

February 26, 2009
City of Erie, Pennsylvania
ZONING HEARING BOARD
1:00 P.M.

The specially scheduled hearing of the Zoning Hearing Board, was held on Thursday February 26th, 2009 at 1:00 p.m., in the City Council Chambers, Municipal Building, 626 State Street.

- MINUTES -

THE FOLLOWING APPEAL WAS HEARD:

Appeal No. 11,037 (1108-102) by Robert Petroff concerning property located at the **1600 Block of East 10th Street**. The appellant is appealing the Zoning Officer's December 23, 2008 plan approval of Erie Renewable Energy's proposed tires-to-energy power plant. Mr. Petroff states that the City Zoning Office erred in finding structures in excess of the 100' maximum height limit as appurtenances as set forth in the Zoning Ordinance.

Findings of Fact

1. Prior to taking testimony on the appeal, E.R.E. Attorney Clifford Levine filed a preliminary motion for Board consideration to quash the present appeal. According to Levine, Mr. Petroff failed to timely submit his appeal to the Erie Zoning Office's December 23, 2008 approval of the E.R.E. site plan (proposal no. 3) within the required thirty days.
2. The facts concerning Mr. Levine's appeal were not in dispute: Mr. Petroff filed a hand-written, one page appeal on January 16, 2009 – within the thirty-day time limit for appealing the Zoning Office's approval. The Board was shown the letter/appeal at their January 27, 2009 meeting. The Board agreed with the Zoning Office that the appeal, as submitted, was insufficient, and instructed their solicitor to inform Mr. Petroff that the appeal would have to be re-submitted in appropriate form. The Board's solicitor, Attorney Donald Wagner, sent a letter to Mr. Petroff dated January 30, 2009. At this point Mr. Petroff's attorney, Edward Betza, contacted the Zoning Office via telephone and email, indicating that he would be submitting a revised appeal. Attorney Betza then submitted a revised appeal, which is now under consideration of the Board.
3. Mr. Levine submitted all the aforementioned correspondences into evidence. Additionally, Levine submitted the appropriate statute, 53 Pa.C.S. Section 10914.1, governing the time limit for filing appeals to zoning office decisions. According to Attorney Levine, the Board did not have the legal authority to overrule the statute, and grant an extension to the thirty-day limit. According to

- the appellant, the letter/appeal filed by Mr. Petroff on January 16, 2009 tolled the statute. The subsequent revised appeal submitted by Attorney Betza after the thirty-day period was simply in response to Attorney Wagner's letter indicating that the Board would only consider a more specific appeal.
4. Upon oral motion, the Board voted, and denied by a four to one vote, Attorney Levine's motion to quash the appeal. The lone dissenting vote was from Board member Dale Niemenski. The appeal from Mr. Petroff then proceeded.
 5. Attorney Betza called Erie Zoning Office official Katie Deible to clarify the Office's decisions on the three different site plan proposals submitted by E.R.E. According to Ms. Deible, the difference between the second plan, which was rejected, and the third plan, which was approved, was that the (third) revised proposal included a brick wall built around the three structures that exceeded 100'. E.R.E. officials indicated to the Zoning Office that the only reason the brick walls were built was to comply with the earlier Office decision that rejected the second plan (in order to be consistent with the Board's September 4, 2008 ruling).
 6. On cross-examination by Attorney Levine, Ms. Deible testified that the original plan submitted by E.R.E. in April, 2008, was approved, with the three high structures considered appurtenances as defined in section 205.15 of the Erie Zoning Ordinances; this conclusion was subsequently rejected by the Board at its July, 2008 hearing on the matter. It is not uncommon, according to Ms. Deible, for appellants to change their plan proposals in order to comply with the Code.
 7. The "features" of the power plant in dispute, the bag-house, smoke stack and boilers, are all enclosed in the third plan, and now satisfy the Board decision of their interpretation of the Code. Ms. Deible still agrees that the third proposal meets the definition of the Board.
 8. In his closing remarks, Attorney Betza indicated that the Zoning Office's decision currently under appeal is wrong for several reasons. The developer placed buildings around the three structures that are over 100' solely for the purpose of meeting the standard of "appurtenance," as it is defined in the Erie Zoning Ordinance, and reviewed by the Erie Zoning Board at its July, 2008 meeting. The developer's own expert witness, chief engineer Ned Popovic, agreed that buildings served no engineering purpose, and were only erected to comply with the Code. Lastly, Attorney Betza asserted that to simply accept something as an appurtenance by placing a wall around it opens the door to allowing structures of any height to be erected. There would be, Attorney Betza suggested, no integrity to a one hundred foot limit, or any height requirement for that matter, if it could be mooted by construction a surrounding wall and considering it an "appurtenance."
 9. Attorney Levine countered the appellant's argument by suggesting that it is possible to interpret the various laws and codes too strictly, losing the spirit and intention of the law in the process. For example, he pointed out that by strictly interpreting the City's definition of a "building," one would include any accessory, or enclosure of property, to be a building.

Conclusions

1. The Zoning Office rejected the second plan approval submitted by E.R.E., and approved the third plan, so as to conform with the Zoning Board's ruling that was published on September 4, 2008.
2. In the third plan, approved by the Zoning Office, brick walls had been placed around the boilers, stack and filter system in order to comply with the ordinance and the Board's previous findings.
3. The buildings placed around the structures serve no engineering purposes.

Decision

By a vote of four to one, the Board granted the appeal filed by Mr. Petroff, and held that the boilers, stack and filter systems were not appurtenances. Board member Dale Niemenski dissented. Board members Ron Desser, Sal Parco, Lisa Austin and Richard Wagner voted in favor of the appellant. The Board accepted the appellant's argument that, by considering a structure an appurtenance solely because a surrounding wall is built around it, essentially makes the height requirement assigned by the legislature meaningless. Simply building a brick wall around a structure does not alone make that structure an appurtenance.

It is So Ordered
