

Holly Township
Board of Trustees and Planning Commission
Special Meeting
Minutes of March 9, 2009

Call to Order: Chairperson LaLaine Kilbourn called the March 9, 2009 Special Meeting of the Holly Township Planning Commission and Board of Trustees to order at or about 6:00 p.m. at the Holly Township Hall, 102 Civic Drive, Holly, Michigan, 48442.

Roll Call:

Commissioners Present:

LaLaine Kilbourn, Chairperson
Steve Ruth
Rick Stevens
Bill Angus
Mark McHalpine
Ted Gurski

Others Present:

Attorney Greg Need, Adkison, Need & Allen
Brian Oppmann, Carlisle/Wortman
Peter Clemens, Holly Village Manager
Larry Lilly

Commissioners Absent:

George Barton

Board Members Present:

Jesse Lambert, Supervisor
Karin Winchester, Clerk
Mark Freeman, Treasurer
Janet Leslie, Trustee
Steve Ruth, Trustee

Staff Present:

Laura DeVault, Zoning Administrator

Chairperson LaLaine Kilbourn moved to excuse Commissioner George Barton from the meeting. Commissioner Mark McHalpine supported the motion. A voice vote was taken; all those present voted yes; the motion carried.

New Business:

1. Township Attorney presents an Educational Workshop on planning and zoning issues.

Attorney Greg Need provided information to the Planning Commissioners and Board of Trustee members. An overview of his presentation is as follows: There are new board members and he thought it would be helpful to discuss the various boards and their responsibilities; what they do and who decides what. He indicated he would also discuss how to make proper motions and create a record that can be defended in court, if need be. He will discuss conditions and bonds and zoning violations; how they're addressed and how they effect pending applications.

There are three basic boards that administer zoning within the Township. The first is the Township Board, which is the legislative function. They are the elected representatives of the Township so they are responsible to, among other things, adopt not just zoning ordinances, but all kinds of ordinances, as well as amending those ordinances.

Part of the process of amending a zoning ordinance is rezoning pieces of property. When someone wants their property rezoned from residential to commercial, it is considered an amendment to the zoning ordinance. Because of that, the powers to decide rezoning rest within the Township Board and not the Planning Commission. The Township Board also appoints or confirms the Planning Commission and Zoning Board of Appeals (ZBA) members. They are the legislators of the township, the elected officials. In the zoning context, that is what they do.

The next zoning function is the administrative function. When you have your ordinance in place, now someone wants to do something with their property, zoning is administered by the Planning Commission. The Planning Commission decides special land uses and site plans. Because rezoning is a legislative action, the Planning Commission's role is to recommend. So you consider rezoning and conduct a public hearing. When that's done, you make a recommendation to the Township Board whether the rezoning should be approved or not.

Finally, there is what the law calls the judicial function, which is vested in the Zoning Board of Appeals. If the zoning ordinance would create a hardship for a particular property owner, they have the right to go to the ZBA to request a variance. That's allowed under Michigan law and by the terms of your own ordinance.

There are also permitting and enforcement functions, which vary from community to community. Here we have a zoning administrator, building official and ordinance officer that all have their own responsibilities. The zoning administrator takes care of the permitting process; the building official, some permitting and some enforcement; and the ordinance officer in some cases also handles enforcement functions.

The Planning Commission decides special land uses and site plans. Those are their powers. The difference between the two relates to what kind of use somebody wants to develop within the township. The zoning ordinance is divided into districts. In every district you have some uses that are permitted by right, or permitted automatically; and you have other uses that are called special land uses. If a use is permitted by right, as the property is zoned, all the property owner needs to do to go forward is to get a site plan approved by the Planning Commission.

There are other uses that are considered more intensive; maybe they'll create a lot of noise or generate a lot of traffic. For whatever reason, they have the potential to be a little more obnoxious than your uses permitted by right. Those uses are still allowed, but they're only permitted under what's called a special land use under our zoning ordinance. For example, in the C-1 district, auto service stations are a special land use. They're not allowed automatically. If somebody wants to develop an auto service station, they have to go through two sets of approvals. It requires both special land use approval, as well as site plan approval.

Let's say somebody comes to Holly Township and they want to put up a four-story hotel on property zoned residential. Whether you would allow this or not is beside the point. If somebody wanted to do that, they would first have to seek rezoning from the Township Board. Hotels are not allowed in single family residential districts so they would need to seek a rezoning for the C-2 district. But they're not done there. They would also have to seek a special use

permit from the Planning Commission because a hotel is considered a more intense use that's not allowed automatically; it's only allowed through the special land use process. They then have to seek site plan approval from the Planning Commission. But even here they're not done because they want a four-story hotel and our zoning ordinance restricts height to two and a half stories. They would have to seek a height variance from the Zoning Board of Appeals from the two and a half story limit in the C-2 district. If you want an example of how the various boards in the township interplay, this would be one.

When the court looks at defending these issues, the test is a little bit different, depending on whether the Planning Commission makes the decision of a special land use or the Township Board makes the decision on a rezoning. So the distinction becomes important in that context.

Chairperson LaLaine Kilbourn noted rezoning comes to the Planning Commission first and the Planning Commission recommends approval or denial to the Board.

Attorney Need agreed, stating ultimately the Township Board decides. The Planning Commission is the recommending function.

Commissioner Bill Angus questioned where Attorney Need had stated the final step was to go to the ZBA for the extra story and a half, why someone would make an application for an additional 1 ½ stories when it isn't a hardship beyond their control, but something they only wish for.

Attorney Need stated he used the example to show how somebody might have to go to each various body. In terms of the actual request, height variance is very difficult to grant by the ZBA because there's almost always a reasonable use of the property without it. In that particular case it's likely it wouldn't be granted because the only rationale is, well, I'll make more money with a four-story building; and that's not supposed to be a consideration the ZBA takes into account.

Commissioner Angus questioned under what kind of scenario a height request would be approved.

Attorney Need indicated height variances that are sometimes granted can be for billboards or large signs, where a property actually sits in a big hole. Without the height variance, the sign wouldn't get any visibility. But there the hardship is because of the topography of the land. It is difficult to meet the hardship test for the height of a building.

Commissioner Angus questioned where the applicant is requesting to build a hotel in a single family district, if there was a district that was appropriate for a hotel and if you were to approve an application like that for rezoning, whether that would say that your zoning ordinance has little meaning and it might be changed at the drop of a hat.

Attorney Need stated it may be that the property is appropriate for a hotel but was zoned single family residential fifty years ago and nobody thought to change it until now. That sometimes happens where zoning districts are reviewed and changed. When the request comes in, you look at things you're supposed to look at; what does the Master Plan call for, what's the zoning around it and what the planning consultant says. You take all those factors, and others, into account.

Commissioner Steve Ruth questioned whether the Township Board would have no input into how the building looks, whether it's tall, short or ugly, if the Board approves the rezoning.

Attorney Need stated those are site plan issues and site plan issues are decided by the Planning Commission. Either the site plan meets the ordinance criteria or it doesn't. The special land use tool is different. There is a fair amount of discretion there as to whether the use should be allowed or not. But even there, in the Holly ordinance the power is vested with the Planning Commission.

Mr. Need continued with his presentation, stating a proper motion is very critical in making a record that can be defended in court. If you're going to deny something, you should explain why; show a standard, show why the ordinance wouldn't be met.

Trustee Janet Leslie questioned whether Attorney Need means the actual wording of the motion that's voted on and not the deliberations that took place when he refers to a proper motion.

Attorney Need stated you can incorporate in the motion I'm going to deny this for the reasons set forth before, or you can refer to a planner's report or attorney's report. To the extent that it's silent, there are problems.

Proper motions protect the Township from liability and also give the applicant some certainty and direction as to what they're supposed to do. It creates a record so that as the project moves along, the Township can determine whether the project is being built in accordance with the approvals and the ordinance standards.

Certainly if somebody is denied by the Township, they can sue you for it. However, there is a body of law that says if you do something improper in approving the application, the surrounding neighbors can sue the township claiming that decision was improper. The law has set forth different tests, depending on whether it's a legislative decision by the Township Board like a rezoning, or an administrative decision, like the site plan or special land use.

The test to challenge a rezoning decision is whether there was a rational basis for the decision. What that means is if the Township Board denies a rezoning, the property owner can certainly sue, claiming that decision was improper. But the judge is supposed to say if there was any rational basis for that township board's decision, I'm supposed to uphold the decision; not necessarily because the judge may not like it or because he or she would have decided it differently, but whether there is a rational basis for the decision. That's a fairly easy standard to

meet. The important thing with the rezoning is if you are challenged, you are not limited to whatever evidence was presented to the Township Board. We can come up with planning testimony, engineering testimony, whatever needed, to defend the rezoning decision.

For an administrative decision, whether it is a site plan or a special land use the Planning Commission grants, or a variance the ZBA grants, the test is whether the decision is authorized by the ordinance and whether the decision is supported by substantial evidence in the record. That means when we go to court, all that the judge is supposed to look at is the evidence that was submitted to the Planning Commission or the ZBA, depending on which body is being challenged. Unlike a rezoning, we can't bring in additional evidence. We can't bring in live testimony, we can't add anything to the court record beyond what was considered by the Planning Commission or the ZBA. That makes it pretty vital to make sure that when you make your decisions, it's important to refer to all of the evidence, all of the documents that you are relying on to justify your decision.

The critical point is decisions have to be based on the standards in the zoning ordinance; site plans, special land uses and variances. It's different for a rezoning because on a rezoning the law doesn't require that you're limited to what may be in the zoning ordinance because it's legislation. But for an administrative decision, you have to make your decision based on the standards found in the ordinance. Those are usually outlined by Brian Oppmann in his letter, or sometimes by Administrator DeVault. To the extent that you don't like something, even if it's the ugliest thing in the world, that in and of itself isn't grounds to turn something down. You have to base your decision on either the special land use standards, site plan standards or the variance standards that are found in various sections of the ordinance.

You should note in the record what information you looked at in making your decision. Again, you'll be getting consultants' reports, sometimes you'll be getting attorney reports. That should all be noted if you're basing your decision on that.

Commissioner Rick Stevens questioned whether tape-recordings of the meetings could be introduced as evidence.

Attorney Need stated it hasn't been decided conclusively one way or the other. Technically the minutes of the meeting are supposed to be the official record of your action. On a variance request, the official record is what is put in the minutes of the meeting. There have been cases where attorneys on one side or the other have tried to introduce the tape of a meeting on the grounds that the minutes were incomplete, usually because there's something on the tape that didn't make it into the minutes, either intentionally or unintentionally. Some judges will allow the tape, others strictly say, no, the minutes and the record and the evidence submitted is all we're supposed to look at and won't listen to the tape. It's an unsettled question.

Commissioner Stevens questioned how long the tapes should be retained.

Attorney Need stated typically tapes are retained for the period of time it takes to create the minutes and have the minutes approved.

Mr. Larry Lilly stated he has been getting copies of typed meeting minutes and has taped the meetings, himself, for almost ten years. The only thing that's accurate is the tapes, especially his tape. Typed minutes are always censored. Anything negative is not in the minutes, so how in the world can minutes be used when they're not accurate?

Attorney Need stated the law does not require minutes to be verbatim. He noted the Planning Commission minutes may be abbreviated to a point.

Mr. Lilly stated Holly Township minutes are not abbreviated, they're very accurate. The recording secretary does an excellent job. Everything is in there and you could use that in court. He's been to the Oakland County Commissioners meetings. He asked for a copy of the minutes and you've got your name down and address, that was it. There is no tape-recording allowed there. He questioned what protects residents when they come to meetings and they don't want zoning, what procedures are there. So far he's only heard what protects the Township.

Attorney Need noted the program was prepared to present to the Planning Commission and the Township Board.

Mr. Need continued with his presentation, stating public comment is required by law and clearly you hear all sorts of things on some requests, much of which is germane and relevant to the issue before you and sometimes it isn't. The law says you can consider public input, but only if it's relevant to the standards of the zoning ordinance. Otherwise, as passionate or upset as people can be – and they may have legitimate reasons for not liking something -- if it doesn't relate to an ordinance standard, it is not something that, by law, you're supposed to consider.

The key question to be considered is does the application conform to the application requirements and standards. If those ordinance standards are met, you must approve the application. You can grant conditions. But, again, those conditions have to be related to a specific provision of your ordinance and the state Zoning and Enabling Act.

You hear public comments that are very passionate, very heartfelt and the people that have said these things sincerely believe the application they're referring to should be turned down. But it is not permissible to grant or deny approval because you think it's a good idea; or because it will or will not hurt the neighbor; or it will make things better. One he sees a lot of is, well, we approved this one so we must approve this one. That is not permissible grounds. You can't approve because it looks good to me; or, nobody came to object so we're going to approve it. Simply because nobody came to object doesn't mean that you must grant a particular application if it doesn't meet your ordinance standards.

Commissioner Angus noted one of the provisions for approval is that an application does not harm the property value in the neighborhood. If such a proposal came forward, hurting the neighborhood would be relevant.

Attorney Need stated if someone can actually present you with appraisal testimony that says this is going to seriously damage our neighborhood or unreasonably impair our values, you absolutely can consider that. But simply because, well, we think the neighbor is going to be hurt if this auto dealership comes in or this mixed use is developed, that's not in and of itself grounds. Something that's specific, such as a demonstrated effect on property values, can be considered.

In administrative decisions, the motion should always identify the property involved. If the motion is to deny, you should clearly identify the ordinance standards that are not met and explain why they aren't met. If it's approval, you should clearly identify any conditions on approval. It's certainly acceptable to refer to other documents, reports or discussion in the record, such as it doesn't meet this standard because of the various items that have been discussed previously. That ties everything together and allows the attorney to go to court, if necessary, and defend the decision.

Commissioner Mark McHalpine questioned if a developer says we'll put in a traffic light, whether that could be considered part of the approval.

Attorney Need stated that should be included in the motion. If they simply say in the minutes we're going to put in a new traffic light and you don't in your motion say subject to A, B, C, and one of those is a traffic light, then the promise that was made at the meeting is almost certainly not enforceable. It needs to be part of the motion.

Discussion on the motion should always pertain to the standards in the ordinance, and whether it does or does not comply. For rezoning, should it or should it not be rezoned for the standard reasons; Master Plan, surrounding zoning, land uses, et cetera. Anything else should be avoided. Sometimes you have people from the public making statements and getting into all sorts of extraneous matters. In that circumstance, it's difficult in the chairman's position but you need to let the people speak and point out that's not really something you can consider. If you do start discussing matters that shouldn't be considered by the Planning Commission, it might cause a judge to question the basis for that decision. The judge may question whether the Planning Commission really applied the ordinance standards when they spent thirty minutes talking about these things that they weren't supposed to.

Trustee Leslie questioned whether it was advisable to limit public comment and not allow it throughout the meeting.

Attorney Need stated the public has a right to comment. It's usually more efficient to have public comment as an agenda item, only because then it's fresh in your minds as you're

considering it. As long as it's relevant, that's wonderful. If the judge sees you spent a lot of time discussing something that shouldn't be discussed, then he'd question whether there was a rationale for your decision to begin with.

Referring to conditions and performance guarantees, conditions have to be related to something in the ordinance. There are sections in the zoning ordinance that specifically allow you to grant conditions and they explain how they're supposed to be granted.

Performance guarantees are certainly vital. Under the current ordinance, you have to include those in your approval motion to allow them to be imposed. There is ordinance language that's going to be discussed tonight that will address this. But when and if that ordinance gets approved and published and becomes effective, you have to relate and impose performance guarantees only under the standards of your ordinance. And, again, it needs to be included in the approval motion to be imposed. A dollar figure can be part of the motion or you can refer to, for example, an engineer's report, or you can say security was posted to cover items A, B, and C and the amount is determined by the township engineer; or the township planner, in certain landscaping issues. That's appropriate. But if the motion is entirely silent about performance guarantees, you will probably not be able to impose those if the applicant objects.

An application has to be decided based on ordinance standards. You look at what's being proposed and whether what's being proposed meets what the ordinance requires; it meets the site plan standards or the special use standards or whatever else, none of which talk about who is making the application or if that person happens to be in violation of the zoning ordinance for that property or some other property. In some circumstances it may be proper to say we'll condition compliance on addressing A, B and C, if the ordinance standard allows you to do that. But you're not supposed to consider the fact of the violation, itself, in granting or denying approval. In zoning, you're supposed to be focusing on land use and land use issues, not necessarily who is before you and whether that particular person happens to be in violation of the ordinance for one reason or another.

There are some general steps on how to avoid or minimize liability. It's absolutely critical that you know and follow your ordinances. Holly Township does a fairly good job of that. He has been in other communities where it's scary sometimes that the planning commission will begin doing something the ordinance clearly does not allow them to do. It's important to know the ordinances and follow them. If they're not working, change them.

There is no perfect ordinance. We do the best we can to come up with the best language. But until it's in operation, we don't know where any weak points are. You only learn that by experience. But if you have a particular area that shows a glitch, then we'll change it. In looking at the performance guarantee section, for example, the mining ordinance was rewritten a while ago to address problems recognized in that process. It's up to the Planning Commission and the ZBA if they see there is a glitch in the ordinance to let the Township Board know. Again, the Planning Commission deals with site plans and special land uses. If there is a glitch in that process, the Township Board may never know about it unless you tell them about it.

By law, ordinances cannot be vague. Many times communities try to adopt ordinances that leave unlimited discretion to the Planning Commission or the ZBA as to whether or not they should grant something. In that particular case, the property owner has an excellent argument that the ordinance is not constitutional. To be valid, an ordinance has to be specific enough so that the property owner knows what's permitted and what's not permitted.

When making decisions, be prepared by reviewing everything and making a record of your decision. Explain the standards, explain whether or not they're met, and condition it upon consultant reports. Holly Township usually does a good job of that.

Document and respond to all complaints. Going back to the zoning violations, the enforcement of violations of the zoning regular ordinance is not vested in the Planning Commission or the Township Board or any other bodies; it's vested in the township supervisor and then the other officials that report to him; the zoning building official and ordinance officer. The Board can certainly make their case, but it's basically the supervisor's function to enforce ordinances. To protect the Township from liability, it's important to maintain that separation. It's important to not discuss any violations at great length in a site plan or special land use or rezoning function because, again, under the law there is a different individual who is responsible for the enforcement issues. Clearly, if any Board member or Planning Commissioner has an issue, then let the ordinance officer or the supervisor or the building official or the zoning administrator know about it. It's not a proper subject to be hashing out at a public meeting.

Know and avoid conflict of interest situations. Conflict of interest rules in Michigan are incredibly murky, surprisingly so. If it doesn't feel good, avoid it, because it's not a pleasant situation to be in. If you have a personal interest in any particular project, step aside and abstain.

Be proactive and anticipate issues. We are in a horrible economic climate right now. The one silver lining is that it does give us the opportunity to look at our ordinances and make whatever changes we need to make to make things better without the pressure of having developments and site plans and rezoning piled upon you, as was the case several years ago. It's a good time to reflect and look at the ordinance language. One hopes the economy will turn around at some point reasonably soon and development may begin again. We'll be prepared for it at that point.

If there is going to be a legal issue or a planning issue or engineering issue, it's better if we know about it before the meeting than at the meeting. If we know about it in advance, we're prepared for it, we can look at information and have an intelligent response. That's not to say there will be a dumb response at the meeting, but those responses will be much more limited in terms of being prepared for it. If you know something is going to be a problem, please let the planner, engineer or attorney know so they can address it.

Never be afraid to make the tough call. A few years ago there was a court case involving the City of Novi where they were hit with a multi-million dollar judgment in a zoning lawsuit. Ultimately the lawsuit was settled, the City paying a large sum of money and donating some property. But for years after that, it seemed like property owners or lawyers would stand up at the meeting and wave the case and say if you don't approve this, you'll be subject to that kind of

liability. The truth of the matter is if you act in accordance with your ordinance, if you make decisions based upon your Master Plan and all relevant and proper criteria, you will protect yourself from that kind of liability. The Novi case was an extreme case where the City did all sorts of things that they really shouldn't have. The potential of being sued should not ever stop you from doing the right thing; following the ordinance, making the best judgments and the best call you can, despite the flak that you may get from attorneys or property owners in the audience.

Treasurer Mark Freeman noted if there is an application and the application has met all the standards and criteria, you have to approve it, regardless of what people in the audience are trying to say, or other citizens are trying to say. If that applicant has met all the standards, they are entitled to that approval and you are obligated to approve.

Attorney Need agreed, stating the communities that get in trouble are the ones that don't do that. They deny a property owner who has met all the ordinance standards. Quite often it is a hostile crowd that is causing the problem. He was before a different planning commission for a site plan approval a few years ago. The planning commission chairman early on lost control of the meeting. Finally he decided to go down the row and have everybody vote on whether the site plan ought to be approved. Anticipating this, a court reporter was there taking all this down. They made their pitch, smiled, got denied. Went back and filed a lawsuit. The township attorney immediately called wanting to settle the case because he knew that that was clearly improper and couldn't be done. Those were the days before the Novi decision when there wasn't necessarily monetary liability. In this day and age, that kind of decision certainly would subject the township at least to a lawsuit, if not the possibility of a damage amount.

Chairman Kilbourn noted Commissioner Rick Stevens is on the ZBA also. She has learned he cannot participate in any ZBA motions because it's a conflict of interest, which Holly Township's bylaws state a representative from the Planning Commission must be on the ZBA.

Attorney Need stated Mr. Stevens does not have to abstain in every circumstance. If the Planning Commission denies somebody and they were allowed to take an appeal of that denial to the ZBA, then he would not be able to participate in the decision. If you take the hypothetical where the hotel wants the four-story height variance, even though he's on the Planning Commission, he can participate in the vote because one isn't an appeal of the other. The idea is if you sit on one body, you shouldn't be allowed to review your work at the next level. And that's why the conflict of interest provision was put in. But it certainly doesn't mean he has to abstain on every variance that may involve a site plan in some fashion.

Mr. Lilly stated the meeting was excellent and very educational. The Township made a tough call regarding the mining situation. There were many people at the public hearing. He's heard over the years they're going to sue us, they're going to take us to court. You have to stand up for

the rights of the residents. There are 10,000 residents in our community and they come here with concerns and they have facts and figures. He's been in management for a good many years. He's told people working for him to check, double-check and triple-check to get facts and figures, get a hold of General Motors and Ford, Chrysler, whatever it takes, and hold up the project until they get it right. That's not done here.

Attorney Need stated the 10,000 residents in Holly all certainly have their legitimate concerns. However, zoning is a means of balancing the citizen's rights with the property owner's rights to do what they want to with their property as long as it meets ordinance standards.

Mr. Brian Oppmann stated in some communities there's a policy that prior to any kind of rezoning, any kind of action in front of a board, your property can't be in violation. This is going back to the ordinance violation section. He questioned whether the township could put that in place; whether they can place it on the application as a caveat that says you can't be in violation or you won't be heard until things are brought into compliance.

Attorney Need stated it's something that certainly could be considered. There is a danger in doing that because a property isn't in violation until a judge says it is one way or the other. So we may think that the property is in violation for a particular reason and it may not be. To deny somebody on that basis and it turns out we were wrong, there are liability issues.

Administrative Laura DeVault stated Mr. Need discussed having expert testimony with appraisals to determine whether the use is in conflict with the neighborhood. She questioned whether an opinion of the Township assessor in writing would satisfy the requirement.

Attorney Need indicated a comment that's often made by property owners is that this use, such as a cell tower, would decrease property values, for example, by 50 percent. If somebody says it hurts the neighborhood and they can demonstrate, in fact, there is an effect on property value, it can be considered in that particular circumstance. If a property owner came with an appraisal and said this cell tower is going to diminish my property value 50 percent – it's rare you would find someone to say that – it's certainly something the Planning Commission can consider. If an assessor feels they're qualified to make that opinion, you can ask them to do that.

Commissioner Angus requested Mr. Need to speak briefly about an appropriate way to deal with an applicant who asks for a rezoning and brings a site plan to justify or illustrate his request.

Attorney Need indicated applicants can present whatever they want. The Planning Commission and the Township Board need to understand that that site plan is nothing more than their expression of what might be developed on that property. That often causes problems with people in the audience. They see this plan and they assume that that's really under consideration. You

can explain you can present a site plan but we are not supposed to consider that because once you rezone property, you're fair game for anything within that zoning district, not necessarily that site plan. The only exception is we've got the new conditional zoning concept where somebody can come in with a contract conditional zoning concept. If that's what's being applied for, then you can certainly link that to a site plan. But that's a very specific process that has to be followed. Generally speaking, no, a site plan shouldn't be considered. If it were up to him, he would tell the applicant to not present it.

Adjournment: Chairperson LaLaine Kilbourn, hearing no other business, adjourned the meeting at 6:57 p.m.

Zo Turner, Recording Secretary

Karin S. Winchester, CMC
Holly Township Clerk