

TOWNSHIP OF LOPATCONG
PLANNING BOARD MEETING

September 27, 2017

The meeting of the Planning Board of the Township of Lopatcong was called to order by Chairman Johnson at 7:00 pm.

A Prayer was offered followed by the Oath of Allegiance.

Chairman Johnson stated “adequate notice of this meeting has been provided indicating the time and place of the meeting in accordance with Chapter 231 of the Public Laws of 1975 by advertising a Notice in The Star Gazette and The Express Times and by posting a copy on the bulletin board in the Municipal Building.”

Present: Members Correa, Pryor, Woolf, Mayor McKay, Chairman Johnson. Also present was Attorney Sposaro, Planner Ritter.

Old Business:

Minutes – Approve minutes for August 23, 2017. Motion by Member Pryor, seconded by Member Correa. Roll call vote:

AYES: Members Correa, Pryor, Woolf, Mayor McKay, Chairman Johnson.

NAYS: None

Chairman Johnson – We have a resolution. I have not looked at it yet. Let’s take a look. I think this is for the meeting we had last month right August 30th around there?

Attorney Sposaro – Yes.

Chairman Johnson – Just give me a couple of minutes to read through real quick.

Attorney Sposaro – It’s 18 pages.

Member Woolf – It’s 18 pages.

Chairman Johnson – Now the Board voted on the resolution from the 23rd correct?

Secretary Dilts – You’re working on the resolution from the 30th.

Chairman Johnson – Right but the 23rd one is good to go?

Secretary Dilts – That was done at the meeting of the 30th.

Attorney Sposaro – While some of you are pursuing this resolution, there is only one typo that I picked up. It's on Page 14, Paragraph 20 half way down - Mr. Rashad indicated that the design should comply with – instead of WH it should be WB for wheelbase so that change should be made, but other than that, I don't have any additional corrections or revisions. I will tell you that a significant amount of time was devoted to this resolution and I know that Mr. Ritter and Mr. Sterbenz took their time to review it as well.

Chairman Johnson – We're through exhibit A-4 right? That's as far as; there were no other exhibits we just went through A-4.

Attorney Sposaro – That's correct.

Chairman Johnson – Okay. Thank you. It's always easier to read it when it's printed versus on the screen. We will take a motion to

Member Pryor – Well, if I could

Chairman Johnson – Absolutely.

Member Pryor – before the motion, I know Robert's Rules talks about after the second that it might be worthwhile if I just spoke first and I have a comment, question and then a pre-statement that I'd like to make. It's obvious Tony spent quite a bit of time on this. I saw that when I read it. It's appreciated particularly included the discussion on the traffic and I don't think you said frustration but I got the, you know, I got the message. I think it's good that it's in there. I'd like to make a quick statement on that in a second. I do have a question. This developer is applying under the redevelopment overlay. He's still does not have a financial agreement and I asked this question before; I'd like to ask it one more time before we pass this. At what point could he actually begin constructing it? He, he submitted an application for a pad site under the redevelopment overlay. He really doesn't have approval under that yet cause he has no financial agreement. It would seem to me that he could proceed with the approval process but he really can't touch the site until he gets his financial agreement.

Chairman Johnson – Is the 60 day; is that what the 60-day?

Member Pryor –No, no. The financial agreement has to be negotiated. That could take two months; it could take two years.

Chairman Johnson – Oh, okay.

Attorney Sposaro – I don't think he has the authorization to move forward with construction until that agreement's in place. I would, if you would like, I'll communicate with the Township attorney on that issue but it is not unlike a developer's agreement. They have to have something in place here before they can move forward.

Member Pryor – I'll rely on your opinion there. I just forgot it's a concern of mine. I know he's anxious to get a temporary road out there to bring the trucks in. That's my opinion that he can't move so

Attorney Sposaro – Not part of the pond, but this maybe where the river meets the river.

Member Pryor – Yeah, and just maybe to reinforce, I would like to make a brief statement if you can indulge me for a second. If you recall when the hearing concluded on this application and it was time for a vote, the Chair called for a vote and no one made a motion. We had several moments of silence. There was some discussion on what to do next and at that point I made the motion to approve the application noting it was the right thing to do. Second motion followed and it was approved. I'd like to take a second to explain what I meant by the right thing to do. I don't want that being taken out of context and used against the Township, the Board or myself in the future. Did I mean that the proposed development was the best use of the property? No, but that was not the question before the Board. The Council had incorporated warehousing into the redevelopment ordinance; Council had already designated the applicant as the redeveloper for the site. Planning Board had previously approved a General Development Plan so the Planning Board's job did not include revisiting the use for intensity or development. Did I mean that the proposed development could be constructed without adverse impacts, again, the answer is no. Both myself and other members of the Planning Board have expressed concerns about the increase in truck traffic on Rt. 22, however, that issue is under the exclusive jurisdiction of DOT as you stated in the resolution, Tony. Though I believe there is room for interpretation, both the applicant's traffic expert and the Planning Board's traffic consultant offered opinions that the applicant was following NJDOT regulations. So, what did I mean by the right thing to do. When it rules on site plans and subdivisions, the Planning Board functions as a quasi-judicial body, its procedures are similar to those used in a court room. The Planning Board members are expected to rule on applications fairly and dispassionately, basing their decisions on the facts presented during testimony and in conformance with the Municipal Land Use Law and municipal ordinances. To do otherwise, inevitably, it results in litigation. In my opinion, the applicant had satisfied the Board's requirements for preliminary approval so I made a motion for approval feeling that was the right thing to do. I will continue to communicate with NJDOT hoping to convince them to address our traffic concerns and I would just like that in the record.

Chairman Johnson – Joe, we have not heard back from the NJDOT yet on the (inaudible) at this point.

Member Pryor – Well again, I guess it's been offered but that's not part of this approval but as a status report, there is a new guy his name is Citco I can't remember his first name. He took over for Debbie Hirt. I spoke with him twice. He was in the process of reviewing the file; big file. Debbie left him a lot of files. I said I'm sure you have a lot of files but nobody's as big as this one I'm sure of this. So, that's where it is, he owes me a call.

Chairman Johnson – Okay, that's all we can do at this point. I have a question on your first point and actually it's a question to Tony too. When you were asking whether or not they can could start construction or break ground, do they have to wait to final approval before they can start construction regard, it's only preliminary approval. They can't start yet, right?

Attorney Sposaro – If they post the requisite fees, yes they could but there are, if you look at the resolution, and I did look, you were giving your statement, there are a dozen things that they need to do before they can commence construction. I mean I can go through it if you like.

Member Pryor – Well, I had read it and again, I appreciate the effort. I saw it was permits, this, that and the other thing but I'm still concerned they really don't operate under that redevelopment overlay until they've completed all of the requirements for a full redevelopment agreement including the financial agreement so

Attorney Sposaro – Well, let's put the shoe on the other foot. Let's assume that they comply with all the conditions in the resolution but no agreement is in place. There really proceeding at their own peril. They really are because if the agreement is never reached. They've made improvements I don't know what they can do.

Member Pryor – But those improvements are non-conforming because they're not in the underlying zoning. George?

Planner Ritter – Well, I

Member Pryor – There's the underlying zoning and then there's the redevelopment overlay

Planner Ritter – Yes.

Member Pryor – and as a redeveloper, you're eligible for the redevelopment overlay. If you're not the redeveloper, what are you doing?

Planner Ritter – Well, it's the base zoning if you did not come in under the redevelopment plan. I'll defer to Tony on the actual financial agreement. I kind of admit I wasn't aware it hadn't been worked out yet.

Member Pryor – I don't think I'm (inaudible) secrets here; it's one of the few things the mayor and I can sit down and agree on. I'll just say he's here and we're someplace else. The difference is significant and what the pilot should be. So he sends us an agreement, he sends us another agreement, he sends us a third agreement; Mayor correct?

Mayor McKay – Correct and you made a verbal statement as to how much

Member Pryor – All with the same pilot; that doesn't change and so the negotiations haven't been productive so far. Is that fair?

Mayor McKay – That's accurate.

Attorney Sposaro – Well, can I make a suggestion? The applicant, I did send Karl Kemm a copy of the draft resolution. The only comment I received was the typo he picked up in Page 14, Paragraph 20 but he could have come tonight. I'm not throwing him under the bus, but nothing prevents this Board from reviewing the resolution as it has and making a recommendation that the resolution change and I think you are free and authorized to do that this evening so if you would like, I can include yet another condition to the extent it is doubtful in anyone's mind that addresses the failure to reach this agreement and that construction cannot commence prior to an agreement being reached. I think it provides one additional layer of protection.

Member Pryor – That would be my objective if you feel on good legal ground there, I'd like to call for this.

Attorney Sposaro – If they don't like it, they can challenge it but where are they going as a practical matter? So let's see if we can come up with some language. Prior to the commencement of construction, the applicant shall enter into an agreement with the municipality regarding what?

Member Pryor – The pilot is the big one and other financial conditions

Attorney Sposaro – I guess we could say

Member Pryor – There's timing of the payments and escalation and other things.

Planner Ritter – Well, would it be better to say enter into the developer's agreement.

Member Pryor – I’m going to argue that’s different George. I mean everything goes through here winds up with a developer’s agreement.

Planner Ritter – Yeah.

Member Pryor – This is a financial agreement and its part of the redevelopment package.

Planner Ritter – Well, I understand what you were saying, I just thought it was all part of the same package.

Member Pryor – The financial agreement by itself is that thick.

Chairman Johnson – Would you call it a financial agreement?

Mayor McKay – That’s what it’s been called.

Member Pryor – That’s what we’ve been calling it. I think even our attorney has been calling it that.

Attorney Sposaro – Okay financial shall enter into a financial agreement with the municipality for the development of this site. I would like to be more specific.

Member Pryor – Why I am just suggesting for regarding the pilot and other financial matters.

Mayor McKay – It’s mostly the amount of the pilot (inaudible) Township and he gave us numbers and then they changed drastically.

Attorney Sposaro – I’m not overly familiar with this pilot and what it’s called.

Member Pryor – Well, it’s payment in lieu of taxes and instead of paying normal property taxes; he pays a lump sum payment in lieu of taxes. It’s generally lower than taxes

Mayor McKay – And it’s a payout to the municipality only.

Attorney Sposaro – Okay then, why don’t we say this then and prior to the commencement of the construction, the applicant shall enter into a pilot agreement with the municipality.

Mayor McKay – Well, financial agreement with respect to

Member Pryor – I'd still say pilot and other financial matters cause there's credits involved, there's timing, there's other things.

Mayor McKay – There's other taxes in there. The land tax is split by the municipality and the county and the school district but not the buildings part of it. That part is exclusively to the Township in the form of the pilot program, pilot payment and like Joe said it's much less than what it used to be a normal tax situation.

Attorney Sposaro – So, regarding the pilot program or the pilot agreement

Mayor McKay – Yeah, proposed pilot agreement.

Attorney Sposaro – Agreement?

Member Pryor – Yeah, you can call it that and he'll know what it is. I think he even mentioned it in his opening, his opening or closing remarks

Attorney Sposaro – And, I'll add some catch all language and other related matters.

Chairman Johnson – It's good enough to use pilot, that's a common

Member Pryor – Everybody uses pilot. The terms we've been using is financial agreement.

Mayor McKay – Financial agreement that especially concerns the pilot payment.

Attorney Sposaro – Okay. All right so (inaudible) language I've come up with this. Prior to the commencement of construction, the applicant shall enter into a financial agreement with the municipality regarding the pilot and I put in "payment in lieu of taxes" and other related matters.

Member Pryor – Yeah, that works for me.

Attorney Sposaro – All right. I will add that as a condition to the resolution so with that in mind I think there was a request by the Chair for a motion to adopt the resolution and I would take it that motion would include the typographical change I made that I referenced earlier and this additional condition.

Chairman Johnson – That's how I would include it.

Attorney Sposaro – Yes.

Member Pryor – And if it's appropriate I'll make that motion.

Chairman Johnson – I'll second it.

Attorney Sposaro – Any further discussion?

Chairman Johnson – Thank you Joe.

Attorney Sposaro – Beth

Roll call vote:

AYES: Members Correa, Pryor, Woolf, Mayor McKay, Chairman Johnson.

NAYS: None

Attorney Sposaro – Before we move on it was in the packet a Notice of Dismissal filed in the Stowaway Self-Storage lawsuit against the Planning Board and Ferruggia connection with that application for approval and the dismissal was quite interesting in that Stowaway dismissed with prejudice its claims against all defendants including the Planning Board. Let me give you some background. There was a case management conference two weeks ago before Judge Miller and prior to that conference I had a conversation with Mark Peck who was then representing Ferruggia and I brought to Peck's attention the existence of a case that came out of the appellate division within the last month or so and oddly enough I had been before Judge Miller a week before that conference and I discussed this case that I'll describe to you in just a moment and the case stands for the proposition to record the decision that I think the courts are getting tired to a degree of competitors challenging approvals by Planning Boards and Zoning Boards just for the sake of slowing competition down. There's not really any legitimate basis they look to fabricate issues, they look to draw the process out even if they can't stop them developers are unwilling to invest the money necessary to build some of these substantial projects until all appeals have been exhausted and what the court said for the, I think for the first time, was that a cause of action for tortious interference can, it does exist against person or entities that without real cause challenge development approvals and went so far as to say that the law firm that prosecutes any such appeal could also be held responsible. I told Peck about this case and it wasn't my place to raise the issue during the conference but Peck did and put the attorney for Stowaway on notice that his client was considering filing such a counter claim not only against Stowaway but against the Simon law group that was advancing this claim on behalf of Stowaway. I don't know this for a fact, but the only logical conclusion I can reach is that this law firm went back to Stowaway and said not only are we not taking this case but you're facing exposure if we pursue this and the court concludes that you're claims here are without merit. I was around, like I said my first tenure and George I don't know if it was the Planning Board, the Zoning Board when Stowaway came in for its application, it was many years ago, and you'll note that this is Stowaway Self-

Storage Roman Numeral IV. The gentleman that owns these companies has several of these. If I remember, he's involved in some other businesses and I think he's a very conservative guy. I think he came to the conclusion, this is just supposition on my part, that it was not worth the risk. It's probably something he could not insure against. He might have difficulty finding a law firm to bring the claim and I think he thought better of it and with that, they abandoned this case and they did so with prejudice. I think that's what happened here. We may never know with certainty but I think it's a good result. I think Ferruggia worked with us. They responded to the concerns by Larken. I think the Board did an excellent job with that application. I think that it would be a good project in this municipality but that's what I think was behind the reasons for dismissal so you will not need to incur any additional expense for the defense of this matter. As another aside, which I find very interesting and unique development Beth as she always does and as she should do submitted this lawsuit the existence of this lawsuit to the Township's insurance carrier despite the fact that there was no claim for monetary damages, the carrier agreed to provide a defense and was in the process of doing so. I spoke with the Attorney Dick Cushing who was assigned to the matter who I know and has been around for a long time and he also was shocked that the carrier was picking up the defense but look if the municipality can get it's insurance carrier to pick up the defense and not have to pay me in similar matters in the future, so be it. I think there was a question raised as to why a defense was not provided in the asphalt litigation which ended up being quite expensive for the municipality and I think Katrina Campbell was looking into that issue.

Secretary Dilts – Well, we had a different carrier at the time and now we have Chubb and so you know they all these different insurance companies that join in and I think it was the fact that we had somebody different.

Attorney Sposaro – That maybe so. It may be water under the bridge but that, that's the whole story with respect to this case. That's all I have.

Chairman Johnson – Thank you.

Member Pryor – Thank you for a job well done.

Attorney Sposaro – Well, it's done.

Chairman Johnson – That's closed? That's it.

Attorney Sposaro – Yes, that's done.

Chairman Johnson – All right thank you. It's good to hear. The next order of business, assuming there's no comments on the, that right?

Member Pryor – No, I just, Tony might of been around years ago, it has to be a decade ago, the new ShopRite down on 31 there was a competing ShopRite did the same thing; held that up for years. So, I've seen that before and I'm happy there's finally, you know, appellate decision on it.

Attorney Sposaro – I've also seen, I can remember hearing about a case involving a Bog Turtle that mysteriously appeared at one of these sites that held up construction for a while as well and I think ultimately it was determined who put that Bog Turtle there and it was competitor and I think it was hefty price that was paid in order to resolve that matter.

Chairman Johnson – Wow. The Bog Turtle mysteriously appears. Next on our agenda is continuing the Highlands and Master Plan Revaluation. It's been a few months so there's a couple outstanding topics that I think I'll let George refresh on a couple of these so we can catch ourselves up and see if we have any more talking points on them.

Planner Ritter summarized by saying that there were eight different areas of interest in terms of developing the ordinance in terms of the center area under the Highlands Regulations. Seven areas of interest were identified; a Public Use Zone, Non-Conformities located in the RB District – R75 and Commercial Uses. Piazza Tract Affordable Housing Project, repeal/replace Planned Development Overlay District and AARC District. After several hearings the Planning Board did draw several conclusions. There was a decision made that the Planned Development Overlay District (includes ROM and allows mixed use projects) was to repeal this district. The other area the AARC District behind the mall was to change this area back to Highway Business and notify the Highlands to include this in the Center Designation. The HB District would include the Piazza Tract to support change for Affordable Housing. Outstanding items that have not been addressed yet would be the Public Use District and the RB District on Rt. 22. A proposed map was provided to Board members so they could review and go out into the neighborhood to take a closer look. Planner Ritter thought the main change would be the district line on Baltimore Street. The homes to the north would remain part of the residential neighborhood and the Mixed Use Zone then continues to the south. Out where the bank is on Baltimore Street is split by a zoning line right now; half of the bank is in the RB District and the other half is in the Residential Zone. Recommendation would be to include the entire bank in the RB District. The RB District by the diner extends out to Seventh Street and includes a residential lot but should only include Budd Agency. There is a doctor's office, parking lot next to the mall that should be incorporated into the RB District. Member Pryor reported the first Master Plan was dated 1959 and that predated the Municipal Land Use Law. Goals were to protect the character in the neighborhoods recognizing problems with mixing business in neighborhoods, undersized lots, etc. to preserve the residential in that area. Member Woolf asked that we put the three lots between H & K and the diner in the R75 District. Planner Ritter said the changes we're making to the setbacks would be for all the residential in the District so they would benefit equally to

those regulations. Planner Ritter said 60/65% of the District is already commercial. Member Pryor felt the residents would probably want to preserve the residential. Planner Ritter discussed Third Street – 3 lots on the south side of Baltimore and continuing down to the jug handle – single family run down to 22 there – could be a potential commercial block. Chairman Johnson indicated they are so close to the jug handle did not see much of an advantage of catching those with the new line. Keep it the way George shows it – Baltimore be the split between residential and Mixed Use in the Third Street area. Member Pryor said his feeling was to protect the residential – not much meaningful commercial and Chairman Johnson agreed. Planner Ritter asked if there was a consensus to carrying it down Third Street and picking up those residential lots on both sides of Third to the jug handle. Chairman Johnson said he wouldn't object. Mayor McKay said absent any kind of redevelopment plan for all of this, take care of the people who live there to the extent you can. Member Pryor did not want to make anything worse for the people who live there. Chairman Johnson said if that's what protects the residents, he would be all for it. He confirmed those properties would be captured. Planner Ritter confirmed. Planner Ritter asked if the design standards within the RB, the bulk standards slightly to make it easier for the people. Member Pryor said yes. Planner Ritter asked what the Board wanted to do about the Public Use Zone. Member Pryor said he is not in favor of the Public Use Zone. The Board decided not to make this change at this time. Planner Ritter reported AARC District is zoned for senior citizen housing – the recommendation is to put it back into a commercial designation the same as a mall and to request to put it back into the Highlands Center Designation. This would provide a chance for the property to be sewerred. Planner Ritter said these are the main points that the Board would like to incorporate into the center plan which would be eventually translated to recommendations for ordinances that actually will go into the center zoning regulations. Planner Ritter will begin the write this up and pull together a draft of what is appropriate and forward this to the Highlands. The Planning Board itself would hold its own public hearing and make changes and amendments that come out of the hearing which would be the final document that goes to the Highlands. Chairman Johnson confirmed this as the logical next step.

Chairman Johnson – Any discussion from Planning Board member to talk about?

Mayor McKay asked if there was a response from the DCA regarding Mr. Pryor's submission on conflicts of interest. Attorney Sposaro said he has not heard anything as of yet.

Mayor McKay asked about the term of Mr. Fox also the Environmental Commission member. Mayor McKay explained that both terms were made to expire at the same time and that Council choose to use the earlier date. Member Pryor noted Mayor McKay sponsored the resolution at the Council meeting. The Council pointed out the requirements of the law. Mayor McKay agreed it was in the state law. Mayor McKay said he should revert the seat back to the expiration to December 2019. Member Pryor noted that this was not Attorney Sposaro's decision.

Attorney Sposaro confirmed that the process was handled correctly and it meets the letter of the law. He did the research and reviewed the minutes and other documents and agrees with the Township Attorney Katrina Campbell.

Chairman Johnson – Brought up the reduced set of plans he would like to have as a submission from applicants. Member Pryor said he would have Council entertain an ordinance to take care of this.

Public Comment:

Bill Wright – 173 Stonehenge Drive – Asked Chairman Johnson if he would be correct if he would say we are here to make sure we don't get sued, try to keep everything up and level. He Asked the Chairman to confirm the Township does not want to be sued. He went on to say that Chairman Johnson said he was seeing the resolution for the first time and he needed to read it. The resolution is 18 pages. Asked him if he did the right thing tonight by making a motion to second the adoption of the resolution. Chairman Johnson responded that he read the resolution at work on the screen and said it was the first time he saw it on paper.

Attorney Sposaro said it is incumbent upon all Board members to review the resolutions in advance of the meeting so that they're prepared to comment on them. He felt Mr. Wright's comment was well taken.

Motion to adjourn by Member Pryor, seconded by Mayor McKay. All in favor.

Respectfully submitted,

Margaret B. Dilts