



Memo

From the Clerk

Date: March 14, 2017
To: Mayor and Assembly
Cc: Borough Manager
From: Julie Cozzi, MMC, Borough Clerk
Re: Agenda Item 7A – Rehearing on Appeal of Planning Commission Decision Highland Estates, Inc. – Conditional Use Permit

On 2/9/17, the planning commission (PC) approved a conditional use permit (#17-06) for Highland Estates, Inc. (Roger Schnabel) to develop property C-SEC-26-0100. HBC 18.30.060 allows for an appeal to the assembly of a PC decision, and the following two appeals were properly submitted to the clerk. On 2/28, the assembly considered each appeal separately and voted to rehear the PC's decision in each case. These hearings were scheduled for this meeting, as required by HBC 18.30.060(A). Each appeal must be heard separately.

A. Lenise Henderson Fontenot

B. Ella Bredthauer and Jeff Harrison

The evidence shall be limited to a review of the record, and the burden of proof shall be solely on the parties (appellants) challenging the commission's decision. "The Record" in these appeals is determined to be: all documentary or oral statements and any material objects that were provided to the PC in this matter. The evidence is limited to that same record, although further argument may be allowed. Argument is defined as "reasons given for or against a matter under discussion that is intended to convince or persuade the listener." The deadline for written arguments was noon on Friday, 3/10. Oral arguments are acceptable during these hearings. As typical for appeal hearings, each one will begin with presentations by the appellant, permit-holder, and the borough manager, and then proceed with any public testimony (limited to 3 minutes). It is anticipated a representative from the planning commission will be present to answer assembly questions during deliberation.

I have attached to this memo for the assembly's convenience Borough Code Section 18.30.060 concerning appeals and 18.50.040 pertaining to conditional use permits.

The Record consists of the following documents attached as a packet to this memo:

The Record:

Document or Object	When Provided to PC
<ol style="list-style-type: none">1. Public Notice of CUP Public Hearing, posted on 1/30/17 at the Post Office, Howser's, Public Library, Borough Administration Building, and Borough Website. [1 page]2. Newspaper Ad of CUP Public Hearing, published 2/2/17. [1 page]3. 2/9/17 Planning Commission Meeting Agenda (Item 8B), posted on 1/30/17 at the Post Office, Howser's, Public Library, Borough Administration Building, and Borough Website. [1 page]	Standard/Required Public Notices
<ol style="list-style-type: none">4. Manager's CUP Recommendation dated 2/3/17. [4 pages]5. Highland Estates, Inc's Conditional Use Permit Application and attachments – Complete/Accepted on 1/25/17. [10 pages]6. 1/30/17 Letter Notifying Neighbors of the Public Hearing, with Map Showing Location and Routes of Proposed Activity. [2 pages]	Part of the 2/9/17 PC meeting packet published on 2/3/17
<ol style="list-style-type: none">7. Audio Recording of the CUP hearing portion of the 2/9/17 Planning Commission Meeting. <i>NOTE: Request this item from the Clerk's Office or access on the borough's website.</i>	During the PC Meeting on 2/9/17.

Assembly Action Needed:

The assembly hearing an appeal from a PC conditional use decision is acting in a quasi-judicial capacity. Therefore, a supermajority is required, per Charter 5.06(D). The assembly may confirm the commission's decision, reverse the commission's decision, or change the conditions which the commission placed on approval.

The assembly must make its decisions at this meeting keeping in mind that "in all decisions the burden of proof shall be on the party challenging the decision of the planning commission." The assembly may deliberate in open session or in executive session.

Written findings of fact and conclusions of law setting forth the reasons for any decisions made by the assembly will be prepared based on the reasons stated by individual Assembly members at the time the votes are taken. The draft written decisions will be formally adopted at a subsequent assembly meeting after being reviewed by the assembly to make sure the written decisions accurately reflect the reasons for the decisions.

18.30.060 Appeals to the borough assembly.

An appeal made to the borough assembly of the commission's decision on any permit shall be requested by filing with the borough clerk, within 10 business days of the date of the decision appealed, a written notice of appeal stating with particularity the grounds for the appeal. At the next regularly scheduled borough assembly meeting the borough assembly, by passage of a motion, may choose to rehear the commission's decision. Any aggrieved person, including the developer, may appear at that meeting and explain to the borough assembly why it should rehear the commission's decision.

A. If the borough assembly chooses to rehear the decision, it may choose to rehear the entire decision or any portion thereof. If it decides to rehear a decision or any portion thereof, it shall give public notice, conduct a public hearing and make its decision at its next regularly scheduled meeting.

B. In all re-hearings the burden of proof shall be on the party challenging the decision of the commission.

1. Findings of fact adopted expressly or by necessary implication shall be considered as true if, based upon a review of the whole record, they are supported by substantial evidence. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the record as a whole affords a substantial basis of fact from which the fact in issue may be reasonably inferred, the fact is supported by substantial evidence. The burden of proof shall be on the appellant to demonstrate the facts and resolution of the issues on appeal by substantial evidence. The evidence shall be limited to a review of the record, although further argument may be allowed.

2. In all decisions the burden of proof shall be on the party challenging the decision of the planning commission.

3. The borough assembly may confirm the commission's decision, reverse the commission's decision, or change the conditions which the commission placed on approval. The borough assembly shall support its action with written findings.

C. A decision by the commission shall not be stayed pending appeal, but action by the appellee in reliance on the decision, shall be at the risk that the decision may be reversed on appeal.

D. The borough assembly hereby provides for an appeal by a municipal officer or person aggrieved from a decision of a hearing officer or other body to the superior court. An appeal to the superior court under this section is an administrative appeal heard solely on the record established by the hearing officer or other body. (Ord. 12-05-291 § 6; Ord. 05-02-091; Ord. 04-05-078)

18.50.040 Decision.

The commission shall hold a public hearing on the conditional use permit application. The commission may adopt the manager's recommendation on each requirement unless it finds, by a preponderance of the evidence,

that the manager's recommendation was in error and states its reasoning for such finding with particularity. In addition, for good cause, the commission may alter the conditions on approval or requirements for guarantees recommended by the manager.

A. Before a conditional use permit is approved, the commission must find that each of the following requirements is met:

1. The use is so located on the site as to avoid undue noise and other nuisances and dangers;
2. The development of the use is such that the value of the adjoining property will not be significantly impaired;
3. The size and scale of the use is such that existing public services and facilities are adequate to serve the proposed use;
4. The specific development scheme of the use is consistent and in harmony with the comprehensive plan and surrounding land uses;
5. The granting of the conditional use will not be harmful to the public safety, health or welfare;
6. The use will not significantly cause erosion, ground or surface water contamination or significant adverse alteration of fish habitat on any parcel adjacent to state-identified anadromous streams;
7. The use will comply with all required conditions and specifications if located where proposed and developed, and operated according to the plan as submitted and approved;
8. Comments received from property owners impacted by the proposed development have been considered and given their due weight.

If the commission finds that the development implements all relevant requirements of this title, it shall issue a conditional use permit and the conditions and requirements shall be part of the approved permit. If the development does not implement all relevant requirements, or the commission otherwise determines the development is not in compliance with this title, the commission shall deny the permit and note with particularity its reasons for the decision.

B. The commission may alter the manager's proposed permit conditions, impose its own, or both. Conditions may include one or more of the following:

1. Development Schedule. The conditions may place a reasonable time limit on construction activity associated with the development, or any portion thereof, to minimize construction-related disruption to traffic and neighbors, to ensure that lots are not sold prior to substantial completion of required public improvements, or to implement other requirements.

2. Use. The conditions may restrict the use of the development to specific uses indicated in the approval.
3. Owner's Association. The conditions may require that if a developer, homeowner or merchant association is necessary or desirable to hold or maintain common property, that it be created prior to occupancy.
4. Dedications. The conditions may require conveyances of title, licenses, easements or other property interests to the public, to public utilities, or to the homeowners association. The conditions may require construction of public utilities or improvements to public standards and then dedication of public facilities to serve the development and the public.
5. Construction Guarantees. The conditions may require the posting of a bond or other surety or collateral (which may provide for partial releases) to ensure satisfactory completion of all improvements required by the commission.
6. Commitment Letter. The conditions may require a letter from a utility company or public agency legally committing it to serve the development if such service is required by the commission.
7. Covenants. The conditions may require the recording of covenants or other instruments satisfactory to the borough as necessary to ensure permit compliance by future owners or occupants.
8. Design. The conditions may require the adoption of design standards specific to the use and site.