

January 18, 2012 MINUTES

A regular meeting of the Township of Roxbury Planning Board was held on January 18, 2012, at 7:30 p.m. in the Municipal Building at 1715 Rt. 46, Ledgewood, N.J. After a Salute to the Flag the Chairman read the Open Public Meetings Act.

ROLL CALL

PRESENT: Mr. Rilee, Ms. Lutz, Mr. Verge, Mr. DeFillippo, Mr. Shadiack, Mr. Carey, Mr. Silcox, Mr. Bautz,

ABSENT: Mr. Zoschak, Mr. Scott Meyer & Mr. Matt Meyers.

STAFF: Mr. Ferriero, Mr. Germinario, Mr. Stern, Ms. Tardive

MINUTES: January 4, 2012

Motioned by Mr. DeFillippo to approve the minutes of January 4, 2012 seconded by Mr. Verge.

Roll call: Mr. DeFillippo, yes; Mr. Verge, yes; Rilee, yes; Mr. Carey, yes; Mr. Bautz, yes.

The minutes of the November 2, 2012 meeting will be put on the next agenda for approval.

RESOLUTIONS:

COMPLETENESS:

APPLICATIONS:

PBA-09-018 THE PLAZA AT ROXBURY (St. Theresa's R.C. Church) Block 5103, Lot 1 Main Street & Commerce Boulevard

Minor Subdivision and Preliminary Site Plan for Medical Office Building and Bank. This matter was carried to March 21, 2012 with new notice required.

PBA-11-10 ROXWOOD ASSOCIATES, LLC. Block 9302, Lot 1 and Block 9401, Lots 1, 12 & 13 1550 Route 46 Amended Preliminary Site Plan Application – Sarlo Conversion.

Attorney Thomas Carroll represented the applicant. This application is to convert an age restricted approval to non age restricted under the Sarlo Law. Notice of the hearing was provided and the matter was carried from December.

The Sarlo Law statute says two things, if an applicant had approval for an age restricted community and if that applicant shows water, sewer, parking are sufficient to allow for a conversion to non age restricted, the Board should grant the application. The application was filed June 29, 2011 addressing all those issues including drainage. The application

was deemed incomplete and additional information on water, sewer, etc was provided along with plan revisions and the application was ultimately deemed complete. Ordinarily a public hearing would be held to address the issues (water, sewer, etc.), however, the Board Attorney has raised a jurisdictional issue. The nature of the issue is that the Sarlo Law does not apply because this site has within its pedigree a Settlement Agreement. In 2004 a Settlement Agreement was entered into that called for an age restricted community for approval. Mr. Carroll disagreed with the Board's counsel on this issue.

Mr. Carroll disagreed that the Sarlo Law has any language that carves out an approval or that it carves out applications with any particular pedigree. If that question is to be addressed at all, it can only be addressed by a Court or a judge. The Board doesn't have the training or statutory authority to analyze the Sarlo Law and make a decision as to whether that statute applies to this application. Only a judge can make that decision. This matter should be deferred to a Court.

If the Township feels that this position is correct, Mr. Germinario questioned if it made a difference whether it goes to the Court on the appeal of the Planning Board's decision or on a declaratory judgment, the same judicial review would ensue.

Mr. Carroll felt the Board should hear the Sarlo application. The issue that has been raised has no legs to stand on but he recognizes that if the Township wants to press it, they should, but he is not equipped as to the proper mechanism to do that. He does not think it is a legitimate issue in the first place. If the Board wants to rule on this legal question as to whether the Sarlo Law encompasses an approval that has zoning with this pedigree, then he would like to summarize for the Board his position also outlined in his letter of December 2, 2011.

The Sarlo Law, if you read it, does not have any language in it that the legislature intended to exempt approvals arising from zoning with any particular pedigree. If there is a preliminary approval or a final approval for an age restricted development and if an applicant meets the criteria of the statute (sewer, parking, etc.), then that application should be granted.

Mr. Germinario asked if there are instances in statutory interpretation where if something is not specifically said, it is implied. The statute doesn't state that it applies to Court ordered settlements or that it doesn't. Mr. Carroll said it was silent to any and all issues relating to pedigrees of zoning. Mr. Germinario asked if there were constitutional provisions both on state and federal levels that say that legislature cannot pass a law that impairs contractual rights. Mr. Carroll said they were making legal arguments that should be made in a Court before a judge, not a Planning Board.

To address Mr. Germinario's argument that since the Settlement Agreement was accompanied by Consent Order that was filed with the Court, that we have an obligation to seek a modification of that Consent Order before pursuing this application, this is not a legal question that the Sarlo law puts to Planning Boards. This Consent Order, also an exhibit to the December 2nd submission, is not rulings by a judge; it's an order that there is a settlement agreement. The Consent Order ended the case that could have been done

by a stipulation of dismissal. There is nothing you could ask a Court to change. It doesn't say anything about the underlying rights or obligations of the parties. At the very least it says that the Judge has reviewed the settlement agreement and finds it to be legal and not in conflict with the public policy and in addition to saying that it is age restricted housing it also says that it is owner occupied housing.

Mr. Carroll says that sale versus rental is not a decision that a Planning Board should legally make. The Settlement Agreement does have that language. The legislation has made a determination that properties can be converted from age restricted to non age restricted regardless. To suggest that this property is in a different category from other properties in the State because of the settlement, Mr. Carroll felt had no basis in the statute.

Mr. Germinario said regardless of the age restricted issue, the Sarlo Law doesn't say anything about owner occupied versus rental. A Township or Board cannot impose any requirement regarding ownership versus rental but there is nothing in the law preventing a developer and a Township from agreeing that the status of a property is owner occupied. The Judge determined the Settlement was legal so it was enforceable. It was a voluntarily agreement. The Sarlo Law allows a conversion from non age restricted to age restricted but not from sales to rental but the jurisdiction was the issue tonight.

The Upper Deerfield opinion which the applicant provided made the same argument that there was a settlement agreement and the Court rejected that argument and it was approved. The Highlands Act specifically carved out certain properties, the legislature knows how to do this.

This property proposes to provide low income credit including bonus credits and that substantive certification from COAH is premised upon the notion that the development of the property is realistically likely to happen and the Sarlo Law tells us that it is more realistic for development to occur if it is not age restricted. This is an additional reason to grant the application. Conversion is the only way to make realistic development of the site possible.

If the Sarlo law didn't give us jurisdiction, the Mt Laurel reasons would have to be presented to the Board of Adjustment as justification for granting a "D" variance.

The Sarlo Law has a 20% COAH requirement and that is one of the reasons the law was passed and Roxbury needs those lower income credits along with a realistic development to be entitled to credits.

A witness was available on the overall issues of the Sarlo law and how they relate to jurisdiction. It's Mr. Germinario's position that they have to show changed circumstances to be able to get relief which Mr. Carroll disagrees with. However, Mr. Otteau, consistent with his report, will comment on changed circumstances since 2004 because there has been a degeneration of the age restricted market that led the legislature to pass the bill for conversion. Also, consistent with Mr. Otteau's report, you can conclude Mt. Laurel credits and development of the property is more realistic for non age

restricted. The report is in the record and Mr. Carroll felt it was pertinent to the jurisdictional issue.

As far as the changed circumstances, Mr. Germinario felt that was something for the Court to rule on in a motion under Rule 4:50 and Mr. Carroll wants this on the record but if there is a discussion in a Court proceeding on changed circumstances justifying a modification of the consent order, he would raise no objection to any proofs Mr. Carroll would seek to put into that proceeding. He feels the Board has limited powers in this proceeding and Mr. Carroll doesn't feel we should look at the jurisdictional issue and Mr. Germinario doesn't feel we should look at the change circumstances. It would still be a "D" variance in the absence of the Sarlo Law being applicable here and that would not enable the Board to take jurisdiction. Mr. Germinario stipulates the issue of changed circumstances is for a Court and they will not object to any proofs and that testimony doesn't have to be heard tonight since the Board is not capable of ruling on that issue. The report is in the record.

The Board was polled as to whether they wanted to hear the testimony. Mr. Carroll said if they want to pursue Mr. Germinario's argument, that it should be done only in Court, we should have a full hearing on all jurisdictional issues that have been raised as to whether conditions have changed justifying the Board's decision to hear the application. The Board should either decide none of this or all of this or hear the testimony. Mr. Carroll would like the letters, exhibits and reports to be part of the record. With regard to hearing testimony, the outcome of the poll was a unanimous vote that no more testimony was necessary.

Mr. Germinario said even if the Board believes that it lacks jurisdiction here, it should leave that issue up to a Court. When a Board takes action it must always initially look at the jurisdictional issue. When an application is made, it has to determine whether a use variance is involved and if it is, the Planning Department would send it to the Board of Adjustment for action. In this case if the Sarlo Law doesn't apply, it is not a permitted use. The Sarlo Law makes a non age restricted development a permitted use if it applies, if not, it is a "D" variance and has to go to the Board of Adjustment. The analysis tonight is not often done in an elaborate way with all the proofs and arguments but a Board goes through the process in every application it takes on.

Mr. Germinario said there is a provision in the Sarlo Law that in addition to filing an application with the Board that the developer needs to file a notice with the Clerk and said she found no notice. Mr. Carroll will supply a copy of the notice.

The meeting was open to the public. No one from the public commented. The meeting was closed to the public.

A motion was made by Mr. Rilee based upon the proofs and arguments provided by the Board Attorney that the Board does not have jurisdiction on this matter, seconded by Mr. Carey.

Ayes: Mr. DeFillippo, yes; Mrs. Lutz, Mr. Verge, yes; Rilee, yes; Mr. Carey, yes; Mr. Shadiack, yes; Mr. Bautz, yes

Abstain: Mr. Silcox

Noes: None

OLD BUSINESS:

NEW BUSINESS:

Mr. Stern informed the Board that at the next Planning Board meeting the Board will be looking at the Re-examination Report of the Master Plan and Development Regulations for Renewable Energy Facilities and Systems. Changes have occurred pertaining to solar and wind energy and the Master Plan and Ordinances do not specifically address the changes.

Mr. Shadiack said the Economic Development Committee has been trying to work with the Morris County Economic Development Corp. A program called "Listening to Business Initiative" visits the businesses in the towns to get information what is liked about the town, concerns, signage and gather data and present it to the towns and they have been informed that Roxbury is the next town to be chosen. They will be at the next EDC meeting and will give a presentation on what that initiative is and how we can assist and participate. If any one would like to attend, the meeting is Thursday January 27th. Mr. Paul Ferriero discussed how this works as he had seen their presentation in Randolph.

Motion to adjourn the meeting was made at 8:20 p.m.

FOR THE PLANNING BOARD
TOWNSHIP OF ROXBURY

Eugenia Wiss (not present, summarized testimony from meeting recording)