

**TOWN OF EDEN
PLANNING BOARD MINUTES
OCTOBER 28TH, 2014**

MEMBERS PRESENT:

**MARK AGLE – CHAIRMAN
BILL MAHONEY – VICE CHRM
FRANK MEYER, D.D.S.
JUANITA MAJEWSKI
BILL ZITTEL
KEVIN O’GORMAN M.D.**

MEMBERS NOT-PRESENT:

**TONY WEISS
ANDREW ROMANOWSKI
DAVE JOHNSON**

GUESTS:

**GREG KEYSER – CRA INFRASTRUCTURE & ENGINEERING
WILLIAM TRASK – TOWN ATTORNEY
SCOTT HENRY – TOWN CODE ENFORCEMENT OFFICER
PHIL MUCK – EDEN ZONING BOARD MEMBER
ED KRYCIA – EDEN TOWN BOARD COUNCILMAN
JAY POHLMAN – MR. KNOOREN ATTORNEY**

Chairman Agle called the October 28, 2014 meeting to order at 7:03pm and asked the board if there were any changes to the August 2014 minutes as printed. Juanita Majewski made a motion to approve the minutes seconded by Bill Zittel “ayes” motion approved.

NEW AND UNFINISHED BUSINESS:

1. Pre-Submission – Minor Subdivision - Knooren residence 8195 Schreiner Road

(Applicant desires to explore the potential use of Transfer Development Rights [TDR’s] coupled with additional land acquisition to minimize the number and degree of the variances needed to bring a non-conforming property into conformance and thus have the Planning Board consider the proposed minor subdivision)

Mark Agle asked Scott Henry how or if the TDR program would even apply to a situation like this and if so how would we apply it?

Scott said basically the TDR program would allow someone to go out and purchase what would be a developable lot in a sending district (Conservation or Agricultural). In exchange for a certain number of development rights, the applicant can increase the density in the receiving zone. In exchange for preserving that open land in the sending zone.

Mark Agle -To what degree can you increase the density?

Scott Henry - By increasing density, what the code is saying is the lot dimensions can be reduced, frontage and area of the lot.

Mark Agle – Yes, but to the extent they're asking for here?

Scott Henry – No, I think they will still need variances but it will get them closer [to compliance] if they can show that they are eligible and qualified for the open spaces technically.

Mark Agle – I understand the concept but what is the allowable reduction? Is it based on a formula somewhere? Is it at our sole discretion? How is it implemented? That has been one of the points of confusion with the TDR process since its inception.

Scott Henry – it's through the Planning Board that this process begins.

Mark Agle – So, if we [the Code] require a one acre lot and this applicant comes in with a plan for 25 lots and he has secured 25 development rights and says he would like ¼ acres lots or 1/10 of an acre lots and we [the PB] decide that it looks good. Is that all there is to it? Would it only have to satisfy us? Are there no other criteria to apply? Seems awfully subjective to me.

Scott Henry – I do not know what land he is looking at but if it is in Conservation Zone you get certain rights.

Mark Agle – this applicant has already told us that Mr. Minekime has 20 or 25 of these development rights that he acquired from my parent's farm some 20 years ago and that he could obtain a number of these TDR's from Minekime to apply to his application.

Scott Henry – so if you are talking Agricultural Zone, X number of development rights are associated with every development. So if he in turn takes them and wants to apply them to this lot and then go and

get some more and applies those to the other lot it will get him closer but again I believe he will still need variances.

Mark Agle – that’s my point; how much can we reduce it? What are our parameters? Should we feel compelled to reduce it given all of the other outstanding issues the applicant has with this property? Let me ask Mr. Trask [Town Attorney]: if Minekime actually has some number of development rights that were transferred to him, can he then assign a portion of those rights to some other 3rd party (in this case Mr. Knooren)?

Bill Trask – the development rights are seldom used, your Board is responsible for issuing the optional density permit when they are brought into play and how many years has it been since you’ve done it? Every time you get one of these requests you’re kind of going back and starting a new to look at the statute. I agree with everything Scott Henry said, variances are still going to be required from all appearances. The idea of looking into TDR’s and optional density permit actually came from Lucille Kaminski, Chair of the Zoning Board of Appeals. Mr. Knooren came in and made a request for a subdivision to pull his illegal residential unit (garage apartment) out of the existing lot of record and create a new separate lot of record trying to bring him into a more of conforming status for both lots. I think in order to create an actual legal conforming lot of record, (I’m not that familiar with the configuration of his existing lot) he would either have to buy a whole lot more land than what he has been thinking about buying up until now. There still may be some area variances required from the Zoning Board even if he bought a large enough lot. Jay Pohlman just arrived he is Mr. Knooren’s attorney he has more of the details on this, but I think Lucille at the Zoning Board, she contacted me about this idea and I relayed to Mr. Pohlman and he obviously spoke with his client about it. I think Lucille’s feeling was, even though an optional density permit probably won’t do the trick in and of itself, it may make the area variances of a lesser magnitude request to the ZBA and therefore make it a little more palatable to them. Given the history here, Mr. Knooren has admitted that this is a self-created hardship when he put this thing [garage apartment] in many years ago and you all should know that there is an article 78 preceding still pending. I represent the Town of Eden in that preceding defending the Zoning Board’s original denial of the use variance and Mr. Pohlman is representing Mr. Knooren as the petitioner in that preceding. It’s in front of Judge Timothy Drury, he is one of our Supreme Court Judges in Erie County. Both Mr. Pohlman and I have made our submissions to the Article 78 preceding itself. What we are doing right now is a result

of Judge Drury encouraging us to see if there is some way of making this right even though nothing can undo what's been in place for the last decade or more. I think we all have our own personal feelings in some cases about whether it is prudent to try to (not ignore the fact) but there is some reluctance on some peoples' part. I think that this reluctance is fully understandable because to in effect to try to work out some kind of fix, may be in the end be construed as appearing to reward somebody for bypassing the law. That's not lost on you and me. That being said I think in response to Judge Drury's promptings we're trying to see if there is some way of making this situation livable for the Town and at no small cost to Mr. Knooren financially to get it done.

Juanita Majewski – not that it matters at this point but how did this come to be that the garage became a residence?

Bill Trask – I do not have that information directly at hand but I think, in the original Zoning Board minutes from when he came in for the use variance that is the subject of the proceeding probably indicate, that shortly after he received the building permit for the garage he took it upon himself (and I will characterize it this way) to build a residence in the garage without informing the Town. It was pretty clear from our standpoint, and the record bears it out, this is a "self-created hardship" which by law disqualifies him from a use variance. This is why I feel pretty confident that Judge Drury has to make a decision based on the merits of the law so it should be pretty clear.

Juanita Majewski – will this not open the door for precedence.

Bill Trask - I can't say that it wouldn't be something that other people who have violated the law would find out about this and point to this and say how come in this case you were able to work with this violator and then get this straightened out.

Mark Agle – this does put the Board in somewhat of a bind because everybody would like to reach some sort of solution but at what cost? To answer your first question Juanita, his quote from the Zoning Board minutes was "I knew I was doing something illegal it's my fault and I'm trying to rectify the problem." When he built the apartment, he admitted he knew it was illegal. But the point being is that if someone has the mind set to want to circumvent the code, it's like just like saying go ahead and do it and then if and when you get caught you just go in and make your case and they will eventually give in and you will get your way. In my twenty years, I haven't seen anything that

comes close to the litany of issues involved in this case. As I was reading the ZBA minutes, I kept saying to myself; you can't make this stuff up! That said, we are here tonight to explore some potential solution options raised by the applicant. If I read the pre-submission questionnaire the intent really is to try to explore the use of transfer development rights, or acquisition of more land, or a combination of both.

Dr. Kevin O'Gorman – the town lawyer said that this is being enabled due in part at a cost to the client. So in other words, what we are saying here is if you have the money to go around the law this will work. If this was a poor guy who couldn't afford the lawyer and all of this we would just shut it down, but if you have the money you can get around the law.

Bill Trask – that is your interpretation

Dr. Kevin O'Gorman – you said at a large cost to the client.

Bill Trask – I was just emphasizing that if this is to be done to fix this, there should be no cost to the Town. Mr. Pohlman doesn't work for free I dare say, and if he [Knooren] has to acquire open space easements, and/or additional land plus Zoning Board variances it will cost him.

Dr. Kevin O'Gorman – if you have the money you can try to skirt around the law, basically, I'm just pointing this out.

Bill Zittel – money or no money he was caught and now it's on the table and our job is to go forward, within the code, if we can.

Dr. Kevin O'Gorman – why is it our job to go forward? Because the Judge doesn't want to make a decision? This is the law, this is the rule why should somebody come with a lawyer and money and try to skirt around the rules for the last 10 to 15 years?

Mark Agle – I think there is a couple of options proposed by the applicant that are here on the table tonight for us to explore. What, if anything can be done, to apply the TDR provision of the Code? Can that be used in some conjunction with more land acquisition and variances or a combination of all three. If so, then you are not circumventing the law but that's going to involve a lot of hoops for you to jump through along with the associated costs and expenses in order to rectify it. If a solution can be devised that is within the code

parameters, then it's not putting us in jeopardy of doing something that can later be construed as "letting somebody slide". I think that's what we are here to do and if we can't do it then so be it.

Bill Zittel – Is there a justifiable penalty for as many years as he has had this?

Mark Agle – I wish it were as simple as dealing with the area variances. This applicant has many other issues he must deal with on this property that will be costly for him to address. There is also a pond installed on the property without permits. There is an admission from the Zoning Board that he has not paid his taxes. A final C/O was never secured for the initial building permit. There may be unauthorized utility connections on the premises. Suffice it to say, there is a whole laundry list of things that need to be done. We [the Town] are in this position, in part, due to past reliance on his word and assurances and this reliance has only been to the detriment of the Town. He's going have to demonstrate that all of these things have been corrected so that any subsequent buyer doesn't get caught in the middle. These are all costs that he will have to incur to resolve all of these issues.

Jay Pohlman – I represent Mr. Knooren, he is up on charges for housing code violations those are penal charges in the Town of Eden Justice Court. Those are already in place as Mr. Henry has brought those as he rightly should for a number of violations and not getting certain permits and C/O's and everything else that is going on with this. This is the existing lot [shows a map] it is pretty heavily blocked by front foliage and it's a visual barrier. You will see a picture of the back garage and the existing porch he built and the apartment inside where there is about \$100,000.00 in improvements between the kitchen and the bedroom. It didn't start out that he was going to violate, he would come back from Florida in the summer and use the other half of the duplex. At one point he rented out both sides of the duplex that exists on the property. He was running out of money with two empty houses and he rented them out and came back from Florida with nowhere to live. So he lived in the garage apartment and every year he added on a little bit and then he finally came to me with what am I going to do and I told him he had a real issue and he also wanted to refinance the property to raise some money for the taxes. The first thing they ask you for is a code compliant letter from the Town of Eden that says you're permitted to put a three family property in what otherwise a permitted for a duplex. He made his own bed and pleaded to the Zoning Board and now that is what I am trying to undo. There

are no excuses it's his problem it's all on him, I'm just trying to fix it. I think three things can happen, a gentleman who made a lot of mistakes and volunteered that he made them doesn't have to rip out \$100,000.00 worth of improvements. We can put him back on the tax rolls and make certain there is some benefit to the Town. Take this and hopefully make this into two pretty close conforming lots that will allow the property to remain and in the future not be such a problem. Scott was kind enough to sit down with me with the revised plan and go through it and I suggest to you that the very insistent that you see on the worksheets that we went through for the duplex and the garage apartment are a lot less than what the Zoning Board Appeals faced. Even if you have a conceptual idea as a board that you would even continue to entertain or take up your time with my request I still have to get the Zoning Board of Appeals to grant the variances, acquire the property in the rear and get the development rights. It is not an end all decision that you make but it puts me in at least the ballpark of trying to resolve this emmactably. If you look at this we cannot meet any of these requirements. We asked a surveyor to go out and lay out a two-lot sub division that would envision us acquiring a rear portion of 40 x 150 and the development rights that still exist for Mr. Minekime, which are the last development rights that came out of Bley Road. What you're looking at is the same piece of property with a cross hatched area to the east which lays out exactly what the property is that will be acquired from Minekime. That was one point proposed as a development but that will never come to fruition. On one side of property we have an existing home and that precludes us from obtaining any additional property to the south. On the North the Hoopers have turned down any request for us to buy additional land so we are land locked from the North and the South. The only way we can go is to the rear and that's why we put this configuration together that would create two separate lots. That all of the setbacks are put on there and all of the existing square footages are put one there so it makes it easy to see where we will have to go for variances and there is at least 3 we need. If you would consider setting forth a two lot subdivision contingent upon that acquisition of that rear portion and contingent upon using whatever development rights in addition to that they may work so we can try to meet some responsibility to the Town and make amends to what was done in the past. It would end the Article 78 and the building code violations. It would be contingent upon development rights, additional land we would have to get the Zoning Boards approval. I think coming to this meeting tonight with the predisposed opinions of a lot of members, which I would have the same opinion. Think about me now having to go to the Zoning Board of Appeals, who I took up on the Article 78 and ask a Judge to oversee

their decision and revisit that? I have to go back to them and get the same type of approvals and although the Chairman was kind enough to suggest the development rights I still have to go through a whole board. The people in the Town of Eden have been very helpful, Mr. Trask, Mr. Henry everyone at both levels of the Planning and Zoning Boards but I need to get to a point where I have less of a need for variances. I need to get to a point where I am closer to conforming lots. I need more land and I need the development rights. In order to do this the development rights were salvaged in 1977 in Eden it was the idea to supposed to do two things: preserve open space for agricultural use and keep it esthetically open space keep it from having development that was like the first rings of towns around the city. It's envision is that you are going to take rights from a big open space in some of the Agricultural districts and move it into districts like the Hamlet district and allow a greater density. I need to have your input on whether something like this will work and what would be required on top of the existing land and how much development rights you would like to see.

Bill Trask – I looked at the TDR section today, it is certainly set up to provide for increased density and change for the Conservation easements, open space easements in the Agricultural or Conservation areas. What it doesn't give us is a situation like this in a formulaic set up, where you can say "ok we need 2 TDR's to compensate for increased density that you are requesting." Keep in mind that if you agree then that optional density permit can be issued to him, he still has to go in front of the Zoning Board and they have to buy all the other criteria for granting an area variance on one or both of these properties.

After much discussion it was determined, by unanimous opinion of the Board, that the use of TDR's, as contemplated within the Code, does not lend itself to this application. The use of TDR's is meant to be a planning tool to be used during the initial planning phase of project. The TDR provision is set forth in the code, it has an designed purpose (to direct planned development away from "open areas" to areas zoned for development). It is not a tool to be used, after the fact, to address unique one-off circumstances in an effort to try and retrofit a non-conformance situation. Also the acquisition of additional would still leave the property in need of several variances.

For these reasons, a **motion was made by Bill Zittel**, seconded by Bill Mahoney to refer the applicant back to the Zoning Board of Appeals as the Planning Board cannot act on the applicant's proposed minor subdivision until, or unless, all of the necessary variances are obtained. **Vote: All Ayes.**

REPORTS:

Talked with CRA Engineering, Greg Keyser about conducting a training seminar for the all board members to meet their required training for the year, November will be our next training class.

ANNOUNCEMENTS: None

ADJOURNMENT:

Bill Zittel made the motion to adjourn the Planning Board Meeting at 8:20pm, seconded by Juanita Majewski, all "ayes".

Next Planning board meeting is scheduled for November 25th, 2014 @ 7:00pm.

Respectfully submitted,

Diane Herzog, Secretary Eden Planning Board