

February 15, 2012 MINUTES

A regular meeting of the Township of Roxbury Planning Board was held on February 15, 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. Scott Meyer, Mr. Silcox, Mr. Matt Meyers and Mr. Bautz,

ABSENT: Mr. Zoschak

STAFF: Mr. Germinario, Mr. Stern

EXCUSED: Mr. Ferriero

MINUTES: November 2, 2011 and January 18, 2012

Motioned by Mayor Rilee and seconded by Mr. DeFillippo to approve.

Mrs. Lutz had a question on the Minutes of January 18, 2012. The secretary will transcribe the exact wording for the attorney and he will review the minutes and they will be put on the March 7, 2012 agenda for approval.

Mr. Rilee withdrew the part of the motion to approve the January 18, 2012 minutes, seconded by Mr. DeFillippo.

Ayes: Mr. Shadiack, Mrs. Lutz, Mr. Verge, Mayor Rilee, Mr. DeFillippo, Mr. Carey, Mr. Meyer, Mr. Meyers, and Mr. Bautz

Abstain: Mr. Silcox

Noes: None

MOTION APPROVED.

RESOLUTIONS:

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.

ROXBURY TOWNSHIP PLANNING BOARD RESOLUTION OF MEMORIALIZATION

Decided: January 18, 2012

Memorialized: February 15, 2012

**IN THE MATTER OF ROXWOOD ASSOCIATES, LLC
APPLICATION FOR CONVERSION PURSUANT TO THE SARLO LAW
BLOCK 9302, LOT 1; BLOCK 9401, LOTS 1, 12 AND 13
APPLICATION NO. PBA-11-10**

WHEREAS, Roxwood Associates, LLC, is the owner of the Subject Property, comprising approximately 57 acres located in the R-5 Multi-Family Residence District; and

WHEREAS, Roxwood Associates, LLC (the “Applicant”) applied to the Roxbury Township Planning Board (the “Board”) to amend its existing major preliminary site plan approval for a multi-family residential development comprising 260 owner-occupied age-restricted condominium units (the “Approved Development”) by converting to 260 non-age-restricted rental units (the “Converted Development”) pursuant to the “Sarlo law,” *N.J.S.A. 45:22A-46.3 et seq.*

WHEREAS, the Board granted preliminary major site plan approval of the Approved Development by its Resolution of November 1, 2006; and

WHEREAS, the preliminary major site plan for the Approved Development was approved pursuant to Section 13-7.1501B of the Township’s Land Development Ordinance, which provides for owner-occupied age-restricted condominiums as a permitted use in the R-5 District (the “Condo Zoning”); and

WHEREAS, the Condo Zoning was adopted by the Township pursuant to the Settlement Agreement, dated April 6, 2005, between Roxbury 80, LLC (Applicant’s predecessor in title to the Subject Property) and the Township and Planning Board of Roxbury, which Settlement Agreement resolved litigation entitled *Roxbury 80, LLC v. Township of Roxbury, et al.*, Docket No. MRS-L-1782-01PW (the “Litigation”); and

WHEREAS, the Honorable B. Theodore Bozonelis, A.J.S.C., issued a Consent Order, dated May 24, 2005, which ordered Litigation to be “settled in accordance with the Settlement Agreement annexed hereto”; and

WHEREAS, the Converted Development is not a permitted use in the R-5 District and is not in compliance with the Settlement Agreement, insofar as it proposes rental apartment units instead of owner-occupied condominium units, as required by the Condo Zoning and the Settlement Agreement, and insofar as it proposes non-age-restricted units instead of age-restricted units, as required by the Condo Zoning and the Settlement Agreement; and

WHEREAS, the Applicant contends that the Sarlo law requires that the Converted Development be considered a permitted use in the R-5 District, regardless of the contrary provisions of the Condo Zoning and the Settlement Agreement; and

WHEREAS, before the Board can consider the merits of this application, it must determine whether the Converted Development is, in fact, a permitted use in the R-5 District, because if not, a use variance is required under *N.J.S.A. 40:55D-70d*, as to which the Board lacks jurisdiction; and

WHEREAS, the Board held a public hearing regarding the jurisdictional issue on January 18, 2012, in accordance with the procedural requirements of the Municipal Land Use Law, *N.J.S.A. 40:55D-1 et seq.*; and

WHEREAS, the Board makes the following findings of Fact and Conclusions of Law, based on the hearing record:

A. Findings of Fact

1. The proposed Converted Development does not comply with the use permitted under the existing Condo Zoning of the Subject Property as set forth in Ordinance §13-7.1501B:

B. Age-Restricted Condominiums. Owner-occupied condominiums restricted to occupancy by households having at least one member fifty-five (55) years of age or older, with no children under 19 years of age in permanent residence, designed and

administered in accordance with the Required Conditions set forth in Section 13-7.1052,B. (Ord. No. 02-05 §1)

2. The foregoing permitted use was adopted under Ordinance No. 02-05 as required by a Consent Order entered by Superior Court Judge Bozonelis on May 24, 2005, and by the Settlement Agreement of April 6, 2005, executed between Roxbury 80, LLC, Applicant's predecessor in title to the subject property, and the Planning Board and Township of Roxbury. The Settlement Agreement resolved litigation entitled *Roxbury 80 LLC v. Township of Roxbury, et al.*, Docket No. MRS-L-1782-01PW (the "Litigation").

3. The Settlement Agreement was the result of a good deal of give-and-take bargaining, which resulted in a number of major concessions on the part of the Board and the Township. Among these concessions were provisions exempting this project from certain requirements of the Township's Land Development Ordinance, including the regulation of steep slopes disturbance and tree removal. In each case, the Settlement Agreement and the associated Condo Zoning ordinance recite that these exemptions were granted "in furtherance of providing affordable *senior* housing." The proposed conversion of this project from age-restricted owner-occupied condominiums to non-age-restricted rental apartments therefore has the one-sided and distinctly inequitable effect of re-writing the Settlement Agreement so that most of the bargained-for advantages accruing to the Township are eliminated, while those accruing to the developer remain.

4. The Board finds no provision in the Sarlo law that addresses the Applicant's proposal to convert the owner-occupied condominiums of the Approved Development to the rental apartments of the Converted Development. While the Board recognizes that it lacks the authority to unilaterally impose a requirement of owner-occupancy, the Board finds, and the Applicant acknowledges, that the Applicant willingly accepted the provisions of the Settlement Agreement which require owner-occupancy. The Board also notes that Judge Bozonelis, in his Consent Order, stated that he had reviewed the Settlement Agreement and found "none of its terms illegal or in violation of public policy," including the provisions mandating owner-occupancy of the dwelling units. When questioned at the public hearing as to why the owner-occupancy requirement of the Settlement Agreement and the Condo Zoning should not remain binding on the Applicant, regardless of the Sarlo law, counsel for the Applicant gave no reason.

B. Conclusions of Law

1. The question of whether the Sarlo law applies to age-restricted developments approved pursuant to court-ordered settlements of litigation is a matter of statutory interpretation, since the Sarlo law itself does not explicitly speak to this issue.

2. The principles of statutory interpretation do not favor interpretations which produce manifestly unjust results, which impair contractual rights and which defeat the legitimate expectations of parties to a legal and otherwise binding agreement.

3. The principles of statutory interpretation do not favor interpretations that override judicial rules regarding the finality of court-ordered settlements and consent judgments and the requirements of judicial approval to modify the terms of such final orders and judgments.

4. The case of *Kaplan at Helmetta, LLC vs. Borough of Helmetta, et al.*, Law Division Middlesex County, Docket No. L-2068-10 (June 28, 2010), involved circumstances similar to the matter at hand. There the Borough and the developer Kaplan had negotiated a redevelopment agreement which called for the construction of age-restricted residential units. Kaplan later applied to the planning board to convert the age-restricted units to non-age-restricted units pursuant to the Sarlo law. The board denied the conversion application based on the finding that it would impair the intent and purpose of the zone plan. In upholding the board's action the court found:

"... that granting the conversion singularly amounts to modification of the redevelopment agreement without the consent of the Borough. *There is nothing in the conversion statute even suggesting that the approving board is vested with such authority.*" (emphasis supplied)

5. The final sentence above clearly relates to the issue of the Board's jurisdiction, indicating as it does that a planning board is without authority to modify the contractual rights of the municipality without the consent of the governing body. Yet that is exactly what the conversion application now before this Board proposes to do, by altering the terms of the Settlement Agreement between the Township and Roxwood. In fact, the very first provision of the Settlement Agreement specifies that the Subject Property would be zoned for

“... 260 owner-occupied condominium units, restricted to occupancy by households having at least one member fifty-five (55) years of age or older ...” (Settlement Agreement §1a)

6. In exchange for age-restricting the development, the Settlement Agreement granted the developer several major exemptions from requirements of the Township's Land Development Ordinance:

“... if strict compliance with any other provision(s) of the Township's Land Development Ordinance would render the development of 260 units ... infeasible, then the requirement(s) of such provision(s) shall be deemed superseded to the extent necessary to allow the development of 260 units.” (§1b)

“... in furtherance of providing affordable senior housing ... the provisions of Section 13-7.818 of the Township's Land Development Ordinance, relating to disturbance of steep slopes and ridgelines, shall not apply to the development ...” (§1c)

“... development of the Roxbury 80 property ... shall not be subject to the Township's tree removal and replacement ordinance, in furtherance of providing affordable senior housing ...” (§1e)

7. Consequently, the conversion of the Approved Development into non-age restricted rental apartments deprives the Township of the most significant benefits it obtained from the Settlement Agreement, while leaving all of the advantages granted to the Applicant under the Agreement intact. Here again, the reasoning of the *Helmetta* decision is directly on point:

“An application by Kaplan to the Board for the conversion can be considered a modification by one party to a contract. Unilateral amendments to existing agreements to change material terms is not permitted.”

8. Even if, for the sake of argument, the Sarlo law is interpreted to allow this conversion without the consent of the Township, the Board would not be empowered to act without a Court-sanctioned modification of its Consent Order adopting the Settlement Agreement. New Jersey Court Rule 4:50 requires judicial approval to relieve a party of its obligations under any final judgment or order, including final consent judgments. *DEG, LLC v. Township of Fairfield*, 198 N.J. 242, 261 (2009). While the Applicant's counsel argues that the Consent Order itself does not direct the parties to do anything, the entire purpose of that Order is to effectuate a Settlement Agreement premised upon the implementation of owner-occupied, age-restricted residential zoning. If Applicant's argument were correct, then no Rule 4:50 motion would ever be required to modify a final consent judgment or order, which is contrary to both the language of the Court Rule and the case law interpreting it.

9. Consequently, the Board concludes that the Sarlo law does not have the effect of modifying the court-ordered zoning applicable to the Subject Property, and that the Board therefore lacks jurisdiction to deal with the proposed amendments to the existing preliminary major site plan approval for the Roxwood site.

NOW, THEREFORE, BE IT RESOLVED, for the reasons stated hereinabove, that the Board lacks jurisdiction in this matter, and that the amendment of the Applicant's existing preliminary

major site plan approval to provide for non-age-restricted rental apartments instead of age-restricted owner-occupied condominiums requires a use variance pursuant to *N.J.S.A. 40:55D-70d*.

The undersigned does hereby certify that the foregoing is a true copy of the action taken by the Planning Board at its regular meeting of January 18, 2012.

Eugenia Wiss, Secretary

Motioned by Mrs. Lutz and seconded by Mr. DeFillippo to approve the Resolution.

Ayes: Mr. Shadiack, Mrs. Lutz, Mr. Verge, Mayor Rilee, Mr. DeFillippo, Mr. Carey and Mr. Bautz

Abstain: Mr. Silcox, Mr. Meyer, Mr. Meyers

Noes: None

COMPLETENESS:

APPLICATIONS:

OLD BUSINESS:

NEW BUSINESS:

Adoption of the Reexamination Report of the Roxbury Township Master Plan and Development Regulations for Renewable Energy Facilities and Systems

The last Reexamination report was done in 2005 and the law was changed so it does not have to be done again until 2015, however, there is a lot of legislation concerning renewable energy facilities and they are identified in this short Reexamination Report related to renewable energy. The four pieces of legislation are identified in the report. A driving factor is that NJ Renewable Energy portfolio Standards require that a portion of their electricity sales have to be renewable energy.

There exists a need to regulate the use, placement and design of solar, photovoltaic and wind energy facilities/systems throughout the Township, and it is recommended that the Governing Board enact such regulations. An Ordinance will be introduced shortly to regulate solar facilities. It will address rooftop solar units, residential, commercial, as an accessory use to an industrial building, as a freestanding accessory use and how it is regulated as a freestanding solar production facility. Most rooftop residential solar panels can be approved administratively as an accessory use as long as there is no overhang or the height does not exceed the roof line. An ordinance to address solar energy will be drafted and the wind power ordinance will be addressed in the future. The solar ordinance will not address utilities putting solar panels on telephone poles. There is a State law that permits the utilities to do that.

There was a discussion about the disrepair of solar panels. It has to rise to the level of a safety hazard. There is a provision in the draft ordinance that if it is abandoned it will have to be removed. The Planning Board will have a chance to comment on any Ordinance that is introduced and send their comments back to the Council.

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

Motioned by Mr. Meyer and seconded by Mrs. Lutz to adopt the Reexamination and also the Resolution

Ayes: Mrs. Lutz, Mr. Verge, Mayor Rilee, Mr. DeFillippo, Mr. Carey, Mr. Meyer, Mr. Meyers, Mr. Silcox and Mr. Bautz

Abstain: Mr. Shadiack

Noes: None

MOTION APPROVED.

Amendment to the Roxbury Township Master Plan Land Use Plan Element to provide for a Q-O Quarry Overlay District for Block 7101, Lots 23,24 and 29 as a result of litigation

The amendment was for the rezoning of the Kowalski Tract because of the litigation between County Concrete Corp. vs. Township of Roxbury. A settlement agreement has been entered into that will create a Q-O overlay district that will provide for quarrying as a permitted use for a limited time with reversion after completion of quarrying use to a low density residential use. The duration of quarrying will be 8 1/2 years from when they start.

The ordinance for the overlay will be introduced by the Council and will be referred back to the Planning Board for consistency and comment. A typo in the Resolution was corrected.

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

Motioned by Mr. Meyer and seconded by Mr. Carey to adopt the amendment and Resolution.

Ayes: Mrs. Lutz, Mr. Verge, Mayor Rilee, Mr. DeFillippo, Mr. Carey, Mr. Meyer, Mr. Meyers and Mr. Bautz

Abstain: Mr. Shadiack, Mr. Silcox

Noes: None

MOTION APPROVED.

RESOLUTIONS:

**ROXBURY TOWNSHIP PLANNING BOARD
RESOLUTION ADOPTING THE
REEXAMINATION REPORT OF THE
ROXBURY TOWNSHIP MASTER PLAN AND
DEVELOPMENT REGULATIONS FOR
RENEWABLE ENERGY FACILITIES AND SYSTEMS**

WHEREAS, the Municipal Land Use Law (the AMLUL@), N.J.S.A. 40:55D-89 provides for periodic reexamination of the municipal master plan and development regulations; and

WHEREAS, the Planning Board of Roxbury Township (the “Board”) completed its most recent periodic re-examination of the Township’s Master Plan and development regulations and adopted a report thereupon in April 2005; and

WHEREAS, receipt amendments to the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.) promote the development of renewable energy facilities; and

WHEREAS, the Township’s current Land Development Ordinance does not specifically address renewable energy facilities, such as solar and wind systems; and

WHEREAS, in light of recent legislation and market trends favoring renewable energy facilities, the Planning Board has determined that there is a need to regulate the use, placement and design of such facilities, which need should be addressed in a Reexamination Report of the Master Plan and Development Regulations for Renewable Energy Facilities and Systems (the “Renewable Energy Reexamination Report”); and

WHEREAS, pursuant to the MLUL, N.J.S.A. 40:55D-10, the Board held a public hearing on February 15, 2012, with notice thereof given in accordance with N.J.S.A. 40:55D-13, at which time there was an opportunity for public comment on the Renewable Energy Reexamination Report; and

WHEREAS, at the conclusion of the public hearing of February 15, 2012, the Board voted to adopt the Renewable Energy Reexamination Report.

NOW, THEREFORE, BE IT RESOLVED that the Board does hereby adopt the Reexamination Report of the Master Plan and Development Regulations for Renewable Energy Facilities and Systems, a copy of which is attached hereto.

AND, BE IT FURTHER RESOLVED, that the Board=s Secretary shall arrange for notice of the adoption of the Renewable Energy Reexamination Report in accordance with the MLUL and shall send a copy of this Resolution and the Renewable Energy Reexamination Report to the Township Clerk and the Morris County Planning Board.

The undersigned does hereby certify that the foregoing is a true copy of the action taken by the Planning Board at its meeting of February 15, 2012

Eugenia Wiss, Secretary

ROXBURY TOWNSHIP PLANNING BOARD

**RESOLUTION ADOPTING AN AMENDMENT TO THE
ROXBURY TOWNSHIP MASTER PLAN
LAND USE PLAN ELEMENT**

WHEREAS, the Roxbury Township Planning Board (the ABoard@) adopted its first Township Master Plan in 1958, with a comprehensive review in 1975; and

WHEREAS, in accordance with the recommendations of the 1998 Master Plan Re-Examination Report, the Board adopted a new Master Plan Land Use Plan element on August 15, 2000 (the “2000 LUPE”); and

WHEREAS, the 2000 LUPE recommended low density residential zoning for the lower Berkshire Valley area south of I-80 and railroad rights of way; and

WHEREAS, pursuant to the aforesaid recommendation of the 2000 LUPE, Block 7101, Lots 23, 24 and 29 (the “Kowalski Tract”) were zoned RR Rural Residence District pursuant to Ordinance No. 3-01 on April 3, 2001; and

WHEREAS, as a result of litigation regarding the zoning of the Kowalski Tract in Federal District Court entitled County Concrete Corporation et als. vs. Township of Roxbury, et als., Docket No. 03-1445 (DMC), a Settlement Agreement dated January 18, 2012, was entered into, which Settlement Agreement provides for a Q-O Quarry Overlay District on the Kowalski Tract; and

WHEREAS, the Q-O Quarry Overlay District, as provided for in the Settlement Agreement, will allow quarry activity on the Kowalski Tract for a limited duration, with reversion to a modified RR Rural Residence zoning upon completion of quarrying; and

WHEREAS, in light of the Settlement Agreement, the Board deems it appropriate to amend and supplement the 2000 LUPE to provide for the Q-O Quarry Overlay District on the Kowalski Tract.

NOW, THEREFORE, BE IT RESOLVED, that the Planning Board does hereby amend and supplement the Master Plan Land Use Plan Element as follows:

Amend 4.1.1 Rural Residence Single-Family Districts
Page 35 – Insert before the last bullet item

- As a result of the Settlement Agreement of January 18, 2012, resolving litigation entitled County Concrete et als. vs. Township of Roxbury, et als. Docket No. 03-1445 (DMC), regarding the zoning of Block 7101, Lots 23, 24 and 29 (the “Kowalski Tract”), a Q-O Quarry Overlay District covering that Tract should be implemented, which will allow quarrying activity for a limited duration, with reversion, after completion of quarrying, to a low density residential use, in accordance with the underlying Rural Residence zoning, but with bodies of water and areas of steep slopes in excess of 25% not credited in determining lot area, density, floor area ratio, impervious coverage or building coverage.

AND, BE IT FURTHER RESOLVED, that the Board’s Secretary shall arrange for notice of adoption of the foregoing amendment of the Master Plan Land Use Plan Element in accordance with *N.J.S.A. 40:55D-13*.

The undersigned does hereby certify that the foregoing is a true copy of the action taken by the Planning Board at its meeting of February 15, 2012.

Eugenia Wiss, Secretary

Motion to adjourn the meeting was made at 7:55 p.m.

**FOR THE PLANNING BOARD
TOWNSHIP OF ROXBURY**

Eugenia Wiss, Secretary