

Board of Zoning Appeals

Terry Variance Hearing

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Ch. Manley called the hearing to order at 7:30 pm.

Roll found: Fox, Huff, Hoop, Zeleznak, Tamulewicz and Manley present.

Manley polled the board as to whether they reviewed the packets containing the information regarding the application.

**Response: Fox – yes Huff – yes Zeleznak – yes Hoop – yes
Tamulewicz – yes Manley – yes**

Ch. Manley polled the Board as to whether they inspected the Terry property.

**Response: Fox – yes Huff – yes Zeleznak – yes Hoop – yes
Tamulewicz – yes Manley – yes**

Mrs. Huff read the legal notice.

Ch. Manley stated that the Hinckley Township Board of Zoning Appeals acts within the regulation of Section 519 of The Ohio Revised Code and exercises its powers as provided under Section 7 & 13 of The Hinckley Township Zoning Regulations.

Mrs. Huff was filling in for Clerk Garrett in her absence to record the minutes. Manley asked Mrs. Huff. whether the zoning office received any written or verbal communication pertaining to this hearing. Mrs. Huff reported that no additional correspondence was received.

Ch. Manley noted for the record that the Board of Appeals as testimony does not accept non-written communication made by known or unknown persons, not under oath at a properly noticed hearing. He explained to those present that the meeting is being taped for the record. In addition he noted for the record that the documents that relate to this application might include written communications from persons who are not present this evening.

Ch. Manley also announced that written communications from persons not present this evening include communications that are not made by affidavit. Because persons not under oath make these communications, this Board does not accept them. He also noted that written communications might include some writing by affidavit, by persons that are not present this evening and, therefore cannot be subjected to cross-examination. These affidavits, therefore, will not be given much weight, if any, in the decision of the Board on this matter. In addition, the audience was informed that they must state their name, address, and be sworn in. All testimony will be given from the podium.

Mr. Benjamin Ockner, attorney for Terry Building Ltd., was sworn in accordingly.

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Mr. Ockner: In addition to the information supplied with the application, Mr. John Lateulere, planning expert, will also testify next on behalf of Terry Building Ltd. I am with the firm Burns, Ockner and Greenberger, LPA, and we have been retained to represent Terry Properties and Hinckley Land Ltd., on this matter. We are requesting a variance from the 200 foot setback to permit the construction of the proposed office development that you have drawings on. At this time I will turn it over to Mr. Lateulere, our expert planner. He is going to explain to you why you should grant this variance. He has done a careful evaluation of what your code requires and how the neighboring properties will be impacted by this proposal. I am unfortunately constrained by new cases that I come across as a lawyer who practices in this area, that seem to suggest that there is some requirement that I needed to take or do so that my client is protected. One of these is that we are here because we believe that we are entitled to this variance and we are going to explain to you why and be fair to you without trying to sound threatening. If for some reason you don't agree with us we will first of all welcome any questions. If at the end of the day you do not agree with us, it will be our intention to take it to the courts through an appeal. But, our focus this evening is to explain to you why we believe this is a case that really begs for the variance. In a nutshell, given the enormity of the setback requirements in this area, with this shape of property and it's proximity to the creek and the associated setback from the creek to the west of the property, without a variance this property cannot be used for anything. We believe that this qualifies as a practical difficulty and satisfies the requirements that need to be satisfied in order for you to be willing to grant us this variance. I'd like to turn it over to Mr. Lateulere.

Mr. Manley: Were you representing Mr. Terry when the original, buildings were proposed and the approval was given?

Mr. Ockner: I personally was not.

Mr. Tamulewicz: What about your firm?

Mr. Ockner: I am not aware of that. I do not think so.

Mr. John Lateulere, Atwell Hicks, Co., land use planner, was sworn in accordingly.

Mr. Lateulere: I have a letter that I prepared that goes rather methodically through your zoning code.

Mr. Lateulere submitted the letter to the Board. (Exhibit A)

Mr. Lateulere: I have been retained by Terry Properties, Ltd. To be their professional land planner as they work through this application and through the rest of the project. This is the same plan that was submitted for this meeting, although this is a colored version. The land is located on State Rt. 303 immediately west of the Lutheran Cemetery. The Lutheran Cemetery is approximately 80 acres, approximately 40 of it

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has been developed. These 5 buildings are of an office-condo type of project with a main access drive, associated parking, obeying the 30 foot sideyard setback to the west of this

Property, obeying the 50 foot parking setback, that occurs to the east along the cemetery and it shows the encroachment for the variance needed for the subject buildings into the 200 foot setback as stated in your zoning code. Three sides of this parcel are surrounded by industrial land. The existing Hinckley business park on the one side, Aldi's on the west side and to the north we have some vacant industrial land. Two of these sides are a higher intense industrial, the I-B zone. Then to the east is the cemetery which is zoned R1, but has a conditional use permit to operate as a cemetery at this time.

Mr. Tamulewicz: The cemetery is not zoned R1, it is a conditional use in an R1 district. We did not make any special exceptions for the cemetery other than the conditional.

Mr. Lateulere: As I understand it, they have come back to this board for buildings such as the mausoleum that has been an expansion of the conditional use permit. As you are aware, there are 6 measures that have to be met with regard to a variance application. All 6 of those have to be met per your resolution. I have gone through those and they are outlined in the letter as well in slightly more detail.

- 1. The variance will not be contrary to the public interest, and will insure that the spirit of this resolution shall be observed.*

By spirit, as a land planner, I kind of read into that the spirit of the ordinance is generally described as the purpose statement in that zone. The purpose of the zone is to encourage the development of manufacturing business establishments that are clean, quiet, and free of hazardous, objectionable elements and are operated entirely within enclosed structures. That is very similar to what we have here – enclosed structures, business that will be either offices or light industrial that will be clean, quiet and harmonious with their surroundings. This development is what I feel the purpose statement is after. The adjacent use of this is a cemetery, as we discussed. When properties become cemeteries and they become places for our departed, a cemetery is viewed as a land use that will be in place in perpetuity. Generally we do not consider cemeteries to be a temporary use or a use that can be torn down and developed on a later date. We buy a cemetery plot because that is where we to be buried and that is where we want to be.

Mr. Tamulewicz: What do you call the house between the cemetery and the industrial park?

Mr. Lateulere: I believe that is an existing residence.

Mr. Tamulewicz: That is a house then, in the same residential district as the cemetery?

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Mr. Lateulere: Sure. We are actually behind the existing cemetery maintenance facility at his point. So the house, a residential house at that point, however, the portion of the property that we are talking about is actually a separate parcel. This impact is directly related to the cemetery more than any homes that might be associated with the front of the parcel. The cemetery has a conditional permit. The cemetery is expanding back and they are currently about half way back with their current expansion and paving areas. If the intent is for the cemetery to keep moving back, actually there is no way to get to the property back here unless the cemetery does demand that way or you come in from a different direction. From my standpoint, at this point, the back portion of the cemetery, at least the part that is adjacent to this proposed development will be a cemetery in perpetuity from a land planning standpoint.

The send test is:

2. It shall not permit the establishment within a district of any use or dimensional variance for which a conditional zoning certificate is required.

As proposed, the uses do comply with the uses that are described in the Industrial A district. This will not require any conditional uses. Currently conditional uses are governmental facilities, parks and recreation, tattoo and piercing parlors. I do not think any of those uses are either implied or intended to be in this area.

3. Will not cause adverse affect to the property or improvements in the vicinity of the district in which the property of the applicant is located.

Mr. Lateulere: As I mentioned, to the north, west and south, this property is next to industrial property. In my professional opinion, that cemetery to the east is going to remain a cemetery, in perpetuity. The thing that struck me about the cemetery in this conditional use being in an R1 zone is looking at that the mass, the size of the mortuary building. Although it is in a park-like setting it tends to exude the thought of the mass and the size of the commercial building.

4. Is not one where the specific conditions pertaining to the property are so general or recurrent in nature as to make the formulation of a general regulation for such conditions reasonable and practical.

Mr. Lateulere: In this case, obviously the reason we are asking for the variance is dealing with the dimension of the property. I have an exhibit that illustrates what these setbacks impose on the property. Mr. Lateulere pointed out all of the setbacks which were being adhered to.

Mr. Manley stated that he plotted out the map and it came out differently from the measurements on the applicant's maps. The third building will be within the 200 feet setback.

Mr. Tamulewicz: The scale on the dogleg on the documents that we were provided should be about a width of 210 feet.

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Mr. Lateulere: Correct. That is what it is.

Mr. Lateulere explained the measurements.

Mr. Tamulewicz admitted that the figures were close.

Mr. Lateulere: This illustrates the area of the parcel that is encumbered by that setback. Based on these setbacks, it is my opinion that this area and the smaller back area don't render the parcel significantly useable from an economic standpoint.

5. Relates to the property that is under the control of the applicant.

Mr. Lateulere: It is. It is owned by Hinckley Land Ltd. It is also the applicant.

6. Shall include as a condition to the variance the building areas, any accessory structures, and other similar appurtenances, none of which shall be altered without authorization by the Board.

Mr. Lateulere: From a planning standpoint, I do not know that I have a lot to say about that other than per your regulations this will satisfy the conditions. There are also 3 additional measures that the code describes. I believe that we meet all three of them.

1. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of these Regulations.

Mr. Lateulere: Going back in case law, the Duncan case explains that the property owner encounters practical difficulties whenever an area zoning requirement eg. frontage setback, or height, unreasonably deprives him of permitted use of his property. The key to standard is whether the area zoning requirement is applied to the property owner in question is reasonable. What this says in summary is that the question asked by the Duncan case is: Are the setbacks imposed on this property constitute a reasonable action on this property?

Mr. Lateulere stated that here are 6 tests to the Duncan ruling. Mr. Tamulewicz corrected that statement by stating that there are 7 Duncan Factors to be considered.

Mr. Lateulere: I will briefly run through them at this point. The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery

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of governmental services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

Mr. Lateulere answers to the Duncan Factors:

1. Neither a beneficial use or nor a reasonable return are possible without a variance because of the shape and location of property and its being impacted by required setbacks to the west.

Mr. Tamulewicz asked: Are you testifying that the beneficial use per your drawing is the 5 buildings? There is not other potential beneficial use of this property?

Mr. Lateulere: As I stated before, the only area that is potentially usable on that site in the correct condition is this piece right here; as the application stated, the acreage of this parcel is 5.8 acres. This area right here constitutes approximately .56 acres. So this is less than one-tenth of the entire site.

Mr. Tamulewicz: How did you determine beneficial use as far as the 80 foot setback? You are asking for a 120 foot variance. How did you determine?

Mr. Lateulere: Fair question. The size of buildings that we show in the plan is a size that is required for buildings of this type to be successful, generally. The building themselves will be 60 foot deep by 100 foot wide. The reason that they are constructed that way is so that when they are built, being able to sell or lease these units relate to the cost of the developed project and whether or not it makes this unit salable. So obviously, if you can build more leasable square footage in a building you can attract either one tenant that can use the whole 6000 square foot or 2 that can use 3000 sq. foot. The cost to construct the building makes the square footage more reasonably priced.

In the second test is whether or not the variance is substantial. It is my opinion that given the density of the structures and the other uses surrounding this development, that the requested variance will have not substantial impact on the adjoining properties. Again there is the single family structure here on Rt. 303 that has been impacted by the existing development. This development here, the 200 ft. variance will not substantially impact that home based on the location of this parcel.

Ch. Manley: So it is your testimony that a 60% percent variance is not substantial?

Mr. Lateulere: I think in this case where you do not have any structures over here, next to it.

Ch. Manley: So it is your testimony that a 60% variance is not substantial?

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Mr. Lateulere: Yes. The basis for that is really the intent behind why that 200 ft. setback was placed on industrial properties. In a 200 ft. setback the reasons it was placed on industrial properties is to protect potential homeowners and homes that could go in next to the property. In this case, with the cemetery being immediately to the east here, it is my opinion that this will continue to be a cemetery use. There is no indication that it will stop being a cemetery. There will be no homes built next to it. The intent of the 200 ft. setback as I interpret it out of your code is to protect single family residences that could be built up to the property line if that were an available alternative. In this case, that is not an available alternative. There will not be homes built here. This will be a cemetery in perpetuity. The closest home will be right here. You are right. I do not believe that the variance is substantial given that line of thought. The third test is whether the essential character of the neighborhood will be substantially altered or whether adjoining properties will suffer a substantial detriment as a result of the variance. As I have said several times now, surrounding this property is all industrial, except for the property to the east, which is residential.

Mr. Tamulewicz: It is still a residential area across the street. How much increase truck traffic are we going to get there?

Mr. Lateulere: I don't have traffic numbers. However this is currently zoned industrial. In issues such as traffic, if we could develop this right here with the same square footage, if you take these buildings and turn them, there would be the same amount of traffic the only difference is we would be abiding by the 200 ft. setback. The alternate to that is that we do not have this option because we do not own this property. So to be able to realize a reasonable return on the investment is to move forward and request a variance.

Mr. Tamulewicz: I would like to go back to Factor #2. Mr. Ockner, is it your intention that if you get this variance approved to come back for another variance because you do not have 250 ft. width at the building line?

Mr. Ockner: Well, if we, our intention is to do whatever we need to do with your blessing, hopefully, to get it done.

Mr. Tamulewicz: You said tonight that if we deny this, you will appeal it to the Court of Common Pleas. Now, that is just one step. You have another variance because you need 250 feet width at the building line. By your drawings submitted, the dog-leg is only 210 feet.

Mr. Ockner: If I could take a look, because this is not fronting on a street. This is a land-locked parcel. I looked at the code.

Mr. Tamulewicz: I looked at it too, and even considered that private drive as an industrial park road. But then that is not really what you are asking about. The width at the building line is going to be determined by the width at Center Rd., Rt. 303.

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When you come back to the width at the building line you have 210 ft. Two hundred and fifty feet are required. Mr. Lateulere was talking about it being substantial, then it would be a variance above 60%, it would be 110% or 120%. So my question is that if we grant a variance tonight, for the setback, are you going to approach the board again for a variance for the width at the building line, or should we take that into consideration tonight?

Ch. Manley: We can't, we didn't advertise.

Mr. Tamulewicz: It is still a condition.

Mr. Ockner: I would have to take a look at the code because I thought I saw something in the code that suggests that doesn't apply. If I did, I would like to revisit it with you at that time. But, if it turns out that we need to have a variance from the 250 ft. width then we will ask you for that, in the future.

Mr. Tamulewicz: Did you review our zoning too?

Mr. Lateulere: Yes.

Mr. Tamulewicz: And you did not catch this?

Mr. Lateulere: That is what Mr. Ockner and I were just talking about. The interpretation that I took away from it is that it is not required. Mr. Ockner is going to check the code. Going back to number 3, it is my opinion that the cemetery will not suffer undue or substantial detriment as a result of this variance. It will remain a cemetery in perpetuity and no homes will be built on that cemetery. Essentially we'll be providing landscaping along that buffer. If we had the option of turning these buildings and set them at the 200 ft. setback it would be very similar to what you see here. There will still be pavement the same distance from the property line. In my personal opinion, I would think that turning these buildings so that they are perpendicular to the property line actually does more for the cemetery, to support them because it allows you to introduce landscaping on the end of the building then having the back of this building facing the cemetery. From a personal standpoint, this situation actually helps to improve the situation because you do have the opportunity for landscaping, green areas on the ends of the buildings rather than looking at the back.

Mr. Tamulewicz: Will the fifty foot buffer zone be an elevated mound, like the one south of it?

Mr. Lateulere: Currently there is a swale that we put in to pull the drainage off.

Mr. Manley: Is there a storm-water plan?

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Mr. Lateulere: The storm water plan has been done for the entire property as you see it planned at this point. This is typically the way the industrial subdivisions and commercial developments are done. The Storm water collects in a basin in the back.

Mr. Manley: You are saying that it was done when the original project was begun?

Mr. Lateulere: That is my understanding.

Ch. Manley: That property back there was promised to be left open in the original project.

Mr. Lateulere: I do not have any documentation of that. This swale is taking water that is flowing off of the existing cemetery. It is helping to make their situation better. It will be landscaped. If we were to mound this at this point, it would start to cause a back-up problem on the cemetery. We would rather keep it ditched and landscaped so that it is not as much of an open channel. If it was piped at this point it would be a detriment from an engineer's standpoint, hence why we are coming forward with a variance application. In test number 4: The variance will not affect the delivery of governmental services such as water, sewer, garbage, etc. Water exists on Rt. 303 and is part of this development. Sewer is available from a manhole here, and has capacity. Garbage service is done by a private hauler so at this point it will have no adverse impact on those services. In test number 5: When the owner purchased the property he had the intent to use the fullest extent permitted under the industrial zoning, including his right to come back and seek variances. In test number 6 Whether the property owner's predicament feasibly can be obviated through some method other than a variance, as I have stated throughout this testimony, it is my feeling that development of this parcel with the setbacks that are in place is not a realistic endeavor. It is not possible given that only one-tenth of the property is usable.

Ch. Manley: So you are saying that economically, it is just not a practical situation?

Mr. Lateulere: I think it is both. By the time you take this half and acre, which is one-tenth the area that we are requesting for the parcel, by the time you work vehicular circulation in here and things of that nature, I do not think that it is realistic to expect that parcel be developed at that point.

Ch. Manley: I do not follow what you are saying.

Mr. Lateulere: If you are forced only to develop only this piece, by the time you put your vehicular circulation in here, I do not think you would be able to have a building in here that is of substantial enough size.

Ch. Manley: We are back into the economics of building, I guess.

Mr. Lateulere: Yep.

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Mr. Lateulere: Test number 7: *Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.* The purpose of the I-A district is to protect the homes that could be potentially next to an industrial sight such as this. These homes in my opinion will not constructed. The second test set forth in your zoning code: *Where there are exceptional or extraordinary circumstances or conditions applying to the property involved, or to the intended use of the property, that do not generally apply to other property or uses in the vicinity in the same zoning district, and have not resulted in an act by the applicant subsequent to the adoption of this resolution.* The shape of this parcel, I think we can all agree is fairly unique. The width of the parcel is unique, the dog-leg as has been described for an industrial parcel is fairly unique. The reasons for that really relate to the stream corridor that runs through here. When this whole thing was developed, this was part of the industrial zone as well. This is where the property line was drawn. That is not something that was done by my client. That is simple something that was done when this property was platted off. Again it was done for a valid reason - because of that stream. There is an irregularity to this property but it was not something that the owner created and brought upon himself.

Mr. Tamulewicz: He bought it like that, but he did not create his own problem?

Mr. Lateulere: Sure.

Mr. Tamulewicz: So if you bought a junk car and it doesn't run, you didn't create your problem. You bought a car that doesn't run.

Mr. Lateulere: I would say generally that that statement is correct. However, this was approved at one time by the Township and by the County for that lot split to occur. At some point this was approve by the governing authorities. It then came down as a practical difficulty for this site. The third test that you describe is, and remember we only have to meet two of these tests. The third test that we feel we meet is where is: *Where such is necessary for the preservation of substantial property right possessed by other properties in the vicinity in the same zoning district.* As I said before, there are 2 factors that work in tandem in this property being difficult. The first is the dimensional width, the second is the setback. It precludes the development of anything beyond this center point right here. I have looked at the parcel map, zoning map and the aerial photo and I cannot replicate this situation anywhere in the Township. I am not saying it does not exist. I cannot find it.

Mr. Tamulewicz: By purchasing the property, Mr. Terry created the situation. You say it does not exist any place else minus the variance.

Mr. Lateulere: I would again argue that he did not create the situation it was permitted to be created by the county at that point, when that lot was split. And one further point that is made by your code is that no other variance other than the minimum shall be granted. As I have stated, clearly I feel that 120 ft. is the minimum variance that is required to be able to make this property work. To turn the buildings and still request

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the variance – in other words to keep everything the same but to take these buildings and turn them, would actually make the problem worse. So we were looking at that if you turn these, the buildings would get further away from this property line, it wouldn't be the full 200 ft. but they would be further back. But, what you will do at that point is would actually extend your circulation patterns down and require a variance that is part of this 50 ft. landscaping buffer. Again, we aren't asking for any modification of this 50 ft. landscaping buffer. If we were to turn these buildings and we had access from both sides -- which is what is required for a standard development of this type -- that would push our development further towards that golf course. Then we would be back in here to talk to you about a 50 ft. landscaping buffer. Again, I feel this is truly the best alternative that you are looking at for this development. I think that the 200 ft. setback is not only excessive but also injurious to the property. This is a 5.8 acre parcel. Less than one-tenth of a parcel is useable when you take these setbacks into account. Based on that in my professional opinion, I don't see how this property can be economically used in the future.

Mr. Tamulewicz: What is the whole parcel? Isn't it like twenty-three and some acres?

Mr. Lateulere: I do not have that number with me.

Mr. Tamulewicz: You are referring to that only one-tenth of these 5.8 acres is useable. I am saying that 75% of the original 23.8 is useable. To me that is reasonable.

Mr. Lateulere: At this point we are left with a 5.8 acre parcel.

Mr. Tamulewicz: But it is not a 5.8 acre parcel.

Mr. Lateulere: It was split as a part of the condo action for these units here. It is a separate parcel.

Mr. Ockner: If I may go back to the question that Mr. Tamulewicz asked. The 250 ft. minimum lot width requirement, I did see what I was talking about. It is the requirement right before it which is the minimum front yard depth. This establishes where the minimum building line is. The front yard depth is 150 ft. from the street right-of-way line. The street right-of-way line isn't here, it's over here. So, our conclusion was that this particular provision doesn't apply. So that is why did not try to amend our application and did not ask for a variance. On this issue of the self-created hardship, whether the owner knew or didn't know about this property when he acquired it. These factors are identified in the Duncan case as one of the factors for you to consider. Understand that the law in Ohio states that asking for a use variance, and you knew what you were buying, your knowledge generally, in Ohio, is going to keep you from getting the use variance. We are not asking for a type of use. Duncan says that you may consider what the owner knew in the course of considering whether or not to grant an area variance but the watch word is "reasonableness." It is reasonable for anybody who is going to buy a piece of property investing in your township, under these circumstances which is going to disturb no one, to anticipate that I am going to buy this land. If it turns out that there are these unreasonable variances, there is no reason on earth why your

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citizens can't expect that you will decide in appropriate cases to administer your zoning code reasonably. Included in that is the ability to grant variances. Both the United States Supreme Court and the Ohio Supreme Court has said that you are not precluded from seeking damages for a taking of property just because you knew that your property was unconstitutionally zoned.

Ch. Manley: Let me sat that one person's reasonableness is another person's unreasonableness.

Mr. Lateulere and Mr. Tamulewicz discussed the minimum lot width at the building line. This discussion did not reach resolution because Ch. Manley said this course of conversation was off the subject at this time and it was not to be considered in this variance application.

Mr. Lateulere stated that the sideyard setback variance is the only one that Mr. Terry is requesting at this time. If another variance is needed, they will return with an application.

Mr. Zeleznak: Was this one parcel when the original corporate park was built?

Mr. Tim Dean of Terry Properties was sworn in accordingly.

Mr. Dean: I was not with Terry Properties at that time. My understanding is that it was 2 separate parcels that comprised 23.76 acres. The 5.8 acre parcel was split off in 2002.

Mr. Ken Livingstone, zoning inspector: Mr. Terry had an option to buy the parcels under the condition that they be changed to light industrial. He knew all the background of the property.

Ch. Manley distributed papers from the original filings when Mr. Terry requested to change the zoning to light industrial.

There was discussion whether Mr. Livingstone is required to be sworn in. Mr. Livingstone was sworn in accordingly.

Mr. Livingstone repeated his previous statement. He showed the board a map indication the original proposal depicting a retention pond, a proposed building for William's Trailer Company and a storage area for William's office trailers. There was going to be no buildings back in this area because he knew what the property problems were including the creek.

Ch. Manley: Were there 2 separate permanent parcel numbers?

Mr. Livingstone: I am not sure but I know he had to negotiate with 2 different people. To be sure I would have to look it up.

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Trustee Ron Rhodes was sworn in accordingly.

Trustee Rhodes: Back in the time when myself, Walter Robb and Mr. Cahill were Trustees, Mr. Robb was liaison to the zoning department. At this point in time, this whole property was zoned residential. Mr. Terry requested that this property be rezoned due to Aldi's being to the west and the cemetery being to the east. Mr. Robb suggested that as R-1, the likelihood of building residential houses there was slim. The trustees did get the land rezoned to what it is today. We made it clear to him that the plan he submitted at that time, many years ago, was very acceptable. It was discussed with him that this back piece of property should not be developed because it was too close to the sidelines and it was a tail that was just going to hang there. Okay? I am sorry that there is no documentation. I am still one of those suckers that believe in another gentleman's handshake. So there was nothing written. It was made very clear to him that he could not use that piece of property for anything but parking trucks or something. No buildings.

Ch. Manley: You are looking at what was part of the original record. Did the development come out looking like this or is it similar?

Trustee Rhodes: No, it's not like that at all.

Mr. Tamulewicz: How did these 5.8 acres get split as a lot by itself?

Trustee Rhodes: I cannot testify to that because I do not know. I do not know acreage. It was originally residential and the zoning board changed it to I-A. He was buying it pending on the proposed zoning change. He had to go through a site review and the county planning. He presented building plans, we thought they looked great. All of a sudden when the first building went up, it didn't look like the plans. We didn't make him tear it down but we were not happy. What he gets approval for doesn't matter. He changes everything. He has made driveways asphalt when he agreed they would be concrete. Subsequently he did remove them and repaved with concrete per our agreement.

Bill Shaffer, assistant zoning inspector, was sworn in accordingly.

Mr. Shaffer: These are official Medina County tax map photographs taken in 1980. Here is the parcel in question. (Mr. Shaffer pointed out the 5.8-acre area with the dog-leg area) It was all one parcel. It never was split off. I was asked by the trustees and also Mr. Terry to draw a line to what useable area under our existing zoning code, and I came up with pretty the exact area that you came up with Mr. Lateulere. I do not know the exact purpose of their asking me to do this. I do remember Mr. Terry stating that as it is, the land is not useable. The other land was spilt off for tax purposes. For tax purposes, an owner can split their land into many tiny parcels. But, those tax purpose splits have nothing to do with the eventual use of the property. I tend to disagree when comparing the mausoleum with other industrial buildings. A mausoleum is very specific to a cemetery. As mausoleums go, it is a small mausoleum. He is also asking for a 60% variance. In anybody's book, 60% is substantial. Simply

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because someone buys property, there is no guarantee that the property is going to be able to be used or if it is used for commercial purposes, that a profit for every square inch of the property would be due. When this was put up, this was being developed as a full 27 acre parcel. There was no 5 acre parcel as the aerial photos show. On special conditions, Mr. Lateulere stated that the best use of the property is to construct buildings resulting in taxes for Hinckley. The options of having a storage area will not net any new taxes for Hinckley and be unsightly to neighboring businesses. Actually, if Mr. Terry has something unsightly there, he should be a good neighbor and get rid of it. As far as lot size is concerned, lot size is not a practical difficulty. Currently, the existing buildings are tax abated for 15 years. The rest of the property has been developed using the present setbacks. There will be some increased truck traffic and may pose a detriment to the residents along Rt. 303.

Mr. Dean: When these other buildings were built they were approved by the Site Review Committee.

Ch. Manley: Do the buildings lay out just like they show there?

Mr. Dean: No, they do not sir. But I was here at all of the Site Review meetings.

Ch. Manley: I think that is the point.

Mr. Dean: But, you did have a vision as to what to expect.

Charles Toth, treasurer of the Lutheran Cemetery Association, was sworn in accordingly.

Mr. Toth: The Board of the Cemetery Association was somewhat involved when the original parcel was laid out. Our concern is that the area borders on our west side. We are concerned about the mounding, which Mr. Terry and the Board agreed needed to be there. I would like to address some of the presumptions made earlier regarding the cemetery. We agreed to this first stage of development and we did not fight it anymore than being good corporate citizens when it was laid out for us that a mound would be put in here and that this area would be a low usage area. This was laid out and this is what we bought into when we initially did this. We are pursuing alternative uses for our back 40 acres. Otherwise as this gentleman has said, if you don't do this, I am going to take this a step further to the courts. We are stewards of this land. We have to look at it as a business. As a cemetery you sell aesthetics. That is what you sell. Where you are located, and what is next to your cemetery is important. This used to be a pastoral setting; it is now an industrial setting. The mounding helps to a certain degree, but not a great degree. There is still traffic, dumpsters, noise that you can see and hear. Ideally when there is a funeral, you would like it quiet, tranquil. This is not the case. This is what you become when you start to look their back usage. It is zoned R-1 and we are looking for development of that potential. If they put these buildings 120 ft. closer it will have a dramatic impact on us. I don't have a marketing study right now but I know it as a businessman. If we keep it and use that land for cemetery purposes, the noise and traffic is important. Even if we do not enter into a deal to sell it as residential land, the

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aesthetics is still important to future burial sites. This is our business. That is our livelihood. We feel this variance would pose a major detriment to us.

Mrs. Donna Maminskas, superintendent of the Lutheran Cemetery Association was worn in accordingly.

Mrs. Maminskas: What caused me concern is their comment, "Yielding a reasonable return on their land". I informally pooled people that came to the cemetery looking at lots. When asked if they would purchase a lot in the vicinity of a light industrial building that was just 80 feet from our property line, 100% of the people said, "no." It is not the lot owner that reaps the benefits of our property, it is the aesthetics of the property and all of the people that visit the park to visit those people that purchased lots. We did agree to this in the past, and I would say rather willingly. We had a couple issues with water-flow. We were happy to hear that it would be just office trailers that would be parked back there. I think if you look at what they already built, I think they have yielded a reasonable return for their money. I think we would truly suffer in our business.

Mr. Ockner: In drawing SP2 from November 2000, the question is, is that a preliminary drawing? When they were going to add buildings, did Terry Building come to the Township for approval?

Mr. Rhodes? Yes.

Mr. Lateulere: There were some things said about Mr. Terry and he is not here to defend himself. I just want to make sure that some of the important stuff comes out as well.

Mr. Rhodes: He came to us with a proposal. We, the trustees, thought it was a good proposal. We went forward and go the whole property rezoned for business, I-A district. After the zoning got changed, he brought in a drawing to us showing the buildings with mansard roofs, we approved that. The next thing you know, we see one going up with whatever kind of roof it has now. We told him that it wasn't what we approved. We let that slide. We also required his to have the driveway in concrete. Next thing you know they were asphalt. We did manage to convince him to tear them out and repave them in concrete. He complied eventually. Next we approved his plan for the grinding company. We did talk with him regarding that back property. We went to bat for him on the tax abatement and told him that this strip of property cannot be used for building; it is too narrow, too close to the line etc. He fully agrees. Here it is. Is it written down, can anything be done now? No. But, I am testifying to the character of the person they are dealing with. I would never trust him again. I would never. They need to know that. He broke his word, in a handshake to me. I know that it is out of style today. Shame on me.

Mr. Zeleznak: Is Mr. Terry out of town? It seems as if you were aware that there was going to be some dispute. You mentioned that there was going to be some testimony regarding that piece of property not being developed. If this is that important, than why isn't Mr. Terry not here tonight?

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Mr. Ockner: I don't think that it is part of your code to take into account personal opinions about character. I don't think it's appropriate. I want you to know that we do object. Mr. Terry is out of town visiting a business convention.

Mr. Manley: I consider 60% just was overboard. Would Mr. Terry consider reconfiguring with perhaps a 20 or 25% variance?

Mr. Ockner: I think the answer is in the testimony from Mr. Lateulere as to whether or not a 20-25% variance is going to accomplish anything that would allow for the reasonable use of the property.

Ch. Manley: Would you want this hearing continued to a future date when Mr. Terry is available and to study other variance figures?

Mr. Ockner: In terms of a continuance, my short answer is no. In response to having him here, I do not think it would be productive to have these hostile feelings aired in public.

Mr. Tamulewicz asked Mr. Lateulere if he had experience in cemetery planning and if he would bury his parents in a cemetery next to an industrial park.

Mr. Lateulere responded that any use can be harmonious next to any other use. This is something that you see as a modern land use objective in many communities across the nation right now. He has designed one cemetery. It was a not similar case to this one.

Mr. Tamulewicz: The use as outlined and was approved was harmonious, the two uses were harmonious. Now, when you create disharmony, is it still harmonious? We obviously have disharmony.

Mr. Lateulere: From a design standpoint, would I rather have a building with bay doors and loading areas adjacent to either a residential property or cemetery or would I rather have these buildings turned so the noise and traffic did not face the cemetery. The side along the cemetery or residential area would be the quieter side with windows and landscaping.

It is my professional opinion that I would rather have this (meaning the position of the currently proposed buildings) over having bay doors and loading areas adjacent to the tranquil setting.

Ch. Manley: How do you feel about a figure less than 60%? What about 20 or 25 %?

Mr. Late: If we were to turn these buildings, and they are 60 feet deep, keep the exact same buildings, 60 into 200 is roughly between the 25% to 30% range. What that would do is a). require us to turn the buildings so that the bay doors face this way, not what everyone would want because you need a certain amount of loading space by the bay doors. If we push the buildings this way, to be able to allow them in the back, then what

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we have is encroachment in the 50 foot landscaping requirement. In my professional land-use opinion, I don't think is a superior situation.

Mr. Manley: Do you know how many square feet, in your opinion, you would have to build in order to make to make it economically practical?

Mr. Lateulere: I have not prepared that for tonight. With regard to the zoning ordinance, the purpose is to promote business and manufacturing that is harmonious, quiet, does not produce noise, dust, odors, and things of this nature.

Ch. Manley: You just said that if you turn these builds these problems would be created.

Mr. Lateulere: There are certain noises that will occur in every setting. This is zoned industrial already, zoned for those uses. It is zoned for the uses that can be done internal to the building to minimize that noise. You are always going to have a truck or car or something of that nature. It would be unreasonable for me to stand here and tell you that it wasn't going to happen. However if you turn this, then the truck traffic is closer to this property (the cemetery property) and the situation gets worse. We are trying to help to make that situation better by allowing these trucks to be away from that property. The second point I would like to respond to is the impact o this land. In my years of experience, the impact of this industrial use on this land was considered when the property was rezoned. Similar to the traffic, similar to everything. This particular type of industrial was permitted here as opposed to Industrial B zoning.

Ch. Manley: With the understanding that this back piece would not be developed.

Mr. Lateulere: That is where my misunderstanding is. At some this point, this plan has been amended.

Ch. Manley: Well, he has obviously changed his mind.

Mr. Tamulewicz: That is not amending the plan, he has changed his mind.

Mr. Lateulere: And each time it has come back to whatever the appropriate review board was at that time. That is why we are here tonight. Simply because we would like to make a change to this plan and we feel that the restrictions imposed on this specific piece of property are unreasonable.

Ch. Manley: Anything else you would like to ad to the record?

Mr. Lateulere: For the record, the outside storage can be as close as 50 ft. to a residential zoned property. Similar to an industrial facility, when I think outside storage I tend to picture something that is not terribly attractive. I tend to picture, with the code, you need to have a 6 foot tall vegetative buffer to do that. But, construction trailers, office trailers are often 12-13 feet tall. I prefer to have something that is a built environment versus things that could potentially be stored there such as construction

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equipment that would make noise, trailers, and boats. It would be a mish-mash of stuff. This proposal would provide a uniform aesthetic appeal. This would be landscaped to be able to provide that clean uniform look. I would certainly argue that similar plantings and maintenance would occur throughout his property. Certainly if you would want mounding, that is something that could be considered. As far as the location of the cemetery (Exhibit B, provide by Mr. Lateulere :) The section that they are considering selling off would presumably be where there is no existing road and it would be behind this portion of the development where there are no buildings. For clarity, I didn't compare the mausoleum to an industrial building. I said it was similar in mass, size and shape to a commercial structure.

Mr. Toth inquired to the zoning inspectors whether or not there are properties within the township that have more than one zoning designation.

Mr. Tamulewicz: We have had one that was on Boston Rd. The zoning commission rezoned it to consist of just one district. The reason for doing this was to prevent the situation that Mr. Lateulere refers to.

Mr. Lateulere: Mr. Rhodes acknowledged several times there was nothing in writing regarding the agreement between Mr. Terry and Hinckley Township trustees. That has significance in a couple of ways. If there is nothing that prohibits the use of this property, the fact that one time there may have been an understanding that it wasn't planned to be used can't be held against anybody. If it was a condition that was imposed on the rezoning, if it is a condition that's part of a filed restriction, a deed restriction, it can be enforced, in all likelihood. What someone thinks or insists was an understanding, times change, circumstances change. Memories change, to enforce these agreements, they have to be in writing and the law doesn't really allow any kinds of meaningful exceptions to that.

Mr. Livingstone: When you consider the zoning request, are you going to consider exactly these 5 buildings that are here in these dimensions and this situation. Or, are you going to consider no buildings at all – just a blanket request.

Ch. Manley: Yes. The request is for variance. As a guide it would have been nice to see it staked out, which we do not require. The request is for a 120 ft. variance from the sideyard.

Mr. Tim Dean: We have worked well with our neighbors, the Cemetery Association and I would like to say publicly that they have been great neighbors.

Mr. Tamulewicz asked Mr. Toth to show where the grave sites begin on the map.

Mr. Toth showed on the map where the graves sites are located. There are sections that are surveyed for graves but at this time the plots are not for sale. The only section being used is the one that is next to the Bowman Farm.

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Mr. Tamulewicz asked Mr. Lateulere if he discussed some of these points with the Lutheran Cemetery Association.

Mr. Lateulere: It is our assumption that they were going to develop more of the cemetery because they had roads put in. The decision about the appropriateness of industrial uses next to this conditionally permitted residential use was made when the property was rezoned. This is currently part of your zoning code. We have property rights. We do not mean to be disrespectful rights of the cemetery but they are not the ones with an application pending. We are here because we own this property, it is a separate parcel of land and it is land-locked. These factors should be considered and taken into account in deciding to grant our variance. We have property rights and they are to be governed by the law as you chose to administer it. The concerns with Mr. Terry are irrelevant and unfortunate. This is a concrete proposal and we ask that you approve it.

Mr. Zeleznak asked the applicants if they would consider a continuance to come back with a figure other than a 60% variance.

Mr. Tamulewicz expressed concern over the 150 ft. building lot width regulation and would like to seek further advice on that piece of the zoning code from the Medina County Prosecutor.

Ch. Manley stated that he felt this was a separate issue and should be treated separately.

The Board took a 5 minute recess.

When reconvened, the Board reviewed the 7 Duncan Factors:

Factor #1

Will the property yield a reasonable return or
Can there be a beneficial use of the property without the variance?

1. *i.e.:* Can the property be sold for a reasonable amount without the variance?

Yes, it all depends what is a reasonable amount.

2. Can the property be used without the variance?

Yes. For smaller buildings and or fewer buildings.

Factor #2

Is the variance substantial?

Yes. Sixty percent is substantial.

Factor #3

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Will the essential character of the neighborhood be substantially altered or will adjoining properties suffer a substantial detriment if the variance is granted?

Yes, based on the testimony of the Lutheran Cemetery Association.

Factor #4

Will the variance adversely affect the delivery of governmental services?

No.

Factor #5

Did the property owner purchase the property with knowledge of the zoning restrictions?

Yes.

Factor #6

Can the problem be solved by some manner other than the granting of a variance?

Yes.

Factor #7

Does the variance preserve the “spirit and intent” of the zoning regulations be maintained by the granting of this variance and will “substantial justice” be administered to the applicant?

No to the “spirit and intent” as the 200 ft. side yard is intended to act as a buffer between an R-1 district and the adjoining industrial district. The Cemetery Association feels that the variance would create a devaluation of their property.

Ch. Manley called for further discussion of these factors. There was no further discussion so Ch. Manley asked for a motion to be made.

Mr. Tamulewicz made a motion to grant Mr. D. Terry and Terry Properties a side setback variance of 120 feet from the east property line to allow a setback of 80 feet for the construction as per the plans submitted with this application. All other setbacks and so forth shall be complied with per Hinckley Zoning Regulations. All materials for consideration and given as testimony in from of this Board shall be part of this motion.

Mr. Zeleznak second.
No further discussion.

Ch. Manley stated that any person adversely affected by this decision of the Board of Zoning Appeals might appeal to the Court of Common Pleas of Medina County because such decision was unreasonable or unlawful. They have 30 (thirty) days from the date

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the minutes of the appeal are journalized. The minutes of this hearing will be journalized on April 25, 2007.

Vote: Fox – No Zeleznak – No Hoop – No Tamulewicz –No Manley – No

The hearing was adjourned at 10:05 pm.

Work Session and Approval of Minutes

Mr. Tamulewicz made a motion to accept the February 28, 2007 minutes as presented. Mr. Zeleznak second.

Vote: Huff – yes Hoop – yes Zeleznak – yes Tamulewicz – yes Manley – yes

The work session was adjourned at 10:10 pm.

Patty Garrett, Zoning Clerk

Minutes Approved: _____, 2007

David Manley, Chairman

Tom Tamulewicz, Vice Chairman

Jeff Hoop, Member

David Zeleznak, Member

_____ *absent* _____
Dottie Fox, Member

Melissa Huff, Alternate Member