

REGULAR MEETING
BOROUGH COUNCIL
MALVERN BOROUGH
1 East First Avenue
Malvern, PA 19355

July 21, 2020
7:30 P.M.

PRESIDING: Amy Finkbiner, Ph.D., President

INVOCATION: David B. Burton, Mayor

1. ROLL CALL

PRESENT

Council President Finkbiner
Council Vice-President Grossman
Council Member Bones
Council Member Laney
Council Member Meisel
Council Member Phillips
Council Member Raynor
David B. Burton, Mayor

ABSENT

Council President Finkbiner announced that this evening's meeting was being held virtually due to the COVID-19 pandemic and as permitted under Act No. 15 of 2020. Council President Finkbiner announced the following guidelines for the meeting:

- Participants will be asked to identify themselves when being accepted into the meeting.
- The public will be muted during the meeting when the members of Borough Council are speaking.
- For each agenda item, the public will be unmuted and given an opportunity to comment and ask questions.
- Public Comment received via email will be read by the Borough Manager either during the topic on the agenda or the general "Public Forum" period.
- Participants wishing to comment must state their name and must speak one at a time.

2. APPROVAL OF AGENDA

A motion was made by Council Member Laney, seconded by Vice-President Grossman, and carried by a vote of 7-0, to approve the agenda for July 21, 2020 as presented.

3. ANNOUNCEMENTS

a. Recording of the Meeting

Council President Finkbiner asked in accordance with Resolution No. 787 if any member of the audience was recording the meeting. Council President Finkbiner noted that the

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meeting was being recorded for minute taking purposes, but the recording would not be posted on the Borough website.

No member of the audience identified themselves as recording the meeting.

b. Council President Finkbiner announced that Borough Council held an Executive Session on July 14, 2020 for informational purposes with the Borough Solicitor.

c. Please watch the Malvern Borough website for updates pertaining to COVID-19 (e.g., community events, meetings, etc.).

4. MINUTES & REPORTS

a. APPROVAL OF MINUTES

A motion was made by Council Member Phillips, seconded by Council Member Laney, and carried by a vote of 6-0, with one (1) abstention, to approve the minutes of the meeting held on Tuesday, July 7, 2020 as presented. Vice-President Grossman abstained due to her absence from the July 7, 2020 meeting.

b. APPROVAL OF REPORTS

A motion was made by Vice-President Grossman, seconded by Council Member Laney, and carried by a vote of 7-0, to approve the Treasurer's Report, the Committee Reports for Finance and Administration, Public Safety, Public Works, the Chief of Police Report, the Code Enforcement Department Reports (Building Inspector's Report, Housing and Property Maintenance Report, and Zoning Report), the Superintendent of Public Works Report and the Manager's Report for the month of June 2020, as submitted.

c. BOROUGH COUNCIL COMMITTEE REPORTS

- Finance & Administration

Council Member Laney stated that the Finance & Administration Committee has not met since the June 16, 2020 meeting of Borough Council.

Council Member Laney stated that the Borough Engineer and their subcontractor, Hydraterra, have completed their evaluation of the scope of work for the proposed sewer rate study. A recommendation from the Borough Engineer on the next steps is forthcoming.

- Public Safety

Council Member Meisel stated that the Public Safety Committee has not met since the June 16, 2020 meeting of Borough Council. Council Member Meisel noted that work on the N. Warren Avenue Transit Project is continuing and asked Borough Manager Bashore to provide a status update.

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Borough Manager Bashore stated that the stormwater and curb work on the west side of N. Warren Avenue has been completed. Sidewalk installation was scheduled to begin on July 20, 2020. Borough Manager Bashore noted that the contractor intends to complete all improvements on the north side of the railroad prior to starting the intersection improvements.

- **Public Works**

Council President Finkbiner stated that the Public Works Committee has not met since the June 16, 2020 meeting of Borough Council. Council President Finkbiner stated that the contracts for the approved paving projects on E. King Street and N. Warren Avenue have been awarded, but the work has not begun.

5. SPECIAL BUSINESS

- a. RESOLUTION NO. 814: CHESTER COUNTY TAX COLLECTION COMMITTEE

Council President Finkbiner stated that this resolution will update Resolution No. 798, adopted on January 6, 2020, to appoint Tiffany Loomis, Assistant Borough Manager/Zoning Officer, as Malvern Borough's second voting delegate to the Chester County Tax Collection Committee. Council President Finkbiner noted that this is due to the resignation of the former Assistant Borough Manager/Zoning Officer, Neil Lovekin.

A motion was made by Council Member Raynor, seconded by Council Member Phillips, and carried by a vote of 7-0, to adopt Resolution No. 814, approving delegates for Malvern Borough to the Chester County Tax Collection Committee.

6. UNFINISHED BUSINESS

Council President Finkbiner announced that there were no items of "Unfinished Business" for discussion.

7. NEW BUSINESS

- a. Escrow Releases

- Malvern Preparatory School – 418 S. Warren Avenue – Release Request #1

Council President Finkbiner stated that Malvern Preparatory School is requesting release of their Letter of Credit for their land development project approved through Resolution No. 737. The amount requested for release is \$297,118.75. This would close the escrow for this project. Borough Manager Bashore stated that the Borough Engineer recommends approval of the release, subject to conditions. The conditions noted in the Borough Engineer's July 15, 2020 letter are as follows:

1. Installation of four (4) water quality filters per the approved plan.

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2. Providing written confirmation that the applicant will file a PA DEP NPDES Notice of Termination.
3. Completion of minor revisions to the Post Construction Stormwater Management As-Built Plan. The as-built plan must be recorded with the Chester County Recorder of Deeds.
4. Payment of all outstanding fees and reimbursements due to the Borough.

Borough Manager Bashore noted that if Borough Council authorized the release, the funds would not be released until the Borough Engineer confirms that the items outlined in his July 15, 2020 letter have been addressed. Council Member Bones asked if it would be better to wait until the conditions have been to authorize the release. Borough Manager Bashore stated that these are relatively minor items to be addressed and the Borough Engineer has inspected the project.

A motion was made by Vice-President Grossman, seconded by Council Member Phillips, and carried by a vote of 7-0, to approve escrow release #1 for Malvern Preparatory School in the amount of \$297,118.75 conditioned on completion of the outstanding items outlined in the Borough Engineer's letter dated July 15, 2020.

- Atwin Investments – Pennsylvania Avenue

Borough Manager Bashore stated that Malvern Borough has been holding funds in escrow for the dedication of additional right-of-way along Pennsylvania Avenue due to paving that had previously occurred. The current balance is \$11,423.70. These funds have not been released due to the fact that the Borough could not determine at appropriate party to receive the funds. Please be advised that the individual who originally posted the funds in escrow passed away. Recently, the Borough Solicitor has obtained information on a party who could receive the funds being held. The necessary documents to dedicate the additional right-of-way are being completed.

Borough Manager Bashore noted that the paving that occurred resulted in the issues that were witnessed with the Aras Rug Company's land development project. Borough Manager Bashore stated the Aras family has signed the necessary dedication documents. Borough Solicitor McLean stated that there was also a project that extended the right-of-way for Pennsylvania Avenue and had plans for additional projects. Borough Solicitor noted that this issue is has been in existence for approximately 20 years.

A motion was made by Vice-President Grossman, seconded by Council Member Laney, and carried by a vote of 7-0, to authorize the release of funds to Atwin Investments in the amount of \$11,423.70 conditioned on the recording of the necessary right-of-way dedication documents with the Chester County Record of Deeds' office.

b. Zoning Hearing Board

Council President Finkbiner stated that an application for relief for the property at 128-142 E. King Street has been submitted and is scheduled to be heard by the Zoning Hearing

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Board on July 27, 2020 at 7:00 pm. Council President Finkbiner stated that discussion will be among Borough Council first and then opened up to the public. Council President Finkbiner stated that comments and questions from the public will be addressed as a block. Borough Council was in agreement with the proposed structure.

Assistant Manager Loomis stated that the applicant is seeking relief for building height, parking requirements, buffers with residential districts/uses, and landscaped islands in the parking lot. Council President Finkbiner noted that the application and exhibits are available for review on the Borough's website. Council President Finkbiner outlined the process and stated that the Zoning Hearing Board is the body charged with hearing the application and either approve or deny the request. Council President Finkbiner noted that the Borough has not heard the applicant's arguments regarding hardship, but it is incumbent on Borough Council to determine their view on the project as proposed.

Council Member Phillips recommended that an overview of the process pertaining to land development be outlined for the benefit of Borough Council and the public. Council President Finkbiner highlighted the history of the project, noting a review with the Planning Commission in 2016 and the joint meeting with the Planning Commission on March 5, 2020. Council President Finkbiner stated that the Zoning Hearing Board is tasked with reviewing the matters being requested for relief and, if granted, the applicant would move to the land development process, which would require additional engineering and review. That would be reviewed by the Planning Commission and discuss items such as traffic, stormwater management, fire safety, and the construction process.

Council President Finkbiner stated that the Planning Commission reviewed the application on June 18, 2020, but they did not make recommendations on any specific conditions or a position. It was noted that the minutes from the June 18, 2020 meeting will be entered as an exhibit at the meeting.

Council President Finkbiner stated that she is in favor of office space as a use as it would complement the Borough's shops and restaurants as a daytime use. Council President Finkbiner noted that there would be a revenue benefit to the Borough and the project comes as close as possible to a guaranteed tenant. Council President Finkbiner stated that certain conditions should be imposed on the different variances if the Zoning Hearing Board is inclined to grant the requested relief. The following recommended conditions were noted:

- Related to height, it was recommended that the Borough attempt to obtain an agreement on the façade or input in the design process.
- Related to height and parking, reduce the number of on-site parking spaces in exchange for setting the proposed building back further from the sidewalk in order to make the area more pedestrian friendly.
- Related to height, sound dampening the HVAC equipment proposed for the roof of the building.

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- Related to the buffer relief, request that the planting and fencing materials be of high-quality, subject to the review of the Borough's code officials and the Shade Tree Commission.

Council Member Phillips asked if it would be possible to request to have the electrical lines buried. Council President Finkbiner noted that this may be a decision for PECO, noting the experience with Eastside Flats. Borough Solicitor McLean stated that there were multiple meetings with PECO regarding burying the lines for Eastside Flats and they declined. It was also noted that there were issues with other utilities located on the poles. Borough Solicitor McLean noted that there is not the space under King Street to run underground utility lines. Borough Solicitor McLean stated that she does not recommend pursuing this potential item at this time.

Council Member Bones stated that he believes that Borough Council should direct the Borough Solicitor to attend the meeting to uphold the Borough's Zoning Ordinance due to the proposed height and size of the building. Council Member Bones noted that the proposed project is in a large building in a tough spot that will change the character of the Borough.

Mayor Burton stated that he agreed with Council Member Bones and noted concerns with the requested relief for parking. Mayor Burton noted past applications where similar relief was requested and the requests were either denied or the applicant found alternative options.

Council Member Meisel noted that he agreed with Council President Finkbiner's views on the use and the proposed conditions to mitigate the impact. Council Member Meisel stated that he is concerned about the proposed height of the building; however, he would like to see the gap along King Street filled in. Council Member Meisel stated that it must be right for the Borough and the best course of action would be to have a partnership with the applicant.

Council Member Phillips stated that he understands everyone's concerns and has reviewed the correspondence received from the public. Council Member Phillips noted that the Borough Council now has the opportunity to send the Borough Solicitor to the hearing with requests and this may not be available in the future. Council Member Phillips stated that the applicant could construct something by right that is worse than what is being proposed now. Council Member Phillips noted that he shared concerns with the proposed height and would like to see the building setback further to make the sidewalk more pedestrian-friendly. Council Member Phillips noted that he is on the fence, but was leaning toward sending the Borough Solicitor with the proposed conditions outlined by Council President Finkbiner.

Vice-President Grossman stated that she agreed with Council President Finkbiner and Council Member Meisel, noting that the location has been an eyesore in the center of King Street for a significant period of time. Vice-President Grossman stated that she believes that Council President Finkbiner outlined some avenues that could be used to the work with the applicant. Vice-President Grossman noted that there is also a private property issue and, if they are working within the Borough's laws and procedures, then it is not the Borough's position to tell the applicant what they can or cannot build. Vice-President Grossman agreed with Council Member Phillips that the time is now as the applicant has been working with the Borough. Vice-

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President Grossman stated that she supported sending the Borough Solicitor with the conditions outlined by Council President Finkbiner.

Council Member Laney stated that she agrees with Council President Finkbiner. Council Member Laney noted that the applicant previously outlined changes in building methods, which necessitated the increase in height. Council Member Laney noted concerns that the impact the COVID-19 pandemic will have on the business district.

Council Member Raynor thanked the other members of Borough Council for outlining their comments. Council Member Raynor noted that the Borough's Revitalization and Comprehensive Plans outline office space as a desirable use on King Street. Council Member Raynor stated that she has concerns related to the height and buffering and would support mitigating these items as best as possible. Council Member Raynor stated that she agreed with Council Member Laney's concerns regarding the impact COVID-19 pandemic will have on the business district in the Borough. Council Member Raynor stated that receiving the best possible product and establishing a partnership with the applicant, while taking into account the concerns of the residents, is the best course of action.

Council Member Phillips noted economic factors and that the Borough is facing a number of cost increases for services provided to the community. Council Member Phillips stated that Malvern Borough is currently one of the lowest taxed boroughs in Chester County and there are revenue benefits of this project that may help keep taxes low, while continuing to provide a high level of service.

Council Member Bones stated that he believes that every member of Borough Council shares the same desire to maintain the high-quality of life that currently exists in the Borough, but is concerned with the mass of the building and proposed location. Council Member Bones noted that he has no issue with the proposed office space use. Council Member Bones highlighted concerns over the possibility of a traffic signal being installed at the intersection of King Street and Bridge Street as a result of the proposed project.

Council Member Phillips noted that the applicant could construct a by right use that is worse than the current proposal.

Council Member Meisel stated that he is concerned about the mass and height of the proposed building, but that the Borough could end up with a less appealing product than something that could be realized through the variance process.

Council President Finkbiner opened the floor up to comments from the public.

Peter DeLaurier, 113 Broad Street, asked if the project could proceed without the requested relief. Council President Finkbiner noted that all questions will be answered at the end. Mr. DeLaurier noted that he appreciated Council Member Meisel's concern regarding the vacant lot, but does not believe that the proposed project is the answer. Mr. DeLaurier stated that proceeding forward without any relief addresses several concerns, noting that removal of the additional floor will mitigate the parking concerns. Mr. DeLaurier noted the truck traffic on Broad Street and that this project may make the current situation worse.

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David Campli, President of the Malvern Business & Professional Association, stated that he believes that the time is now for a project such as this. Mr. Campli noted that this would benefit the businesses in the community and highlighted concerns with retail space. Mr. Campli stated that he would not want to see the owner walk away from the project and supports a partnership between the Borough and the applicant. Mr. Campli noted previous concerns regarding Eastside Flats and a number of people who complained about the project now frequent the businesses located there.

Cindy Currie, 135 Woodland Avenue, stated that the proposed project is too large and was wondering why it would be given access to Woodland Avenue. Ms. Currie noted concerns with traffic and parking and that the project would change the character of the Woodland Avenue neighborhood. Council President Finkbiner clarified rumors that the project will be a four-story building with access on to Woodland Avenue. Council President Finkbiner stated that these rumors are false and the proposed project is a three-story building only with access onto King Street.

Sidne Baglini, 203 Channing Avenue, stated that she is concerned about the number of variances being requested. Ms. Baglini stated that she believes that the applicant is openly criticizing the Borough for its regulations. Ms. Baglini expressed concerns that relief granted to the extent being requested is setting a precedent for the next applicant. Ms. Baglini stated that the empty lot may not be ideal, but there is a strong feeling that this is too large for the center of the Borough. Ms. Baglini recommended that the building be rotated so that it is parallel with Woodland Avenue. Ms. Baglini expressed concerns with traffic during construction.

David Knies, 114 Warrington Way, stated that the Borough's ordinances have been criticized and that the Borough is moving towards revisiting these regulations. Dr. Knies stated that he believes the height regulations are correct, it is rarely challenged, and matches the existing streetscape. Dr. Knies stated that he is hopefully that the Borough is able to establish a partnership with the applicant during the land development process, noting that this has occurred in the past.

Danny Fruchter, 234 Channing Avenue, stated that he believes that people do not object to the office use. Mr. Fruchter noted that the concerns rest of the aesthetics and the impact of the building itself. Mr. Fruchter noted that King Street, with or without a traffic light, will be impacted since there are only two (2) lanes on King Street. Mr. Fruchter highlighted the potential traffic concerns and that these should be addressed by the Planning Commission and Borough Council. Mr. Fruchter stated that the issues being discussed are addressed in the land planning process and the applicant has turned the process around in order to tie the hands of the Planning Commission and Borough Council in order to be able get variances with what amounts to sketch plans, which cannot be changed without variances through the land planning process. Mr. Fruchter stated that he believed that Borough Solicitor McLean would support him in saying that the financial considerations of the applicant do not matter with regard to this property. Mr. Fruchter does not believe that any member of Borough Council can say what the future holds and that any plan still must go through the Planning Commission and Borough Council as part of the land planning process. Mr. Fruchter does not believe that there is any hardship that can be presented for any of the requested variances. Mr. Fruchter stated that if the Borough Council

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abrogates its responsibility to the Zoning Hearing Board to narrowly decide about zoning, the Borough will end up with a number of restrictions that it does not want. Mr. Fruchter believes that the applicant should withdraw its Zoning Hearing Board application and that the Borough Council should recommend to the Zoning Hearing Board that it is not doing any spot zoning and it is not changing its zoning regulations at this time. Mr. Fruchter stated that the Borough Council should stand on its ordinances and that many of the concerns discussed can only be addressed through the land planning process. Mr. Fruchter noted that the zoning was in place when the applicant bought the building and was in place when the applicant allowed the historic buildings to deteriorate and forced the Borough to make the applicant demolish the buildings and this property will remain in its current state until the applicant decides to sell the property.

John Buckley, 165 Church Street, stated that there are uses near the proposed project that utilize on-street parking, which makes off-site parking for this use difficult, noting issues on Roberts Lane and Woodland Avenue. Mr. Buckley supported the installation of a traffic signal at the intersection of King Street and Bridge Street. Mr. Buckley noted his support for the initial plan since it included retail and residential spaces.

Catherine Raymond, 6 Karen Drive, asked for a better understanding from the Borough Solicitor on what the applicant must prove to the Zoning Hearing Board regarding the requested relief. Ms. Raymond noted that she has no objection to the office use, but is not sure if it will be a financial benefit to the Borough due to the COVID-19 pandemic and people working from home. Ms. Raymond noted that she agreed with the general sentiment that the proposed project is not a good use of the property.

Sidne Baglini, 203 Channing Avenue, stated that the property currently abuts a church parking lot, but it cannot be assumed that it will not be residential in the future, noting the conversion of the church on Monument Avenue.

Borough Solicitor McLean stated that it should not be assumed that she agrees with Mr. Fruchter in regards to his comments about financial considerations. Borough Solicitor McLean stated that Mr. Fruchter is wrong about the land development and Zoning Hearing Board order of the planning process and that he is lying about the developer's actions as it relates to the process. Borough Solicitor McLean noted that the developer did not take any action to switch the order of the process and that the process is moving in the normal course of action.

Eric Beauregard, 153 Woodland Avenue, stated that he believes that office space would be a good thing for the Borough, but the proposed building is too large. Mr. Beauregard believes that there are other ways to design the proposed building. Mr. Beauregard stated that he does not believe that the variances should be granted.

Connie Scanga, 152 Woodland Avenue, stated that she believes that there are solutions to address the developer's issues that have not yet been explored. Ms. Scanga stated that the Borough should not address these issues by granting the requested variances. Ms. Scanga stated that she does not believe that there has been any compromise from the developer or movement to come up with a more workable solution. Ms. Scanga stated that the Borough should ask for a plan that resolves these issues and that she echoes the concerns related to traffic.

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Council President Finkbinder addressed the earlier question about whether or not the project would proceed without the requested relief and noted that this was a matter of opinion. Council President Finkbinder noted that the traffic concerns are valid and those would be evaluated through a traffic study as part of the land development process. It was noted that the applicant is prepared to complete a traffic study. Council President Finkbinder stated that there are a number of factors that could stop the project in the land development phase and she does not believe the Borough's hands would be tied through the requested relief. Council President Finkbinder noted that she believes that the configuration of the building does not have any bearing on the requested relief.

Council President Finkbinder noted the concerns of setting a precedent. Borough Solicitor McLean noted that every request is different. Borough Solicitor McLean discussed the previous request for 346 E. King Street regarding height and noted that this request was not for occupied space, which was deemed not to be grounds for the relief. Borough Solicitor McLean noted that if a municipality is receiving a large number of variance requests, it may not be the projects that are the problem, but the municipality's Zoning Ordinance. Borough Solicitor McLean stated that, prior to the current Zoning Ordinance, nearly every property in the Borough was nonconforming. Borough Solicitor McLean summarized the hearing process.

Council Member Bones stated that after hearing the public comments, he feels even stronger that the applicant should maintain their project within the Borough's requirements.

Council Member Phillips noted the height concern and asked if there was a way to have a stipulation that the building may only be constructed higher than permitted if that is the only option.

Council Member Bones asked the reason behind the Planning Commission's recommendation to send the Borough Solicitor to attend the meeting and if there was a consensus arrived at on what they recommended the Borough Solicitor emphasize at the hearing. Council President Finkbinder stated that it is her understanding that the Planning Commission did not reach a consensus and the Borough Solicitor has historically been sent when a large project has been proposed. Council President Finkbinder stated that the concerns raised are the reason that the minutes from the Planning Commission will be entered as an exhibit.

David Knies, 114 Warrington Way, stated that each variance request, the aesthetics, and traffic are all concerns and the Planning Commission did not take a position. Dr. Knies stated that the Planning Commission has not historically outlined a position for Borough Council, but has noted concerns raised at their meeting, which is why the Planning Commission asked that their minutes be entered as an exhibit.

Council Member Raynor asked if the building was proposed to be as tall as Eastside Flats and it was her understanding it was not. Council President Finkbinder stated that the project is not proposed to be as tall as Eastside Flats. Council Member Raynor noted that the proposed project is approximately one (1) block from building A of Eastside Flats.

Council President Finkbinder outlined a potential motion, including the proposed conditions and a note ensuring that the relief granted is the minimum amount needed. Council

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Member Phillips asked if the opinions on each variance could be handled individually. Council President Finkbinder stated that she did not believe that Borough Council was voting on the variances as it is the Zoning Hearing Board's job to vote on the variances. Council Member Phillips noted that he would like to see the Borough Solicitor advocate for the building to be setback further from the sidewalk and would only be supportive of the height variance provided that their engineer can guarantee that there is no way to construct the building any other way.

Council President Finkbinder summarized the conditions being discussed. Vice-President Grossman asked if Borough Council was trying to determine how aggressive the Borough Solicitor should be in regards to the variance requests. Council President Finkbinder stated that Borough Council should outline conditions for the Borough Solicitor to discuss with the Zoning Hearing Board.

Council President Finkbinder recommended having a motion on whether or not to send the Borough Solicitor and on the proposed conditions. Council President Finkbinder reviewed the proposed conditions. Council Member Meisel recommended that the condition regarding the minimum relief required be the first condition communicated to the Zoning Hearing Board.

Council Member Bones asked for clarification on what was being considered. Council President Finkbinder stated that Borough Council would request that the Borough Solicitor argue for the proposed conditions. Council Member Bones asked if a conditional approval was possible at the Zoning Hearing Board. Borough Solicitor McLean stated that it was and highlighted the history on the controversy regarding "contract zoning." Borough Solicitor McLean noted that the Borough is not doing that in this case and conditions on relief granted must be based on evidence in the record that there are circumstances that need to be mitigated. Without evidence, there will not be an enforceable condition unless the applicant agrees to the condition. Borough Solicitor McLean noted that Malvern Arts accepted a number of conditions at the Conditional Use hearing and appealed the decision, arguing that the conditions were not supported by evidence in the record. Borough Solicitor McLean noted that a similar situation could occur in this case.

Council Member Meisel asked if Borough Council was binding itself tonight or if Borough Council was only sending the Borough Solicitor to the Zoning Hearing Board with Borough Council's concerns. Borough Solicitor McLean stated that Borough Council is not signing off on anything this evening. Borough Solicitor McLean noted that certain concerns were not a reason to deny a relief, highlighting generalized traffic concerns, but some issues could be fleshed out through cross examination.

Council Member Bones asked if, directed by Borough Council, the Borough Solicitor could advocate for denying the variances since they are out of character with the Borough. Vice-President Grossman stated that the applicant must make their case to the Zoning Hearing Board. Council President Finkbinder stated that a motion to oppose the variance relief would be considered.

Council Member Phillips noted that in some areas, the variances may be warranted, while others may not be necessary.

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Vice-President Grossman recommended having the Borough Solicitor focus on the variance pertaining to height, noting that certain items that have been discussed may be used as negotiation tactics.

Borough Solicitor McLean stated that she is unsure of the evidence that will be presented and that there is a possibility that there may be continuances granted. Borough Solicitor McLean noted that the Borough Council did not have contrary evidence and that an expert witness may need to be hired. Borough Solicitor McLean stated that if Borough Council wants to focus on height, she may need to hire a land planner as a professional witness and a height variance cannot be fought without counter testimony. Council Member Meisel asked if it was enough to appear in front of the Zoning Hearing Board stating that the biggest concern on Borough Council is the height and this is the largest opposition. Borough Solicitor McLean stated that she could, but she still does not know what the applicant's testimony will be and if the Zoning Hearing Board will agree with them.

Borough Solicitor McLean stated that it is not unusual in a contentious case for multiple rounds of questioning and continuances, but it is not guaranteed.

After discussion, Borough Council agreed that voting on each condition and the respective variances was not appropriate at this time.

Council President Finkbiner noted that she believes that Borough Council should provide direction to the Borough Solicitor, stating that the direction would be to oppose the application or negotiate on conditions.

Vice-President Grossman stated that the Borough Solicitor should be given latitude during the hearing.

Danny Fruchter, 234 Channing Avenue, stated that he believes that engaging in a negotiation process is proper, but once the Zoning Hearing Board has ruled, there will be several items taken off the table. Mr. Fruchter noted the example that granting relief for parking will set the number of parking spaces and impede the Borough's ability to set the building back and reduce parking further. Mr. Fruchter stated that if the Borough decides there is a better plan, more relief may be required. Mr. Fruchter stated that it is clear that Borough Solicitor McLean is not the person to be negotiating for Borough Council at her own volition. Mr. Fruchter stated that it is clear that the Borough Solicitor should be sent to uphold the Zoning Ordinance and communicate to the Zoning Hearing Board that the Borough is not doing spot zoning or changing its zoning regulations. Mr. Fruchter stated that Borough Council should ask the Zoning Hearing Board to remand the application back to the Planning Commission. Mr. Fruchter stated that Borough Council will only be able to negotiate with the owner through discussion on the land development plan. Mr. Fruchter stated that the applicant can then go to the Zoning Hearing Board with a land development plan to request the required relief. Mr. Fruchter stated that Borough Council was abrogating its responsibility to the Zoning Hearing Board and by having Borough Solicitor McLean negotiate on Borough Council's behalf.

Catherine Raymond, 6 Karen Drive, asked about the options that Borough Council has put on the table regarding direction to the Borough Solicitor. Council President Finkbiner stated that the options are to oppose the application or advocate for the list of

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conditions previously discussed. Ms. Raymond asked about the criteria the applicant needs to prove to be granted a variance. Borough Solicitor McLean stated that it is a difficult question to answer because they are not asking for a use variance. Borough Solicitor McLean stated that case law related to dimensional variances has been provided to Borough Council. Borough Solicitor McLean stated that the applicant does need to show how the Zoning Ordinance impacts them.

Peter DeLaurier, 113 Broad Street, summarized his understanding of the process. Council President Finkbiner stated that the application will go to the Planning Commission regardless of the relief granted through the land development process.

Council President Finkbiner noted that she disagreed with Mr. Fruchter's comments. Council President Finkbiner stated that this is still a question of hardship and even if the Borough were to negotiate with the applicant during the land development process, they are still not guaranteed to get the relief requested from the Zoning Hearing Board.

A motion was made by Council Member Laney to send the Borough Solicitor to the Zoning Hearing Board to uphold the Borough's zoning regulations, focusing particularly on height. Council Member Bones seconded the motion. No vote was taken on this motion and the action died.

Vice-President Grossman stated that she was concerned with how the motion was framed, but believed that Borough Council should argue on the request for the height variance. Vice-President Grossman stated that the first question should be if Borough Council should oppose the application entirely. Council Member Meisel recommended holding off on making an official motion until Borough Council decides what those motions should be. Council Member Bones asked if all the variances were denied, could Borough Council still negotiate with the applicant. Council President Finkbiner stated that if the variances are denied, the applicant will most likely abandon the project.

Borough Solicitor McLean stated that Borough Council is in a difficult position because they are in a decision-making position where they do not make the decision. Borough Solicitor McLean stated that she believes that the best course of action is to send her to the hearing to see what the applicant presents and potentially request a continuance based on the testimony. Borough Solicitor McLean would then report back to Borough Council so that they may make an informed decision. Borough Solicitor McLean stated that an expert witness may be necessary.

Council Member Laney noted that Borough Council will need to consider the costs associated with potentially fighting the application.

Vice-President Grossman asked if the height was more of an aesthetic issue and what kind of expert witness would be used in this case. Borough Solicitor McLean stated that multiple arguments may be presented and it would either be an architect or an urban planner based on the testimony presented at the hearing.

Vice-President Grossman stated that several of the comments indicated what the Borough should be doing with the property and noted that the land is privately owned.

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A motion was made by Vice-President Grossman, seconded by Council Member Meisel, and carried by a vote of 7-0, to authorize the Borough Solicitor to attend the Zoning Hearing Board hearing for the application of 128-142 E. King St. in order to monitor the application and potentially request a continuance.

8. PUBLIC FORUM

Council President Finkbiner stated that Borough Council will now take comment from the public on any item not on the agenda.

There were no items for discussion during the “Public Forum” period.

9. ADJOURNMENT

All business having been discussed, a motion was made by Vice-President Grossman, seconded by Council Member Bones, and carried by a vote of 7-0, to adjourn the meeting at 10:25 p.m.

Respectfully submitted,

Christopher Bashore
Borough Manager/Secretary