the Restrictive Covenant. Mr. Crawford replied that while lot 56 is governed by the Restriction, there is no specific prohibition against further subdivision of oversize lots. The Township cannot enforce an earlier plan where the density requirements have been changed by amending the zoning ordinance to allow a greater density under today's rules.

Doug Tip, 1108 Dorset Drive, said the plan says that the community consists of 76 lots. He asked if a density calculation had been done under the rules of the current Zoning Ordinance. Mr. Crawford said he had not attempted such a calculation. Mr. Tip recommended that the Planning Commission not go forward with the Boor plan because the Spring Meadows subdivision plan approved 76 lots and Mr. Tip believes that calculations under the current Zoning Ordinance, netting out wetlands, etc., will preclude further subdivision.

John Robinson, 1125 Dorset Drive, said the Boor property is unique because of its access points. He believes further subdivision would make it *more* unique and that this impacts the possibility of approval.

Kim Robinson, 1125 Dorset Drive, noted that the Boor driveway is not a street, so the subdivision would be adding a street, not a driveway. Mr. Fritsch (Register Associates) responded that the subdivision would make three lots, but that the access easements had not yet been decided. He said the current Zoning Ordinance allows four lots per driveway.

Steve Rushton, 1133 Dorset Drive, observing that the Planning Commission members were distancing themselves from the decision-making process, asked if the Board of Supervisors will take into account factors other than the Planning Commission recommendations. Chairman DiMarino responded that the Planning Commission would look at a formal plan, have the Township Engineer look at it, and see if it meets all subdivision conditions, then make a recommendation. Mr. DiMarino remarked that the Board of Supervisors, while taking all of the above into consideration, acts independently. Mr. DiMarino said the Planning Commission would not recommend what the neighbors should do and would not make any recommendation on a Sketch Plan. Mr.

Rushton asked if the neighbors' comments would be part of the record (examined by the Board of Supervisors). Mr. DiMarino assured him that the comments become part of the record as they are recorded in the Planning Commission minutes, and that the Planning Commission Chairman relays to Al Bush a sense of the comments made because Mr. Bush is the Board of Supervisors' liaison with the Planning Commission.

Matt Tucker, 1124 Dorset Drive, asked if the Board of Supervisors meetings are public. Mr. DiMarino said that the meetings are public and the agenda is published in advance, including on the website.

Joan Lawless, 1196 Hampshire Place, asked whether the addition of two extra lots would have an impact on her deed, since it would then be contradictory. Mr. Crawford said additional lots would not invalidate the other deeds. The Restrictive Covenant would still be valid for restricting *common* open space. It does not restrict individual lots from being further subdivided or in any way invalidate the title to individual lots. He suggested that the Restrictive Covenant now be amended to reflect what the community really wants. Mr. Crawford repeated that he did not want to give opinions on the private rights of the homeowners.

Kim Robinson, 1125 Dorset Drive, asked if the smallest lot is non-compliant. Mr. Crawford said he thinks there are no lots smaller than an acre.

Cindy Emler, 1130 Dorset Drive, asked who the Township Solicitor was at the time of the Spring Meadows subdivision. No one was sure, but the names Gawthrop and Slade were suggested as possibilities, though both are now deceased.

Dr. Robert Schwan, 1114 Dorset Drive, noted that Mr. Crawford (in a prior meeting) had mentioned that the deed recording was illegal because it had been recorded in reverse. Dr. Schwan asked how an illegal act can now be condoned. Mr. Crawford replied that, regardless of the recording timing, the Restrictive Covenant does not specifically restrict against further subdivision.

Eric Bovard, 1122 Dorset Drive, asked if the Restrictive Covenant didn't "call out" the number of lots as 76. Mr. Crawford replied that it was just a description. Mr. Bovard asked if the access drives would really be permitted. Mr. Crawford said he hadn't examined that. Chairman DiMarino assured Mr. Bovard that the proposed rights of way would be examined if a Preliminary Plan is submitted.

Steve Rushton, 1133 Dorset Drive, asked what weight the Board of Supervisors would place on the two cases cited by Mr. Crawford. Mr. Crawford said the Board would have to take note of them because they would definitely apply to this situation. He said the law requires the Township to approve a subdivision *if* the proposed subdivision complies with the Township's laws.

Cindy Emler, 1130 Dorset Drive, noted that her private right did not seem to matter in that, though she had no say in the original subdivision, the current proposal has

become her (and her neighbors') problem. Mr. Crawford said that she (and her neighbors) *may* have a private right but that he could not advise them about it.

Mr. DiMarino asked if the Planning Commission members had questions or comments. Doug Marshall asked if all subdivisions built under the old Zoning Ordinance are no longer valid. Mr. Crawford said it depends on the master deed. The Spring Meadows agreement makes the common open space permanent, but not the individual lots. Mr. Marshall said he's concerned about setting a precedent (if the Township were to approve a Boor subdivision).

Eric Hawkins said a Sketch Plan does not have many details. He said the Planning Commission is not happy about the Boor proposal and that they're being careful. If a Preliminary Plan is submitted, the Planning Commission will examine it very closely.

Debbie Hineman said that, having been a Birmingham resident since 1976, she is sympathetic to the Spring Meadows residents. She said the Planning Commission will scrutinize every proposed plan, that it is a good Planning board, and that it will do a good job. She encouraged the residents to attend every meeting.

Mary Pat McCarthy said she was in agreement with Mr. Hawkins and Mrs. Hineman.

Scott Towler asked if, since the proposed subdivision must adhere to the current Zoning Ordinance, the whole subdivision will have to be re-evaluated. Mr. Crawford replied that he was not aware of any relevant case law dictating that, but that the property in question must be examined in the context of the entire development. He said the Planning Commission *may* choose to look at the entire subdivision. Chairman DiMarino said the Planning Commission may re-evaluate the whole subdivision. He said Sketch Plans lack detail in order to avoid expense; if an insurmountable problem were found, the applicant would not have spent money needlessly.

Doug Marshall suggested that slopes and wetlands would probably be the next big issue. Chairman DiMarino said the Planning Commission now can only look at the Township Engineer's letter. Mr. Marshall suggested considering the proposal a whole subdivision, not just one lot. Mr. Crawford said that, if the applicant does not submit all the requested information, the Planning Commission may say that the applicant does not have enough information. Mr. Fritsch said that Register has only looked at Lot 56, not at the whole of Spring Meadows. Mr. Crawford said that it is logical to conclude that the Boor proposal would have been denied under the old Zoning Ordinance. To "pick and choose" from both the old and the new Zoning Ordinances is not a defensible position. The newer Zoning Ordinance allows greater density but is more restrictive in "netting out" slopes, flood plains and wetlands; it could be applied to the whole subdivision, particularly in determining permissible density.

Mary Conners, 1101 Dorset Drive, asked for a description of the process. Mr. DiMarino described it as follows: Mrs. Boor brought a Sketch Plan to the Planning Commission. The Planning Commission Solicitor said there was no legal basis for denying it. The Planning Commission examines it to see if it meets all the zoning and subdivision ordinance requirements. The Planning Commission will only go forward if Mrs. Boor submits a Preliminary Plan. Knowing that there are many issues involved, the Planning Commission will make sure that any and every plan meets every requirement of the Zoning Ordinance and Subdivision and Land Development Ordinance.

Kim Robinson, 1125 Dorset Drive, asked if Mrs. Boor was developing the property herself or selling it to a developer. No answer was given.

Ann Hawkins, 1106 Sherbrooke Drive, asked if the Planning Commission has a timetable. Mr. DiMarino stated that there is no timetable since only a sketch plan has been submitted.

Eric Hawkins said a Preliminary Plan submission would start a clock. He said that the Planning Commission has heard from the Boor attorney, an engineer, and Mr. Crawford. There are homeowners of 76 properties. The Planning Commission must do what's best for the Township. "We're not treating this lightly. The Planning Commission can move forward if every question is addressed."

Matt Tucker, 1124 Dorset Drive, asked if any of the three access points could go through the open space. Mr. Crawford said they could if there's an easement.

With no further questions, the meeting was adjourned at 8:55 p.m. (Hawkins, Hineman)

Respectfully submitted,

Jacquie Roach, Secretary