

MILLERSBURG CITY COUNCIL
Special Meeting
May 23, 2016

PRESENT: Mayor Clayton Wood, Councilors Jim Lepin, Darrin Lane, Scott Cowan, Lisa Metz-Dittmer, Special Counsel Wally Lien, City Attorney Forrest Reid, City Planner Don Driscoll, City Administrator Recorder Barbara Castillo

Mayor Clayton Wood called the Special meeting of the Millersburg City Council to order at 6:30 p.m. The Pledge of Allegiance was said.

CONSER'S REMAND

Lisa Metz-Dittmer declared a conflict of interest saying the well to their property is on Conser's property and she will not be involved with any discussion or decision regarding this issue.

Special legal counsel for the City of Millersburg in this issue, Wally Lien told the Council the Conser case is back before you on remand from the Land Use Board of Appeals.

Lien explained the Application is for a Planned Development Subdivision on a site that is over 40 acres in the RR-10 UC zone, on property located on tax lots 200 and 300, Map 10S-3W-21B. The project is identified as Sweetwater West.

The Planned Development would involve 19.97 acres of buildable land. A significant natural area of 13.04 acres that includes two drainage ways, and 11.9 acres of the site that is an identified wetlands delineated in 2014.

The natural area and wetlands are not proposed for any development. On the buildable lands, there are 138 lots proposed. Sixty six of the lots are between 5,000-6,000 sq ft. and 34 lots are between 6,000-7,000 sq. ft. 36 lots are between 7,000-10,000 sq. ft. and 2 of the lots are in excess of the 10,000 sq. ft. minimum lot size in the RR-10 UC zone. The average lot size was projected to be 6,302 sq. ft.

In order to qualify this Planned Development, the project needed a number of Exceptions to the requirements of the zone code:

- 1) The minimum lot size of 10,000 sq. ft. to a minimum of 5,000 sq. ft.; the minimum lot width from 80' to 45'; and the minimum rear yard setback of 20' to 15'.

The Application went through a full set of hearings in the summer of 2015, resulting in a decision of the Council on August 11, 2015 of denial of the Planned Development.

The Applicant appealed that decision to the Land Use Board of Appeals, and made 6 assignments of error attacking the findings and conclusions of the Council's decision. After extended briefing and oral argument, on January 28, 2016, the Land Use Board of Appeals entered its decision, which held in favor of the City on all issues but one. The only remaining issue left in this case is if there is a way the project could be redesigned to obtain approval, or if it is just never possible to do a PD on this site.

Some quotes from LUBA help illustrate what LUBA felt remained to be done by the City:

"Petitioner finally makes an argument that the challenged decision improperly leaves petitioner to guess what changes, if any, might make the proposal approvable. Although it is a fairly close question, we agree with petitioner that the city's decision must be remanded to provide additional guidance on the kinds of changes that might lead to PD approval."

"... we do not agree with petitioner's suggestion that it is the city's obligation to shoulder the burden of independently developing conditions that would effectively redesign the proposal and make it approvable. Neither is the city obligated to tell petitioner exactly what must be changed to make the PD approvable. But

the city's findings are almost entirely a critique and rebuttal of arguments petitioner made in support of its application, rather than a considered determination regarding the merits of the application and whether it satisfies the applicable approval criteria. The city's findings provide almost no guidance regarding the kinds of changes that might lead to an approvable PD. Admittedly the findings make it pretty clear that the city and petitioner have dramatically different views about the value of the proposed 13.04 acres of open space as an undeveloped natural area and the significance of the requested exceptions. Some of the findings that we have discussed above might be read to suggest that if the proposed open space included at least some areas that are suitable for active recreation, and perhaps if the open space were made more accessible for passive recreation, the city might view it as more of an amenity that would justify or warrant some exceptions for smaller lots. And it appears from some of the findings noted above that the city was concerned with the large number of lots for which exceptions were requested and the much smaller size of many of the proposed lots."

"But we agree with petitioner that the way the findings are written, petitioner is largely left in the dark regarding the nature and extent of changes that must be made to justify exceptions to the RR-10-UC minimum lot size."

In conclusion LUBA said: "The city must adopt findings on remand that are sufficient to inform the applicant either of the nature and types of changes in the proposed PD that will be necessary to obtain approval or that it is unlikely that the PD can be approved for this property."

On February 10, 2016 staff met with the applicant and legal representative to discuss the remand. Options presented to the Applicant for dealing with the remand were:

- 1 - Proceed with the existing record and existing application by filing a request for remand; or
- 2 - Submit a modified PD plan to address the issues raised by the City.

Staff presented some ideas for modification of the existing PD plan if Option 2 was selected which include: a) increasing the size of the lots; b) decreasing the number of total lots; and c) enhance the natural area by creating amenities such as extensive walking trails with vista points for viewing wildlife; by creating useable recreational area from a portion of the wetlands and mitigating that offsite; and by clarifying maintenance and liability responsibilities that do not involve the City.

On March 10, 2016, the City received a request that the "City of Millersburg reconsider the remand of our land use application."

By letters of April 13 and 27th, the Applicant's legal counsel was advised of this Special Meeting to consider the remand.

The remand process after a LUBA decision is a special kind of procedure. Since the Applicant has elected to stand pat with the existing proposal, and because the LUBA remand decision did not involve questions of substantial evidence, the remand process is not a traditional evidentiary public hearing.

This is a decision meeting for Council to consider the LUBA remand based on the facts that are already in the Record.

The single issue to be determined is if there are changes to the project that could be made that might lead to it being approved, or if it is the determination of the City that a PD on this property can never be approved. No other issue is relevant for this discussion.

Mr. Conser and his legal counsel are allowed to address the Council and make legal arguments on that single issue. Council may ask questions of Mr. Conser or his attorney, so long as it relates to the single issue on remand and does not involve any new evidence. Because this is not a public hearing, no one else will be allowed to address the Council on this issue.

No new evidence will be allowed to be presented. If new evidence does inadvertently come out, Lien said he will note that, and instruct the Council to reject that new evidence during their deliberations.

Lien said at the conclusion of the Applicant's argument, you will deliberate and make a decision on the application. You have 2 options: 1) reconsider your prior decision and approve the PD; or 2) affirm your prior decision and deny the PD.

Lien said a decision has to be made tonight, in order to give him time to prepare a new written decision to conform to your vote. The written decision will then be brought back to you at your June meeting for review and final adoption. The ORS requires this process be fully completed by July 8th. Whatever your new decision is, it is considered to be a land use decision, and it will be appealable back to LUBA.

Jim Conser spoke to the Council. Conser said they purchased over 40 acres in January 1996. They arrived at a Planned Unit Development based on the best usage of the property because of constraints of wetlands. The wetlands kept increasing in size because of wetland regulation changes. The public buyers are wanting a variation of lot sizes. The Planned Unit ordinance allowed us the variation of lot sizes and in compliance with the City of Millersburg Comprehensive Land Use Plan and state law. Conser said not everyone wants a 10,000 lot to take care of especially older residents. Our plan was designed to provide 12,000 sf lots to a minimum of 5,000 sf lots. Per the code, we could have requested smaller lots yet. We felt that what we requested was reasonable and a good use of the property and not extreme for Millersburg and a good balance for our city. The lots abutting existing Sweetwater lots are the same width of those that now exist. We have worked with the city for 20 years with various donations of open space, parks and drainage issues, and they want to continue this working relationship with the city. We didn't like to have to appeal to LUBA for our Planned Unit development, but felt it was timely and necessary. We felt it would put us at odds with the City with whom we always had a good working relationship. The appeal to LUBA was made to encourage the use of your Planned Development code in the Comprehensive Plan on our plan. We are looking for guidance and reasonable conditions on our Planned Development from the City to be able to get it approved and meet the intent of the LUBA ruling.

Darrin Lane said if this is denied, then you are interested in knowing what you could potentially do to get it approved and close to what you want. Lane asked if they were open to the idea of making the open space in a usable open space. Jim Conser said there are regulations for most of the open spaces.

Wally Lien said you judge the entire application based on the amenities and the design quality of the PD, and if you believe that there are amenities that warrant that the minimum lot size be reduced, then you can approve the application as submitted.

Lane said we have a PD proposal that is not approvable as submitted. If the Conser's came in with the original proposal and asked to have two of those lots reduced to 6,000 square feet, he doubted there would be an uproar. Lane said somewhere between 2 lots being smaller than 10,000 sf and 100 lots smaller than 10,000 sf is the answer.

Scott Cowan said he missed out on the conversations early on, but since then he has reviewed the information and heard from the community and can make a decision tonight. Millersburg is growing and it is because of the larger lots. He understands there might be a need for community members for smaller lot sizes, but he has not heard that at all from anyone that has come to him. So many lots have been reduced and they are 3700 sf smaller than our 10,000 sf. He would not necessarily be against having the smaller lots in this area if it was conducive to the lay of land. If there were more of a community center in the center, with slightly smaller lots around that area but as you expand out to the current residential homes that you have now, they be 10,000 sf lots. We have too many small lots involved here in this proposal.

Jim Lepin said he is black and white on this issue and he has never been so proud of this community. There were about 80 citizens in the audience during the hearings, they were well behaved and 100% of them were against the density. Lepin said he represents those folks and that is where his head is.

Ed Schultz, attorney representing the Conser's said there is a difference of opinion between the Council and his client. LUBA gave us some direction on page 19 of its Opinion where it indicated that the City should provide some minimal idea of what conditions might lead to an approval. For that reason, we hope that there will be an interactive communication as we discuss the conditions of approval.

The City Comprehensive Plan required the City to encourage variable lot sizes. Schultz asked the question is your ordinance one that can be followed? If the council's decision is that there shall be no lots less than 10,000 sf because that is what your citizens want, we shall have to revisit LUBA.

If you adopt a position that only 10,000 square foot lots are acceptable in the City of Millersburg, it would mean that the City's Ordinance is designed to fail and is designed to put the City not in compliance with its own Comprehensive Plan, the state land use goals and state statutes.

Mr. Schultz said the city's planner submitted certain conditions of approval in his staff report that was filed in June of 2015. In the applicant's presentation, the applicant agreed that it would comply with those conditions. Schultz mentioned the natural area and a proposed trail, how a Homeowners Association could work including the funding of it, and a few examples of alternative conditions of approval.

Ed Schultz offered to extend the deadline for making a decision. Lien said that although the city appreciated Schultz's offer, statute doesn't allow us to do that unless we enter into mediation. Schultz said their offer of giving additional time was not to violate the statute, but the goal is to find a solution that allows compliance within your code.

Wally Lien explained to the council LUBA's requirements of the council for making a decision and discussed examples of amenities to the property. Lien explained that an amenity is something that would add value and attractiveness to the PD.

Darrin Lane said in his prospective, he understands that the decision made by the city council was made because of insufficient amenities and design to justify the changes.

Wally Lien told the council if they wanted mediation there is a mediation agreement. The council could move to enter into a mediation agreement with the Conser's, and it would take away the July 8th deadline. Mediation puts things into a technical process with a third party and both the city and the Conser's would be meeting with them separately with the goal to get an approval. The Third party would try to move things forward. The real problem with local government mediation though is that legal counsels never know what you're going to do, mediation is difficult, but it is up to the council and there is a way to do it.

Lien reminded the council that Luba told us that it is not the city's obligation to shoulder the burden of independently developing conditions that would effectively redesign the proposal and make it approvable. Neither is the city obligated to tell petitioner exactly what must be changed to make the PD approvable. The city must adopt findings on remand that are sufficient to inform the applicant either of the nature and types of changes in the proposed PD that will be necessary to obtain approval or that it is unlikely that the PD can be approved for this property. Your job is to tell them why you made the decision.

Darrin Lane said he thinks that it would be a huge mistake for the city to give the statement that nothing under 10,000 sf would ever be developed. Jim's point is very well taken, but I don't believe that if they walked in the door and we said we have a subdivision and all the lots were going to be 9,999 sf there would be a problem. There has to be an answer somewhere in between. Lane said he doesn't believe there is any way we can approve this PD tonight. Lane wants to leave the applicant with the idea that we're open to proposals that are somewhere between the code requirements and what they proposed and come up with a forum to discuss this before they submit another formal application. Lane suggested to have a citizen committee to address PD's

Scott Cowan said he agreed with what Darrin Lane said.

Jim Lepin moved, seconded by Scott Cowan that the application for approval of a Planned Development Subdivision filed by J. Conser & Sons, LLC for property located north of 54th Avenue and west of Sweetwater Estates and identified as tax lots 200 and 300 on Map 10S-3W-21B be denied on the grounds that the lot sizes proposed are too small; that there are too many lots proposed; that there are no proposals made for enhancement of the natural area by constructing such things as walking trails, vista

points; that there are no useable recreational areas proposed; and the maintenance and liability responsibilities for the natural area are not clarified. As currently proposed, this application cannot be approved. Staff is directed to develop a final written decision of denial for Council consideration at our next regularly scheduled meeting. The motion passed with Clayton Wood, Jim Lepin, Scott Cowan and Darrin Lane voting in favor of the motion and Lisa Metz-Dittmer abstaining from voting.

AMENDMENT TO FARM PROPERTY LEASE WITH CREEKSIDE VALLEY FARMS

Scott Cowan moved, seconded by Jim Lepin to amend the existing farm property leases to allow irrigation of certain land owned by the City of Millersburg and Lessee's Agreement to Hold-Harmless and Defend. The motion passed unanimously.

The meeting adjourned at 8:14 p.m.

Respectfully submitted,

Barbara Castillo
City Administrator/Recorder