



WASHINGTON TOWNSHIP BOARD OF ZONING APPEALS MINUTES
April 26, 2010

The Washington Township Board of Zoning Appeals met in regular session on April 26, 2010 in the Meeting Room of Washington Township Government Center. Members of the Board present were Mr. Horine, Mr. Schwartz, Mrs. Mulligan, Mr. Roberts and Mrs. Fish. Call to order at 7:00 p.m.

The Oath was administered by Mr. Horine.

Mr. Horine also announced that throughout the meeting if someone has not been sworn that they will be sworn in before testimony.

Mr. Horine explained the hearing format and voting procedure.

Case #A-1603: John & Francoise Walusis, 1100 Viewpoint Drive

Request under Article 2, Section 3E, a variance to Article 7, Section 4C of the Washington Township Zoning Resolution to reduce the approved front yard setback requirement from fifty four feet (54') to fifty feet (50'), a reduction/variance request of four feet (4') for construction of a 29' 8" x 24' 7' room addition, for property located in a residential (R-3) zoning district.

James Wahl, Zoning Manager, presented the case.

Mr. Schwartz- It's only a fifty feet setback it's only that small triangle. They only need the lower left corner?

Mr. Wahl- Yes.

Mr. Horine- We would like to see the front view slide.

Mr. Horine- There's trees and more along the property line it not really in front of the corner where the construction will be.

Mr. Wahl-No.

Mr. Horine- The addition will be 2 stories. Is there a basement under the rest of the house?

Mr. Wahl- I think applicant can answer that.

Jeff Hurst, Hurst Total Homes 948 E Franklin St, it is a single story addition. There will be a basement underneath the existing home is a slab home. They wanted to take opportunity and advantage of the slope of the property to have a walk out. So they sub terrain or tornado room for the lower level. I do have some pictures of the site if that helps I can bring them up. The homeowners trying to add a couple spaces as you can see in the floor plan. It wasn't to attach these to the back of property with the other room in the house. If they had wanted to do something in the back like a pool it would be a problem with the addition coming off the back side. One of the things that happened when we were first introduced to this client

they had original drawings from the builder. The variance that administrator that had been approved at the time the house was built. The set back that shows on the paperwork and plat record actually said 50 feet. So we assumed that we had that latitude and design an addition on the front and the back of the house. Come to find out when we wanted to make the application that it was incorrect information. It was actually 60 feet. There had been that 54 feet variance that had been approved. We are hoping that will not be interfered this evening. Again you will see the screening on the side property the only a budding neighbors does have a lot of vegetation and it will be of the same materials as the rest of the house. They will be a tiered retaining wall on the front that is to be determined yet. If we get the okay tonight that will be landscaped retaining walls will tier the front down and the brick work will come down as the grade goes down.

Citizens voicing concerns, question and comments included: None.

MOTION- Mrs. Fish moved to approve Case #A-1603: John & Francoise Walusis, 1100 Viewpoint Dr Request under Article 2, Section 3E, a variance to Article 7, Section 4C of the Washington Township Zoning Resolution to reduce the approved front yard setback requirement from fifty four feet (54') to fifty feet (50'), a reduction/variance request of four feet (4') for construction of a 29' 8" x 24' 7' room addition, for property located in a residential (R-3) zoning district as submitted. Motion seconded by Mr. Schwartz

VOTE- Mr. Horine, yes; Mrs. Fish, yes; Mrs. Mulligan, yes; Mr. Schwartz, yes; Mr. Roberts, yes

Case #A-1604: Gregg & Janet Flick, 2427 Mill Trace Lane

Request under Article 2, Section 3E, for a variance from Article 7, Section 4B of the Washington Township Zoning Resolution to reduce the required side yard setback requirement from fifteen feet (15') to thirteen feet, 6 inches (13'6"), a reduction/variance request of one foot, six inches (1'6") to permit retention of a garage addition (4'5"x16') already constructed on property located in a residential (R-4) Zoning District.

James Wahl, Zoning Manager, presented the case.

Mr.Horine- Would the applicant like to comment?

Gregg Flick, 2427 Mill Trace Lane, I would like to apologize I really didn't mean to break the rules. I thought it was less than 100 square feet I didn't need the permit. Since it was only 72 square feet I thought I didn't it. I didn't realize with its attached it makes a difference. The front is within the variance the back side of the 15 ft is where its 18 inches. I really need the space I don't have space in the back. I can take out the pool and gladly deliver it to you. Because it keeps cracking. My wife keeps me busy with projects.

Mr. Horine- He could build a roof over the pool and fill it in.

Mr. Flick- There is too many cracks it needs repair.

Citizens voicing concerns, question and comments included: None.

MOTION- Mr. Schwartz moved to approve Case #A-1604: Gregg & Janet Flick, 2427 Mill Trace Lane Request under Article 2, Section 3E, for a variance from Article 7, Section 4B of the Washington Township Zoning Resolution to reduce the required side yard setback requirement from fifteen feet (15') to thirteen feet, 6 inches (13'6"), a reduction/variance request of one foot, six inches (1'6") to permit

retention of a garage addition (4'5"x16') already constructed on property located in a residential (R-4) Zoning District as submitted. Motion seconded by Mrs. Mulligan.

VOTE- Mr. Horine, yes; Mrs. Fish, yes; Mrs. Mulligan, yes; Mr. Schwartz, yes; Mr. Roberts, yes

Case #A-1605: Rosemary Hicks, 6073 Waterloo Road

Request under Article 2, Section 3E, for a variance from Article 7, Section 4B of the Washington Township Zoning Resolution, to reduce the required rear yard setback requirement from sixty two feet (62') to fifty feet (50'), a reduction/variance request of twelve (12') for construction of a twelve feet by fourteen feet (12'x14') room addition on property located in a residential (R-4) Zoning District.

James Wahl, Zoning Manager, presented the case.

Mrs. Fish- Who owns the property behind this property?

Mr. Wahl- I believe it is open space.

Mrs. Fish- Then it isn't slated for land development?

Mr. Wahl- No, it is not.

Tony King, Champion Windows and Patio Rooms, as you can see the house is already as far back really we don't have any rear yard setback. We think it would make a really nice addition to the home.

Mr. Horine- Are you going to put it on the existing slab that's there?

Mr. King- Yes, we will add footers to the existing slab and then erect it.

Mr. Horine- Can you tell us about the materials.

Mr. King- The materials are vinyl and aluminum. I have some literature here.

Mr. King is showing board information and photos of examples.

Mrs. Fish- The house is brick and slide windows.

Mr. King- This will be a Three Seasons room.

Mrs. Mulligan- Are they putting heat in the room?

Mr. King- No.

Mr. King is showing literature to the board for the three season's room.

Mr. Horine- What will the roof be like?

Mr. King- It will be aluminum skin and smooth.

Mr. Horne- It will be a flat metal roof.

Mr. Horine- It will not be sloped like the rest of the house?

Mr. King- No, it won't be gable it will be studio style or shed style.

Mrs. Fish- Is there a picture of the roof?

Mr. King- Yes, there should be.

Mrs. Mulligan- What is the lifetime of materials?

Mr. King- We offer a lifetime warranty.

Mrs. Mulligan- Will the windows be floor to ceiling.

Mr. King- No there will be a knee wall.

Mrs. Fish- This would have a knee wall and sliding windows.

Mr. King- Yes.

Mr. Horine- What is the slope going to be on this shed roof? Extremely flat or the same as the house?

Mr. King- It will be 8ft down to 7ft. It will be about 1 inch per foot.

Mr. Horine- Did the homeowners explore any other options with you besides this?

Mr. King- No, they have not.

Mr. Horine- A flat level roof addition kind of looks cheap. That's my own private opinion. It's not advancing the neighborhood most of the things we see here its glass and resemble the roof it style is that it fits in instead of an addition that shouts that it was stuck on later.

Rosemary Hicks, 6073 Waterloo Rd, there is nobody to see this room right now we have an awning that's over that parcel. We keep our grill out there and outside chairs. There is nobody to see it there are just trees back there. The house on one side is down and they can't see it. The other side it's their bedroom side not their living part they use is on the other side there is nobody to see this. We have redone that whole house inside and out we have put new windows. We don't want an eyesore even if it's in our backyard. So it will not be an eyesore.

Mrs. Mulligan- How long have you lived there?

Mrs. Hicks- We have been there about 1 year we have put in new kitchen and bathroom. We have completely gutted it. We lived in a nice home in Bellbrook but my husband's got disabled this was more convenient we knew we were going to make it what we wanted. We have upgraded it considerably. We probably have spent more money in it then we will get out of it.

Mrs. Fish- We all know about that but the three season room will be nice you'll get the warmth and the sunshine.

Mrs. Hicks- Yes, it will be our television room.

Mrs. Fish – Yes, and plus the warmth of the sun.

Mrs. Fish- We appreciate that you are upgrading your property.

Citizens voicing concerns, question and comments included: None.

MOTION- Mr. Schwartz moved to approve Case #A-1605: Rosemary Hicks, 6073 Waterloo Rd Request under Article 2, Section 3E, for a variance from Article 7, Section 4B of the Washington Township Zoning Resolution, to reduce the required rear yard setback requirement from sixty two feet (62') to fifty feet (50'), a reduction/variance request of twelve (12') for construction of a twelve feet by fourteen feet (12'x14') room addition on property located in a residential (R-4) Zoning District submitted. Motion seconded by Mrs. Mulligan.

VOTE- Mr. Horine, yes; Mrs. Fish, yes; Mrs. Mulligan, yes; Mr. Schwartz, yes; Mr. Roberts, yes

Case #A-1602: David Oakes, 1755 East Social Row Road, (Re: 1825 East Social Row Road) Administrative Appeal (Article 2, Section 3B, Washington Township Zoning Resolution) of a ruling of the Zoning Inspector that an animal kennel in a Agricultural (A) district is permitted, and that a Conditional Use and a Variance are not required, since construction of the kennel meets requirements for exemption from local regulations, on property located at 1825 East Social Row Road in an Agricultural (A) District.

Mr. Horine- This is for both lawyers on each side. Would you be comfortable skipping opening statements then just let Jim do some opening remarks and then go straight to the testimony or the presentations as opposed to doing two bites at this?

I, David Rickert, on behalf of the homeowners agree.

I, Steve Justice, on behalf of David Oaks agree.

Mr. Horine- We will give everyone plenty of time to speak.

Bob Surdyk the Law Director for Washington Township the facts of the case are relative easy. The decision was made by staff that the building proposed to be constructed on behalf of the Dements was incidental to Agriculture Use and is exempt from the provisions of the Township Zoning Resolution under the Ohio Revised Code. Mr. Oakes has filed an appeal of that decision and the question before you is to determine the whether or not the decision of the Zoning Inspector was correct or incorrect. I have been working with the attorneys of this case and I believe they are prepared to present to you their side of the case that allow you to make this decision. I believe Mr. Justice is prepared to go forward at this time without opening statement.

James Wahl, Zoning Manager, presented the case.

Steve Justice, Taft Stettinius and Hollister, 110 N Main St, I represent the Oaks family. He has filed an administrative appeal of a decision that was rendered by the Zoning Department of Washington Township. I have prepared a Power Point presentation tonight hopefully streamline the information and help you focus on the legal decision that you are being called upon tonight. This is case A-1602 as I think it's recorded. The township did not have the authority to regulate this particular activity and that would be a dog kennel under its zoning regulations.

Mr. Surdyk- I would suggest that those who will present information to the board be placed under oath so the testimony will be in fact sworn testimony that is required per Ohio revised Code.

Mr. Horine- We did in the beginning and if anyone present has not been sworn in please stands so that we can swear you in.

Mr. Horine is swearing in audience members.

Mr. Justice- I have printed off the colored copies of the slide that you will see tonight. Please intercept me with you questions I prefer to answer them while you are thinking about them. The issue before the board tonight is does the Township have the power to regulate through its Zoning Resolution a dog kennel that will not be used to breed dogs but only to temporarily board and groom dogs.

Mr. Justice is showing aerial slides of the property and naming the property owners.

Mr. Justice- The north side of the road it is a residential property it is zoned agricultural but it has been used as a resident since 1919. There are records that show when the home was originally built. I believe the Dements come into possession in the mid 90's and has been their home since then and based on the representation through their briefs so far as well as their counsel. This is where the continue to leave no matter what happens with this respect to this decision. Around them you will see various property owners.

Mr. Justice is showing aerial slides of the property and naming the property owners.

Mr. Justice- These are all properties that are zoned as agricultural but every one of them in essence is residential property. There are neighbors to the Dements who had heard the Dements filed for a conditional use permit and a variance to build a dog kennel. The indicated their opposition to Mr. Oaks. They have signed letters indicating opposition to that. I would like to give this to the board at this time.

Each of these letter say the neighbors have learned of a conditional use application and that they are opposed to the proposed use as a dog kennel. They are not lawyers and privy to the legal foundation that a decision has to be decided by the board tonight and that is where the board has power to regulate this conditional use or to address the variance issue. I thought it was worth providing this information to the board so that you can see that this is just not Mr. Oaks who is concerned about the proposed kennel there are other residential neighbors surrounding the Dements property who share that concern.

ARTICLE 6 "A" AGRICULTURAL DISTRICT. This district has been established to provide for agricultural activities and related uses and is intended to protect and preserve areas for continued agricultural and agriculturally related uses, natural features, and the rural character of the agricultural district. Section 1 Principal Permitted Uses Animal Hospitals, Kennels, or Animal Shelters - Conditional

use (Special Note: (2) Structure(s) must be located two hundred (200) feet or more from all adjacent properties).

Mr. Justice is showing article instructions for the 200 feet.

Mr. Justice is showing aerial drawing of the proposed use of the property by the Dements.

Mr. Justice- This was the drawing that the Dements submitted with the conditional use application. It's important for the Board to keep in mind the Dements and their counsel reviewed the appropriate regulations law and determined that they should actually submit a conditional use application as well as a variance application. Which was the original steps they took it was then after that the Zoning Department and the Township Law Director to determine that the Township may not have the legal authority to regulate an animal kennel in an Agricultural District. They decided that they didn't have the authority the Dements no longer had to proceed with the process that they and their counsel thought they should follow based on the regulations and the Zoning code for Washington Township. So with that in mind when they submitted their conditional use application this was the map they used. This map here is the location of the residence and they are proposing a driveway to go back to the back portion of the property there would be separate parking lot. This is where the proposed dog kennel will be located. It's reported as a small dog kennel since the dogs will be 35 pounds in size or smaller.

The problem that the Dements have with locating this usage on this site not only is it a conditional use based on the Zoning regulations. It should go through that process but because of the special restrictions they have to be 200 feet from all adjunct properties. If you will notice the property frontage is 250 feet. Where they are proposing to put the dog kennel its only 246 feet across this direction. On this drawing they are going to locate the kennel 98 feet in this way and that means they will have 112 feet left here. So they need a substantial variance from their eastern boundary and western boundary in order to put up this kennel if indeed the Township can lawfully regulate it. This past Friday the Dements submitted their brief in opposition to our administrative appeal this was the drawing they included. It's the same the animal kennel is more longitude then sideways it seems slightly closer to the eastern boundaries property then the western boundary then in the prior drawings.

No matter how you structure this unless you put this building on the eastern boundary property you are need a variance from both property boundaries to get this kennel on that particular site. After the conditional use application was filed then the Zoning Department basically issued staff remarks noting that the property owner had existing residence on the site and would like to house a kennel operation in a separate building. The staff determined that the kennel was permitted in Agricultural district as a conditional use. The property owners were request that the Board grant them that use. Then it notes the need for a variance. One very important fact before we move on. The Dements have made clear that both their counsels and representation as well as in their briefings that they are going to be breeding dogs at this kennel. This is going to be basically a place for them to breed dogs and possibly groom dogs. There will not be any breeding of animals going on at this particular facility that is an important fact to keep in mind when we look at the legal issue. Before the hearing was to be scheduled under A-1601 for the conditional use permit the Township Law Director determined that this did not need to be heard and had been withdrawn. In essence determining that the Township did not have the authority to regulate this particular usage in the district.

519.21(A) states, in pertinent part, that township zoning regulations shall not “prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located....”

519.01 defines the term “agriculture” to include “animal husbandry.”

The question then becomes: Does “animal husbandry” in the context of dogs, include the breeding of dogs.

If it qualifies as agricultural to the revised code then township cannot regulate.

Mr. Justice- Does “animal husbandry” include breeding? If it does include the breeding of dogs the township cannot regulate. The Dements have stated that their kennel will not involve the breeding of dogs. It’s only going to be boarding and grooming. It’s in the position of Mr. Oaks and the other neighbors that are not animal husbandry because there will be no breeding, it’s not agricultural use and it’s not animal husbandry there for the Township has the legal authority to regulate it consist with the Zoning Resolution.

Harris v. Rootstown Twp. Zoning Bd. (1975), 44 Ohio St.2d 144.

“...John Harris, submitted to the Rootstown Township Board of Zoning Appeals a request for variance and/or conditional zoning certificate. In the application, appellee presented a proposal for an addition to an existing building on his six-acre tract of land for the express purpose of housing, breeding, raising and showing long-haired Chihuahua [sic] and miniature dachshund dogs.”

“The breeding of animals is in general related to agriculture pursuits of rural people.” 44 Ohio St.2d at 148-49

“The Court of Appeals in this case does not mention R.C. 901.35, which specifically classifies mink raised in captivity as domestic animals, in finding mink breeding exempt from zoning as an agricultural pursuit apparently so finding independently of Section 901.35.”

“Therefore it is reasoned that dogs much more closely fall within the definition which would make breeding them animal husbandry, than would mink, which were so defined by the Court of Appeals of Butler County in the Davidson case, supra.”

Syllabus by the Court

1. “The breeding, raising and care of dogs constitute animal husbandry, as that term is used in R.C. 519.01.”

2. “Such animal husbandry is included in the term ‘agriculture,’ as that pursuit is defined in R.C. 519.01, and does constitute the use of land or buildings for agriculture within the meaning of R.C. 519.21.”

Harris is controlling authority for the Township because it is a decision of the Ohio Supreme Court.

Mr. Horine- I lived on a small farm when I was growing up and we raised beef cattle we never breed them. We bought them as young calves and raised them to mature we either ate them or sold them. You are telling me since I didn’t breed them on the property I was not engaging in agricultural?

Mr. Justice- I am saying that if a cow was a dog it might be the same thing but it's not. You don't take a cow and put in a kennel for a few days go on a trip and come back. Cows are domesticated animals they are at use for agricultural propose in this case it was focusing on dogs. It noted other animals like horses in the past that they are being boarded and cared for had been determined for agricultural uses. When you look at this Harris decision the key focus throughout the entire thing was the breeding aspect of dogs.

Bybee v. Bd. of Trustees of Springfield Twp., 1975 WL 182123 (Ohio App. 1 Dist.)

The specific question concerns the use of their premises for the owning, breeding, raising, selling and boarding of dogs.

Ohio Revised Code Section 519.21 provides that townships have no power to prohibit the use of land for agricultural purposes. Section 519.01 defines agriculture to include "animal and poultry husbandry." "Animal' husbandry is defined: a branch of agriculture concerned with the production and care of domestic animals; specify: scientific study of the problems of animal production (as breeding and feeding)."

"We conclude that the dog is to be included within that class of animals customarily described as farm livestock and either as such, or as domestic animals, the dog is the subject for animal husbandry. Being so subject, the processes engaged in by the appellee constitute animal husbandry; as such they constitute an agricultural use of the premises involved, and under R.C. 519.21 are not subject to township zoning restrictions."

This case comes to the same conclusion as *Harris*: breeding and boarding is animal husbandry.

AGRICULTURE

The use of a tract of land for the planting, harvesting, and marketing of crops and produce; the breeding, feeding and marketing livestock; horticulture, floriculture, structures necessary for performing these operations; and the residence of the owner or operator. Such agricultural use shall not include the following uses:

1. The maintenance and operation of commercial greenhouses or hydroponic farms, except in zoning district in which such uses are expressly permitted.
2. Wholesale or retail sales as accessory use, unless the same are specifically permitted by this Resolution.
3. The feeding or sheltering of animals or poultry in penned enclosures within one hundred (100) feet of any Residential District. Agriculture does not include the feeding of garbage to animals, or the operation or maintenance of a commercial stockyard or feed yard.

Fee v. Windwood Kennels, Inc., 1979 WL 208150 (Ohio App. 11 Dist.)

Bd. of Brimfield Twp.: Trustees v. Bush, 2007 WL 2759495 (Ohio App. 11 Dist.)

Both Fee and Brimfield essentially try to go around Harris and decide that boarding dogs alone without breeding, constitutes "animal husbandry."

Both are 11th District cases (Northern Ohio), and are not controlling or binding on the Township.

Mr. Justice- In both of these cases they go around Harris to reach a result originated decision. It's important that you understand the 11th District is not controlling or binding on this Board at all. This Township is not in the 11th District. The only decision that is clearly binding on this Board is the Harris Ohio Supreme Court decision. The Dements don't qualify for agricultural use because they are not going to be breeding dogs or animal husbandry and it's not an agricultural use. This Board has the authority to do what their counsel originally told them to do that is to apply for conditional use and seek a variance.

519.21(A) states, in pertinent part, that township zoning regulations shall not “prohibit the use of any land for agricultural purposes or the construction or use of buildings **or** structures incident to the use for agricultural purposes of the land on which such buildings or structures are located....”

Agricultural Purposes: [T]he plain language of the statute requires the building or structure to be incident to the agricultural purpose. In other words, the agricultural purpose must be the primary use of the property.” *Concord Twp. V. Hazelwood Builders, Inc.*, 11 Dist., No. 2004-L-012, 2005 WL 990222, 2005-Ohio-1791.

The proposed dog kennel is not the “primary use” of this property. It has been used primarily as a residence since 1919, and the Dements are still using their property primarily as a residence, not an agricultural use.

Mr. Justice- Even if you determine the kennel was agricultural use that's not the primary use of this property. This property is a residence and they want to have a kennel there so Mrs. Dement can have a job with her physical condition we understand that. This property doesn't primary exist to run a kennel it's a house, its residence; it's been a house since 1919. It will be a residence today and a residence tomorrow. It will be a residence no matter what the Board's decision is that's its primary use. If that's the primary use of the property then you can regulate that property. If the kennel became the primary use of the property and you determined that it was agricultural use then you would not be able to regulate it.

The Township can regulate the proposed dog kennel through its Zoning Resolution because:

The proposed kennel will not include the breeding of dogs. Not “animal husbandry.” Not “agricultural use.”

Mr. Horine- The second half of your argument the fact that the house existed before the kennel precludes the kennel because once you build a house its residential property.

Mr. Justice- You might have a house that's lived in by the caretaker and it's no longer residential property the house is merely incident to the kennel. The kennel is the major purpose of the property.

Mr. Horine- There is no kennel. What if you bought a hunk of land you build a house and you wanted to build a barn. There is no barn so therefore it's a residential property then don't you have the same issue building a barn because it's an agricultural thing on a residential property.

Mr. Justice- Not necessarily I guess it would depend on what you have in the barn.

Mr. Horine- You don't have the barn you just built the house and six months later you want to build the barn on this hunk of land. Wouldn't you argue whets residential property you couldn't build the barn.

Mr. Justice- I would argue its residential property, yes. It may become predominately agriculture depending on what you do with the barn. The fact that you have a house there to begin with doesn't necessarily mean it will always be residential. In this particular case it is because the kennel is clearly going to be a secondary use for this property. It is their residence their primary residence they will continue to live there that's why it's concerned residential.

Mr. Roberts- I would think it's entirely possible this is going to be a source of income. Its seems a consequence that on could agree since it is a source of income that might be the primary purpose of the property.

Mr. Justice- I would think one could agree that and ultimately and someone will have to abrader that decision and decide whether indeed the primary usage of the property is agriculture purposes or residential. In the Concord case its self the situation was slightly different then the situation we are dealing with here. In Concord someone was building a house an addition on to a house a large addition that was violating the Zoning regulations. What they tried to argue this was they were trying to build this for a kennel in Agricultural use. So that they can get around the Zoning regulations that would prohibit them from building this otherwise if it was just going to be a residence. The court there said, no, the primary usage of the property is for the residents. The kennel that you want run doesn't seem to be the primary thing happening there. This is where we get this issue of primacy. The board has the right to wrestle this it's a matter of degree. Somewhere along the line a property could switch from being primarily residential and primarily agricultural.

Mr. Schwartz- Is it possible that when they talk about the property are they referring to specific building or structure that is being constructed on a piece of real estate.

Mr. Justice- There is no doubt that my college is going to argue that when they are talking about property in this decision they talking about a specific structure and not to consider what else in on the property. I don't believe the decision stands for that. I think what the Concord case stand for ultimately the use of the property needs to be agricultural if it's going to be exempt from the regulations.

Mr. Justice- Do you have any further questions? I will reserve the opportunity to speak in rebuttal if necessary. I understand that there may be some witnesses put on by my college. I understand that I will have the ability to cross exam if there are put on.

Mr. Horine- Yes, you will and thank you for your presentation and your time.

David Rickert, 110 N. Main St, attorney for the Dements. I think we need to proceed in two phases with this one of the comments made in the initial briefs supporting the appeal that there wasn't sufficient factual record in which this body could make a decision as to the use of this property. I want to call Sherry Dement up and ask her what her general use of the property and plans for the property to discuss some of the legal issue that you will have deal with here. I would like to exam her briefing on the record her intentions for the property.

Mr. Rickert- What is your name and address?

Sherry Dement, 1825 E. Social Row Rd.

Bob Surdyk- I would like for the record that Mrs. Dement and Mr. Rickert have already taken the oath so that the court reporter recognizes that please.

Mr. Rickert- Who is the owner of that property?

Mrs. Dement-Myself, Sherry and my husband Ronald Richard Dement.

Mr. Rickert- It is located in Washington Township?

Mrs. Dement – Yes.

Mr. Rickert- How is that zoned?

Mrs. Dement- Agricultural.

Mr. Rickert- Earlier in the presentation that was made you were asked why you submitted to zoning a variance application and a conditional use application will you tell us how that came to be.

Mrs. Dement- My husband and I visited the office next door and asked about the paperwork on how to proceed with our kennel. It was just to two of us we had no attorney at that time. There was a Jim Wahl in the office and another gentleman named Bob and I don't remember his last name. They gave us the paperwork we had taken it home and answered the questionnaire. We came back submitted it along with the \$100.00 fee while we were there they suggested that we go ahead and file the variance too. When we were there they helped us fill out the variance as far as location and distance and we submitted all that day.

Mr. Rickert- How long have you lived on the property?

Mrs. Dement- We had taken possession May of 1998.

Mr. Rickert- Do you currently have plans to run a business on that property?

Mrs. Dement- Yes, we do.

Mr. Rickert- Please tell us what you plan to do with that property.

Mrs. Dement- We intend on building a small building to board, breed, groom and care for small breed animals, dogs and cats.

Mr. Rickert- Sherry, I'm going to give you a document to verify with the board.

Mrs. Dement- I believe that's the West view of the side of the kennel and the front of the kennel.

Mr. Rickert- Can you flip through and tell me what else is there.

Mrs. Dement- Again, it looks like the West view and the Front and the proposed floor plan for the kennel. The first and the mesa mean upstairs.

Mr. Rickert- Can you describe generally what activities you have planned for this building.

Mrs. Dement- What we would like to do downstairs is have an area to board the dogs. It will be dogs under 35 pounds and cats. We also intend on bathing, washing and having full constructive play. Also behavior skills taught to animals also working with the owners as they come in. The mesa mean will be primarily for cats and what we would do as what we are considering as breeding and that will also occupy that place upstairs.

Mr. Rickert- How many animals do you plan on boarding here at one time?

Mrs. Dement- At any one time there could be 40 -45.

Mr. Rickert- What is the length of stay for those animals? What are the plans for that?

Mrs. Dement- It depends on the individual we are going after a certain type of business professional that may be gone 3 or 4 days call needs an extension. Maybe your common person like me that's going on a short family vacation.

Mr. Rickert- In terms of hours of operation what do you have planned for that?

Mrs. Dement- I will report for duty at 8 a.m. we will have pickups for the animals and drop off basically 9 a.m. to 11 a.m. then we will close down for a 3-4 p.m. pick up or delivery. I will close down by doing what I need to do for the animals by the end of the day. I will then go into my primary residence I will have security and monitoring systems for the animals well being.

Mr. Rickert- Who drew up the drawings that we have shown as Exhibit A.

Mrs. Dement- My architect.

Mr. Rickert- Who is that?

Mrs. Dement- Doug Fisher.

Mr. Rickert- Has this building been planned as anything other than a kennel?

Mrs. Dement- No.

Mr. Rickert- It was design from the ground up top to be that way?

Mrs. Dement- Absolutely.

Mr. Rickert- What's the motivation for having the kennel on your property?

Mrs. Dement- I believe first and foremost my passion for animals and it's an important way for me to drive an income for something that I do have a passion for. I do have a disease in my eye that's debilitating. Eventually I will surrender my driver's license. This is a way for me to be able to work and have an income to provide for my family.

Mr. Rickert- I have nothing else with this witness if there is any other questions we would entertain those now before I discuss the real issues.

Mr. Justice- I think an important fact is that we made before the board is that the Dements have never represented until this very moment that they ever plan to breed dogs in this kennel. If you look at the briefs that were submitted the opposition to our appeal. It would be very easy for the counsel or Dements to specify any where in there that they plan to breed dogs because of the clear application of the Harris case. I submit to you as late as 2 p.m. this afternoon when counsel and I were on the phone together with Mr. Surdyk. The counsel represented on the phone the Dement at that point in time were still not breeding dogs. I would like to ask Mrs. Dement.

Mr. Justice- When did you decide to start breeding dogs?

Mrs. Dement- Probably about 22 years ago. I had been involved with the guiding eyes for the blind because of my own situation in my personal life. This is something that I have discussed since 1997 when I originally set out to open a kennel this was way for me to do this.

Mr. Justice- So, it's your testimony under oath and committing perjury here today that ever since you began seeking this process of building this kennel that you intend to breed dogs at this kennel.

Mrs. Dement- It's for the purpose of the guiding eyes. Yes, I do not want to sell them. I want to donate them to trainers for the blind.

Mr. Justice- That information was never communicated.

Mrs. Dement- It was never asked in any of the questionnaires we filled out.

Mr. Justice- Your counsel never shared in any of the briefs until this very moment this is the first time you understand that right?

Mrs. Dement- I don't understand the question.

Mr. Justice- You understands that this is the first time represented by you or your counsel that you plan to breed dogs at this kennel.

Mrs. Dement- It was never asked of me when I filled out the documents what I was doing with that. I filled out everything truthfully and I'm telling you truthfully now this is the intent since 1997 when we started to think about doing this.

Mr. Justice- I want to submit to the Board a memorandum of opposition. I invite the counsel to come up and say that I anything I represented was incorrect as of 2 p.m. this afternoon he told me and Mr. Surdyk that Dements did not plan to breed dogs in that kennel at this time. There is now where in the memoranda of opposition when they ever mentioned that they easily could have done so. Basically gut the Harris case they could have done and never did. I submit to you that this is a sham. This is a sham in order to get around a clear application of Harris Law.

Mrs. Dement- Ladies and gentlemen this is not a sham. I'm the one that's suffered with this eye condition and I have empathy for those who have the same problems. This is not a sham. This is something I have work toward and something I have a passion for and I resent it being a sham.

Mr. Rickert- Let me address just so we are clear. I'm going to address the last point first and go through this in an orderly fashion. Breeding is not required to be agricultural use. Under the law, under the cases, under Harris and under anything. If Mrs. Dement chooses to breed not to breed that is not going to effect that this kennel is agricultural use. So I want to be upfront about that right from the start. I will go through this in a more orderly progression. The question for tonight basically is whether the use of the kennel constitutes as animal husbandry and if it does its agricultural use which cannot be controlled by the Township Zoning Ordinances. The statute prohibits regulating an agricultural use there are two branches of that under the statute. The township cannot limit any land for agricultural purposes or second branch the construction or use of building or structures incident to the use of agricultural purposes of the land on which such building or structures are located. That's what the statute says you can't paraphrase you have to read the language in the statute. It's either an agricultural use of the property or you can't regulate the construction of the building which would then be agricultural use of the property on which the structure is located that is what the statute says. I want to address the point that you raised Mr. Chairman what happens when you build a house first then you decide you want to build a barn. Does building a house first negate being an agricultural use on the statute deals with that? If you build a building that is in cent to using that portion of the property to which it sits as agricultural use then you cannot prohibit or regulate that building. You need to look at the statute and read what the statute says. Animal husbandry is called out as agricultural use interesting address your Mr. Chairman your point about the cows you raised. The statute in Ohio 955.03 a dog is classified as livestock. There isn't a difference in terms of a dog, cow, horse or anything else under the statute. A kennel has been found an animal husbandry that's the Fee vs. Windwood Kennels that the Oaks site. What about the issue of breeding keeps coming up? Do you have to breed animals to be considering animal husbandry? When the question was asked up here the question was phrased does animal husbandry include breeding. That's the wrong question the question is does animal husbandry require breeding and that makes a big difference. While breeding may necessary be animal husbandry it's not required to be animal husbandry. When you look at the Harris much has been said under that syllabus it talks about breeding being animal husbandry. I believe again you have to read the case in the Harris case the facts of the case was when submitted the Zoning application was the question was and I'm quoting the first paragraph in the case "A peal presented a proposal for an addition to an existing building on a 6 acre track of land and for the expressed purpose for housing, breeding, raising and showing Chihuahua and dachshund". Something with the Bybee case there the owner intended to breed dogs and certainly the Supreme Court said sure if you house and breed dogs that's an agricultural use. No place in Harris and no place Bybee you've got to breed to be agricultural use to be animal husbandry. It just says if you do great you're within the definition. It not a requirement anywhere and to the contrary the cases that we sight admitted from the North part of Ohio the two courts that have considered this question basically say "No" breeding is not required for animal husbandry that the care the kenneling of dogs. In one case operating a dog rescue operation is animal husbandry therefore is an agricultural use to be regulated. The reason they take that position is that the task required the activity takes place are the same you're breeding or not breeding. You still have to house these dogs feed these dogs, groom these dogs and exercise these dogs so these4 are basically the same. There is no difference on how you use the property if your breeding or not breeding the only difference is the dog. To the owners to the people it's the same activity there no magic to breeding the dog in terms of one being husbandry and one being not. The question from the Chairman what if I buy a cow keep it slaughter sell it whatever with it is it not agricultural because I didn't breed that cow. Given the statute that a dog is livestock you can't say that's the rule for cows we have a different rule for dogs there is no different rule

It's the same rule. Therefore you need to find consent with the cases we cite in our brief and that the position taken by the Township counsel that kenneling dogs is a form of animal husbandry which is then agricultural use. If look at what the whole primary purpose of the property is agricultural or residential. Mr. Schwartz you hit the nail on the head when you look at the statute the statute doesn't talk anything about the primary use of the property the main use of the property or anything else. What the statute says it talks of the building or structures incident to the use for agricultural uses on the land which buildings or structures are located. This building that the Dements propose has always been planned to be a kennel and design to be a kennel and used as a kennel. There is no evidence before you at all to the contrary that going to be a kennel. Therefore it falls under that second definition of the statute. If you look at the Concord Township case that's been cited here it's a completely opposite set of facts. In the Concord Township case was these people converted a barn into a residence and intended to be a residence. They found out there was a side setback requirement they didn't meet and what they tried to do was say hold it if this building this barn now being converted into a house can be used for agricultural purposes then we don't have this side set back requirement. So to get away from the requirement they said hey we plan breeding dogs there that our plan for the property. The courts in that case was hold it the owner had no plans for breeding dogs. The building wasn't suitable for uses of a dog kennel or breeding. There was no facility for breeding or storing dogs there it just was house that these people were trying to relabel as a kennel so you could get around the setback requirements for that property. In this case you can't seriously argue when you look at those architectural drawings that this is going to be anything other than a kennel. So the Concord case is completely different than this case that there is no question that the building being constructed is incident to using that part of the Dements property for an agricultural purpose. We fall clearly within the statute. Again our position is set forth in our briefs if you have any questions I will respond to them so that's our position on this appeal.

Mr. Horine- I could vision the structure being used for other things I don't see how you could conclude it can only be a kennel. I'm not saying I disagree with your arguments but that's a weak one. You could put a great bar in there with an outside area and a few tables there.

Mr. Rickert- That's true but you would have to share it with all those dogs. It's true you can convert any building into something else but the fact to the matter is there is no evidence that there is no other intended use but a kennel.

Mr. Justice – I do think it's important to note that my colleague controvert a single thing I said about the representation that were made to me in front of township counsel even as 2 p.m. today respects to the issue of breeding. I highly recommend that you read the memorandum of opposition. If I was an attorney and preparing a memoranda of opposition to our appeal in this case. I know the controlling authority on this board is the Harris case it clearly says that breeding and boarding uses the conjunctive not "or" but "and" it's clearly says that in the syllabus. I knew that my client was going to breed dogs wouldn't I put that in my memorandum of opposition I submit that to you that it is a sham. Did they come up with that in the last few hours to get around the clearing point of the Harris decision? It's not been controverted. I think my final says has to do with the Concord case. If it's true that the Concord case dealt with a barn that was being converted into a residence and there were arguing that they were going to use part of that house for animal breeding and animal kennel so they can claim it agricultural use and get out of the Zoning Regulations that effected the rest of the residents. It happened to be one building. I submit to you the principal of pellet court applies there it applies to whether there is one building or two buildings. The

point is the primary use of the property has to be agricultural whether it's in one building such as you have a house part of it is a house part of it for animal breeding and a kennel then there has to be a weighing on its primary use or whether there is two separate buildings. When one building is incident to running of the animal shelter the animal kennel and breeding. My question has to be answered as to which is the primary use. I submit to you that the Dements and their testimony nor in which you just heard from my colleague indicated the kennel was going to be my primary use of that property. Indeed they continue to live there they have been residents all those years and they plan to continue to have it as their residence. If you decide you have the power to regulate this what's the effect? The effect is that they get to come back here and do what they started off doing and seek a conditional use permit and a variance. Then you give the other fine neighbors around these people an opportunity to have a say so. My client has offered to sit down with the Dements to have a face to face meeting just to talk about some reasonable restrictions on noise, smells or other that are going to be with animal enterprise like this. The Dement have refused to that the other neighbors who pay taxes and live around here should have a right to have something to say about this. If you say you can regulate this and they merely have to go through the conditional use permit you're not saying they can't have a kennel nor is my client. We are just saying give people a chance and let them have a say so on what's going on around them and you have the authority to do that under the Harris law. Thank you.

Mr. Surdyk – The board has several options now that the parties have completed their presentations. You can commence your deliberations at this time as a justice body you may go into executive session to concerned the issues as well and make your determination at a later time in open session. One of the things we would like for you to do in this particular case is to prepare a written continent of facts and staff will be glad to assist you with a draft when instruct the staff on your decision upon. Which will set forth factual basis for your ultimate determination in this case. The issue has been outlined to the private parties. Those are your options for this board.

Mr. Horine- this is a complex matter which deserves executive session.

Mr. Surdyk- The executive session will require a motion.

MOTION- Motion was made by Larry Roberts; motion was seconded by Mr. Schwartz to adjourn the meeting.

VOTE- Dan Horine, yes; Amy Fish, yes; Marguerite Mulligan, yes; Richard Schwartz, yes; Larry Roberts, yes

Mr. Surdyk- It does not have to be tonight it can be at your next meeting or special meeting.

The board members will set the decision to be made at the next meeting.

Adjourned meeting 8:55 p.m.

There being no further business, meeting adjourned. A tape recording of this proceeding is on file in the Township Zoning offices.

Dan Horine, Chairman

Washington Township Board of Zoning Appeals