

Draft Minutes

Shepherdstown Planning Commission

January 19, 2009

Town Hall

Agenda item 1: Call to order, 7:08 pm. Members present: Stuart Wallace, Karene Motivans, Paul Welch, President Pam Berry, Josh Stella, Catherine Wilson, and Mayor Jim Auxer. Zoning officer Michael Abshire.

Agenda item 2: Minutes of November 17, 2008, meeting approved. Minutes of December 1, 2008, special session approved with changes proposed by H. Heyser: page one, penultimate paragraph, last sentence revised to “The Strict approach is to restore the historic and add on to contemporary styles.” Page two, fifth paragraph, H. Heyser felt the word “violate” was too harsh; no other replacement suggested. Seventh graph, there was no way to have expanded on those buildings; strike it. Page three, changed “historical” to “history.”

Agenda item 3: No conflicts of interest reported.

Agenda item 4: Visitors present and signed in: Bain Schill, Maura Balliett, Frank Hill, Carlos Neiderhouser, and Liz Wheeler.

Agenda item 5: Mayor’s report: The lawyer is still reviewing the “blasting ordinance,” and the document should be ready for the next regular session. P. Berry asked if the new town hall changes would come before the Planning Commission; J. Auxer, yes. Currently, the architect is gathering information on space needs.

Agenda item 6: Nothing to report from Shepherdstown Landmarks Commission as no meeting was held in December.

Agenda item 7: Applications for consideration. *Carlos Niederhauser – 113 North Church Street- Application for Occupancy Permit dated April 23, 2008.*

P. Berry recapped events: Planning Commission meeting in April 2008, applicant was informed he needed an Occupancy Permit for the property; Occupancy Permit

application was filed; fee and application were returned to applicant; notification stated the application was incomplete as it was not accompanied by an application for Building Permit; applicant then went to Board of Appeals, which stated the Board of Appeals had nothing to decided on as there was no “decision and order” from the Planning Commission (PC); the appeal was tabled and remanded back to the Planning Commission provide a “decision and order.” Board of Appeals gave PC until this week to “find the facts” and make a decision based on that. The objective is to review the original Occupancy Permit application and give him a decision on any and all points that can be taken back to the Board of Appeals.

Fact noted that the property is in an R-1 zone; as a church it had a variance as a non-conforming use in a residential district; since it was vacated for more than two years any non-conforming use is no longer valid [§9-206(a)]. P. Berry maintained that the vacated structure did not morph into a residence, that it became a structure without a definition, and to use that structure again it must have a definition.

J. Stella questioned if that view conforms to U.S. Constitutional Law, as government does not have the power to grant a use, rather it is assumed as a fundamental right. There was no disagreement about the Town’s right to have zoning; but there was no concept, he was aware of, in state or federal law where government had the right to grant use to one’s property. Use is derived from zoning, there is no requirement for a person to seek use of their property in the manner in which it is zoned.

As a matter of clarification and question, H. Heyser said the PC is not considering use but the application is for an occupancy permit in a residential zone. P. Berry said, no, they were looking at the use, and believed the definition of the structure is now in “limbo.” J. Stella said there is no such thing as limbo in zoning. P. Berry pointed to the ordinance, if use is changed, an occupancy permit is needed.

J. Auxer said the structure is in an R-1 district and right now the only thing it can be used for is a single-family dwelling; other uses have to go before the Board of Appeals.

In the absence of a building code, P. Berry noted, the occupancy permit serves as a way for the Town to keep track of what is happening to a building because it

allows the zoning officer to go in and inspect the structure. In pursuit of fulfilling the request of the Board of Appeals, the PC is reviewing C. Neiderhouser's original application for occupancy that was never seen by the members of the PC.

Attorney to C. Neiderhouser, Frank Hill asked to speak to the application issue, and stated that his client had not submitted this application to the PC for consideration as it is still in Board of Appeals. P. Berry explained that the original application was included in the appeal and that the Board of Appeals wanted the PC's findings.

S. Wallace attended the Board of Appeals (BoA) session (November 2008) and reported that the BoA never considered the merits of legality of the Occupancy Permit Ordinance; he reiterated that the BoA felt the PC had never made a decision, there was no finding of fact; the issue was what was the basis of the decision that C. Neiderhouse was not in compliance with.

P. Berry added that the lot was not a lot of record; it was subdivided approximately 1999, the result was it was all right if the structure were a school or a church, but not a residence as it does not meet the setback standards or parking requirements.

J. Stella again questioned the ability of government to grant use of a structure for the use in which the zoned.

All the PC said according to P. Berry was that the PC did not feel it had the authority to approve the church as a residence, and it would have to go before the BoA. J. Stella registered disagreement based on the structure being abandoned for more than two years, losing its non-conforming use, and returned to R-1.

S. Wallace suggested that because of the differing viewpoints and conclusions the PC should have counsel come in and advise the PC.

J. Auxer suggested that if no agreement was reached, counsel be called in; if the PC could agree on what the structure is, PC should ask C. Neiderhouser to resubmit the application.

S. Wallace motioned that the findings of fact and decision going to the BoA be: Prior to 2008, there had been no use nor occupation for more than two years; when the unoccupied structure became occupied, there was no valid 9-903 occupancy

permit application in the PC's possession, and that is why the PC took the actions (in April 2008) that it did. The motion was approved with one abstention.

Agenda item 8: Continued business: Blasting Ordinance update given in Mayor's Report; List of Title 9 issues to be resolved is forthcoming; and Shepherdstown Historic District Design Guidelines suggested revisions to be completed at the February 2, work session.

Meeting adjourned at 9:15.