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Attorney: O'Neill will appeal LM's decision in county court

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By Cheryl Allison

What may have been the longest-running land-use hearing process ever in Lower Merion Township came to an end last week.

It seems clear, however, that process will soon resume — in a Montgomery County courtroom.

On Jan. 21 the board of commissioners issued its findings and order on the O'Neill Property Group's request for conditional-use approval to develop its 13.8-acre parcel on the Schuylkill River in Bala Cynwyd as an apartment complex.

This may, however, be a case where the developer cannot take yes for an answer.

In the 71-page decision, which wraps up eight months of hearings in 15 sessions, the board grants the residential use under its 2008 amendment of its M (Manufacturing District) zoning.

The site is the former Connelly Container property at 600 Righters Ferry Road, even earlier part of the sprawling Pencoyd Iron Works site from the mid-19th century to early 20th century.

The order also finds that O'Neill can develop, using incentives in the code, to the density it has proposed: 580 apartment units in five buildings with associated parking at a reduced ratio of 1.5 spaces per unit, or 870 spaces in total.

It does so leaving a laundry list of planning issues, some relatively minor and many more significant, to the future land-development process.

That is a point that O'Neill's attorney, Marc Kaplin, had hammered on in the hearings while calling in a long list of expert witnesses to address potential concerns. At the conditional-use stage, he had reminded the board again and again, it should only consider the requested use, and whether the basic proposal complies with code requirements.

At the same it granted that central point, however, the board gave approval with a long list of conditions, at least a few of which, Kaplin said this week, add up to this result: "You can't build this project as designed.

"They've given with the right hand and taken back with the left," Kaplin said. The board "said yes but it's a Pyrrhic victory."

That's why, Kaplin said, his client will appeal the decision to the Court of Common Pleas.

There are many areas in which the board found that issues raised in the hearings could — and must — be resolved when the project goes to land development.

They range from items that could slightly impact the final number of apartment units, such as providing dedicated loading areas and turn-around spaces in parking aisles under buildings, to larger efforts such as redesigning traffic access to the property from the two railroad underpasses that are the only vehicular access from Righters Ferry Road.

In an area of much dispute, the board heeded testimony from township staff and the township engineer that the compacted ground beneath a rail track of the Norfolk-Southern freight line on the property constitutes impervious surface and pushes the development proposal slightly above the 60 percent permitted by right. The developer has said it will provide green roofs on parts of the buildings to get an impervious-surface bonus.

Far more problematic from the developer's perspective are the board's findings regarding pedestrian access to the historic Pencoyd Bridge to Manayunk. O'Neill owns the bridge and the property on which it lands on the Philadelphia side of the Schuylkill.

The bridge plays an important role in potential development for several reasons. It provides a connection from a proposed riverfront trail to the Schuylkill River Trail and other trail networks across the river. It also provides a connection to public-transit facilities in Manayunk. And it would also provide alternative access for fire trucks and other equipment as well as an evacuation route for apartment tenants in an emergency.

Because O'Neill is using access via the bridge to public transit within 1,500 feet to get both density and parking bonuses, the board found that the developer must provide pedestrian access for the general public, not only apartment tenants.

To avoid conflicts in an emergency, the township will further require the developer to provide a separate pedestrian walkway rather than a single lane across the bridge.

"That's a classic condemnation. That's a taking," Kaplin said in response to those conditions. "If someone came to your front yard and said you have to let the public walk on your front yard because there's a trail, that's a taking."

Kaplin said the project provides public access to a river trail on the property. "But nowhere in the ordinance does it say if you have a bridge you have to allow the public to use it," he said.

In the same way, the ordinance, he maintained, simply says that public transit must be within 1,500 feet for the project to qualify for greater density and the parking reduction.

Trumping even that contentious issue, however, is the board's finding regarding requirements of the code as they pertain to development within the Schuylkill River floodplain. In the hearings, Kaplin argued that, by permitting apartments or other residential uses in floodplain areas, the township was permitting associated parking in such areas. The township interpreted the requirements differently.

In the board's decision, it found that the developer had to satisfy floodplain requirements more broadly than Kaplin argued. Specifically it found that parking "can be provided in the floodplain only if non-floodplain locations are not feasible." More than 300 spaces of O'Neill's proposed 870 parking spaces would be in floodplain areas.

It cited a township exhibit submitted in the hearing that indicated parking could, in fact, be provided outside the floodplain if, for instance, it were accommodated in parking structures.

"This is such a disingenuous argument," Kaplin responded. What really is at the root of the board's finding, he maintains,

is that some on the township's planning staff, on its planning commission and on the board of commissioners itself, simply "don't like the design" that has been presented.

In that design, apartments would be built in five buildings situated perpendicular to the river and raised on columns, with parking under and between the buildings.

In adopting the ordinance to permit residential development on the riverfront, the board, in fact, had included a building height of 120 feet, greater than in other places in Lower Merion, with the idea that taller buildings could be built there.

"They concocted this argument" regarding parking in the floodplain "to try to force us to change the design," Kaplin concludes.

Along those lines, Kaplin said his client has filed Right to Know requests to obtain "communication we know was going on between various commissioners and the staff while the hearings were going on," and is awaiting disposition of those requests to determine some of its next steps.

In the meantime, with a 30-day window from Jan. 21 to appeal the conditional-use order, O'Neill will file the appeal in county court, Kaplin said.

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