

Must use law to arrive at decisions (54)

The Bethlehem Gadfly 2 W. Market St., Serious Issues December 13, 2018

(54th in a series of posts on 2 W. Market St.)

Beall Fowler is a retired professor and long-time resident of Bethlehem. Gadfly: About 15 years ago Ralph Schwarz was honored at the Historic Bethlehem holiday dinner. He began his remarks by saying, "The reason we are all here is that we all love Bethlehem." That phrase has stuck with me since, and I have used it myself on a number of occasions. The long and passionate debate at Council rekindled that phrase in my mind: we were all there because we all love Bethlehem! Why else spend 3 hours in that packed chamber and engage as we all did? Yes, we all love Bethlehem — we just have disagreements about what is best for this wonderful city. As you say, democracy in action!

This piece was published 4 years ago in the Bethlehem Historic District Newsletter soon after the Zoning Hearing Board first denied the variance petition for 2 W. Market St., a denial that was upheld by both County Court and Commonwealth Court.

Because zoning issues seem to arise in our neighborhood every year or so, a brief outline of Bethlehem's zoning code as it pertains to us may be useful. For those wishing to learn more, the entire code and accompanying map are available on the City of Bethlehem website by clicking : departments; planning, zoning & permits; zoning office homepage.

Within the Central Historic District, both sides of Main Street and a portion south of Walnut Street from Main to New Streets are zoned commercial (CB), while the Colonial Industrial Quarter, the Moravian Church and Academy area, and most of the area south of Church Street are zoned institutional (I). The focus of this article is on the remaining residential portion, which is zoned RT.

The issues to consider here are the allowed uses in the RT zone, and who decides? Section 1304.01 of the zoning code tells us that there are three possibilities: P, permitted by right (zoning decision by the Zoning

Officer), SE, special exception (zoning decision by the Zoning Hearing Board), and N, not permitted. There also may be current non-permitted uses that pre-dated zoning and are “grandfathered;” these are called non-conforming and are allowed to continue.

Our RT zone has a number of permitted uses, most involving various types of residences; we can see this as we walk through the neighborhood. Other permitted uses include places of worship, schools, and minor home occupations, along with some others. These permitted uses may still face requirements, such as external appearance (HARB) and safety issues as required by law.

Special Exceptions (SE) are potentially allowed uses which require particular scrutiny in their effect on the neighborhood and may require special provisions such as off-street parking. This is why the application for a special exception must come before the Zoning Hearing Board (ZHB). ZHB meetings are advertised and open to the public, and citizens may testify at these meetings. ZHB decisions may be appealed to Northampton County Court. Several of the SE uses in RT zones include bed and breakfast home, funeral home, day care center, and major home occupation. There is also a special provision for reuse of buildings of corner storefront character (1304.04). Only one of these is known to exist in the District, at the northeast corner of New and Church Streets.

What is a home occupation? This is spelled out in 1302.53 and 1322.03(z). Briefly, it is an accessory occupation conducted in a residence that does not impinge on the neighborhood while preserving the residential character of the dwelling. A *minor* home occupation (also known as a no-impact home-based business) involves only family members residing in the dwelling, while a *major* home occupation allows at most one employee who is not a family member, in addition to residents who are family members. The code furnishes further details and additional requirements, but essentially a home occupation is one carried out exclusively or largely by family members who are resident in the home and whose activity is largely invisible outside the home. In other words, the building is still fundamentally a family residence.

What if the owner of a residence desires to convert it to a use that is not included in permitted or special exception categories? It is then

necessary to apply to the ZHB for a *use variance*. (The term “variance” is general and describes any characteristic that is not allowed in the zoning code. Within this category, the most common ones are area or signage variances; if a property owner, for example, wishes to construct an auxiliary building that is closer to a property line than allowed in the code, then he or she applies for an area variance.)

Because a *use variance* involves the use of a property that is forbidden in the code, stringent conditions are applied to any such application. These are stated in 1325.06 of the zoning code: five conditions are listed, *all* of which must be met for the ZHB to grant a use variance. One of these is most telling: “ — there is no possibility that the property can be developed in strict conformity with provisions of the Zoning Ordinance — “

In a recent denial of a use variance by the ZHB (which was upheld in Northampton County Court) it was stated “A variance should not be granted to allow an owner to obtain a greater profit, and economic hardship short of rendering the property valueless does not justify its grant.” Perhaps it may be argued, then, that no residence in the Central Historic District, and perhaps few in the City, would qualify for a use variance under the law. And the law, after all, is what the ZHB and the Courts must use to arrive at their decisions.

Beall