

**BOROUGH OF TINTON FALLS
PLANNING BOARD**

**REGULAR MEETING
AUGUST 24, 2011**

Chairman John H. Cunningham, Jr. called the meeting to order at 7:30 P.M.

Chairman Cunningham read the following statement: "This is a regular meeting of the Tinton Falls Planning Board and is being held in compliance with the New Jersey Open Public Meetings Act. Adequate notice of this meeting has been given by posting on the Bulletin Board of the Municipal Building and by advertising in the Asbury Park Press and The Coaster."

ROLL CALL

Present: Mr. Cunningham, Mayor Skudera, Councilman Baldwin, Det. Trocchia, Mr. Lomangino, Mr. King, Mr. Pak, Mr. Lodato, Mr. Terhune

Absent: Mr. Collins

Others: Dennis Collins (Board Attorney); Paul Gleitz (Borough Planner); Erin Swartz (Board Secretary)

All present stood for a Salute of the Flag.

PLANNING BOARD BUSINESS –

Citizen Service Act Compliance – Mr. Cunningham noted that Sean Collins had previously communicated his absence as he is away on vacation. No objections were heard.

Approval of Minutes –

Mr. Cunningham stated that the minutes have been previously circulated.

Mr. Lomangino offered a motion to approve the minutes of August 10, 2011, seconded by Mr. Pak.

ROLL CALL:

AYES: Mayor Skudera, Councilman Baldwin, Mr. Lomangino, Mr. King, Mr. Lodato, Mr. Pak, Mr. Terhune

NAYS: None

ABSENT: Mr. Collins

INELIGIBLE: Mr. Cunningham, Det. Trocchia

Section 26 Review: Ordinance No. 11-1313 – Mr. Gleitz explained that this is the Wind and Solar Ordinance that has been previously discussed. The Ordinance focuses on setting standards for small wind and solar energy systems. He reviewed the changes that were incorporated into the final version.

Mr. King, Liaison to the Environmental Commission, stated that he was very happy to see lower decibel requirements. Mr. Gleitz explained the reasoning for the differing requirements noting that they modeled it after the Municipal Land Use Law standards.

Mr. Terhune offered a motion to deem Ordinance No. 11-1313 not inconsistent with the Master Plan, seconded by Mr. King.

ROLL CALL:

AYES: Mr. Terhune, Mr. King, Mr. Cunningham, Mayor Skudera, Councilman Baldwin, Det. Trocchia, Mr. Lomangino, Mr. Lodato, Mr. Pak,

NAYS: None

ABSENT: Mr. Collins

INELIGIBLE: None

Section 26 Review: Ordinance No. 11-1323 – Mr. Gleitz explained that this Ordinance is part of the implementation of the Revised CECOM Redevelopment Plan. The Ordinance addresses bulk requirements and design standards within the Land Use Ordinance for the Redevelopment Area.

Mr. Lomangino offered a motion to deem Ordinance No. 11-1323 not inconsistent with the Master Plan, seconded by Mr. Terhune.

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ROLL CALL:

AYES: Mr. Lomangino, Mr. Terhune, Mr. Cunningham, Mayor Skudera, Councilman Baldwin, Det. Trocchia,
Mr. King, Mr. Lodato, Mr. Pak

NAYS: None

ABSENT: Mr. Collins,

INELIGIBLE: None

Mr. Cunningham read a statement of procedural rules and guidelines. He noted, for the record, that he and Councilman Baldwin will be stepping down for the next hearing as they live within 200 feet of the property in question.

Mr. Lomangino assumed the seat of Chair for the remainder of the evening.

NEW BUSINESS –

PB2003-10, Twin Brooks Village, Block 128.03 Lot 15, 16, 41.01 & 45.01, Seeking an Extension of Approval – Glenn Pantel introduced himself as attorney for the applicant. His client, William Sitar is with him as well.

Mr. Collins advised the Board that Mr. Pantel had submitted correspondence dated July 1, 2011 and supplemented that submission with a letter dated July 27, 2011. We are here this evening to extend the approval that the applicant received in 2003. They are seeking extension of an approval for preliminary site plan and minor subdivision approval they received in November 2003. After a review of the file the applications were submitted separately however they were combined into one single approval which was attached to the July 1, 2011 letter. Mr. Collins stated that the correspondence of July 1, 2011 gives an accurate recitation of the history of the application and seeks to extend certain protections of that approval for a period of one year. Because this is something the Board doesn't really see a lot, because of the Permit Extension Act, he wants to make sure the Board understands the parameters of what this application is; it is not an application for development.

Mr. Collins explained that when a developer receives a preliminary approval, whether it is major subdivision or major site plan, on the local level they receive certain protections of that approval for a certain period of time. That period of time is three years and effectively an approval is protected from changes in the zoning that would affect that approval for a period of three years. The Board is permitted to extend those protections for a period of up to two more years, but no more than five years, in one-year increments. There is also a provision that will apply to this case; in certain circumstances where an approval involves greater than 50 acres, the Board can then enlarge that period of time. The statute, which provides protection as it relates to the site plan and subdivision approval, provides protection from a change in the zoning ordinance. It requires filing an application for final approval which then triggers another series of protections. The statute clearly provides that extensions could be granted at any time. This applicant's site plan would have expired in November 2006 and they are seeking an approval of one year to November 2007. The applicant is permitted to apply for retroactive extensions and in this instance they are doing so because once they get passed January 2007, that protection was extended by legislation entitled the Permit Extension Act, which we are still operating under. As a result of the economic downturn, in order to preserve certain development approvals, the legislature extended those protections from the zone change.

Mr. Collins further advised that the applicant is also seeking an extension of a minor subdivision approval that gave a small portion of an adjoining lot, under common ownership, in order to effectuate the site plan. A minor subdivision has a different period of protection. As opposed to approvals that technically don't expire but can be affected by a change in the zone, a minor subdivision clearly expires under the Municipal Land Use Law after a certain period of time. The statute provides for 190-day period to perfect a minor subdivision and allows the Board to extend that for a period of one additional year. Mr. Collins has previously communicated to Mr. Pantel that he believes the minor subdivision has

expired and the Board has no authority to extend it. Mr. Pantel is certainly free to disagree and make whatever arguments he wants, but for purposes of tonight's hearing, Mr. Pantel will present his case on behalf of the applicant on why it is appropriate to extend the approvals for a one year period. There is a dearth of case law that defines what the Board actually does and it talks about balancing the interest of both the applicant and the Borough. The Board will look at what is positive about extending the approval, what is potentially negative to extending it and come to some decision as to whether or not the applicant has convinced them to extend it for a one year period.

Mr. Pantel stated that with respect to the minor subdivision to which Mr. Collins alluded, for purposes of this request they are stipulating that any extension granted would not cover the subdivision approval. They would agree to reapply in the future before any development of the site. The owner of the property has entered into a 90-year agreement to purchase this piece of property to be incorporated into this site under the minor subdivision. No variances would be required of a minor subdivision so he is confident they can come back and reapply. The prior approval was obtained by a contract purchaser and that contract has since been terminated however the owner still holds the approval rights. The approval was granted by the Planning Board on November 12, 2003 and it was a very comprehensive plan for 156 active adult housing units and a host of related improvements to make this a self-contained planned community including a 2,000 square foot swimming pool, a tennis facility, 7,000 square foot clubhouse along with a few variances with respect for parking associated with the clubhouse, the installation of a wall along Jumping Brook Road and signage to be attached to that wall. The scope of the development really is germane because under the MLUL, the standard that the Board is supposed to adhere to in making their decision, is the number of dwelling units involved in the project, the comprehensiveness of the development and economic conditions. The Permit Extension Act recognizes that there exists a state of economic emergency with respect to the real estate industry in New Jersey. The State Legislature, through the Permit Extension Act, stipulated a few findings which can be found in NJSA 40:55D-136.2. Mr. Pantel reviewed the findings for the Board.

Mr. Pantel noted that they are aware there is a wetlands issue associated with certain portions of the development of this site therefore the applicant will stipulate as a condition of any extension that before the project were to proceed, they would seek approvals for any necessary modifications of the project to ensure compliance with any applicable wetlands regulations. That would entail them coming back before this Board for a modification of the approval.

Mr. Pantel confirmed that they received the report of Mr. Gleitz dated August 18, 2011 which comments on the fact that the ordinance changed after the approval was issued. At the time of the approval, they were in the IOP-35 zone and they are now in the AR Age-Restricted zone. Mr. Gleitz's memo goes into detail about the applicable ordinance standards and how the project measured up. Mr. Pantel feels that the memo is a fair summary that shows that they measure up to the current zoning standards. They are certainly under density and they are in general compliance with the key bulk requirements. The extension of this approval would by no means represent material departure from the purpose and intent of the Borough's Ordinance and zone plan.

Mr. Pantel stated that Mr. Sitar currently operates the Twin Brook Golf Facility on this site which is a very challenging endeavor. This property is an asset that needs to be managed and the granting of this extension would enable him to weather the economic storm that he's dealing with now with respect to this property. There are very difficult circumstances; it's hardly a panacea for what ails the site and for the economic issues that affect real estate development on this site but it is an appropriate means of ensuring the approval rights granted by the Board do not vanish.

Mr. Gleitz briefly summarized his memo for the Board noting the variances that were granted at that time. There were a number of engineering and planning conditions placed on the applicant in order to perfect the preliminary approval and finalizing the approval. He is not aware of the status of

Resolution Compliance aspect of the application but the Board has heard pretty clearly what the applicant is seeking and why. His memo does not go into detail for all the design standards but he did review it against the AR zone standards. One thing that hasn't been discussed is that this is a townhouse development and the base permitted unit type in the AR zone is single family detached. Conditionally permitted are townhouses and other kinds of multiplex type of units. If it is a conditional use that meets all of the conditions, it is permitted in the zone and this Board would hear those applications. If it is a conditional use and a couple of the conditions cannot be met, they go to the Zoning Board of Adjustment for a conditional use variance and the applicant would have to address the conditions they can't meet and discuss the negative aspects. In this case, the Age-Restriction is permitted, the density is permitted and the conditional use would be for the unit type itself. His memo gives some information about the townhouse requirements as they currently exist.

Mr. Gleitz referred to the subdivision portion of the approval and stated that the applicant was an acre short of the 50 acre requirement so there was a lot line adjustment to get the extra acre. In the back of the property there are wetlands and open space areas that do not impact the property itself but it appears as though the triangular piece that is part of the subdivision contains buildings 6 and 27 and a portion of the intersection of the roadway. If the small parcel isn't part of the overall project, the design will not work as laid out on the original 2003 approval.

The last item that Mr. Gleitz would like to discuss is the impact of the Conversion Bill. He suggested the Board hear testimony from the applicant on their take on how that would apply and their intentions regarding same. He explained the Conversion Bill and the requirements they would have to meet noting that this applicant would probably be able to accommodate the application requirements. If the Borough is going to be facing another Conversion application on this site based on the extension of approvals it is something this Board may want to consider in terms of whether or not they want to make that available to the applicant by virtue of granting the extension they are seeking right now. The AR zone was created during the Master Plan process based on this approval that was in place. The former IOP zone had a lot of different standards and uses and the Master Plan's intent was to simplify that.

Mr. Lodato questioned the chronology of the approvals and asked why the applicant is here in 2011 asking for an extension back in 2006. Mr. Collins explained that the Land Use Law permits retroactive extensions that would relate back to the date of expiration. He added that the approval was granted to a contract purchaser and since the approvals go with the land, the owner is now coming in to protect their approvals.

Mr. Pantel stated that the MLUL and the local Ordinance express and authorize an applicant to obtain an extension of a vesting period after the vesting period has expired. Mr. Collins clarified by stating that the Borough did not have an expiration of approval ordinance so when a local approval is received, it doesn't expire. What happens is, in this case, when the Ordinance was changed, it affects that approval and the protection from that Ordinance change. In November of 2006 they may have said that there are no Master Plan reviews and there are no Ordinances contemplated so on January 1, 2008 they still had this approval. Now that the Ordinance has changed and Mr. Gleitz has indicated that it affects the approval, they can't apply for final approval as is because the Ordinance has changed. The interesting part about this is that there really is no guidance here and the Board must rely on common sense and practicability. This approval was an age-restricted project in an IOP zone with an overlay and that use was continued on this property through the Master Plan.

Mr. Collins stated that the Conversion Bill option must be debated even though Mr. Pantel has talked about the protection of this approval, the granting of an extension would give the applicant an option that the new does not. There is no case law regarding a situation of this nature.

Mr. Pantel confirmed that in November of 2006 there was no expiration ordinance in place so there was no burning need to get an extension. Also, Mr. Sitar has been trying to make a go of it with the Golf Facility and that is becoming increasingly difficult for him to do so. With respect to the Age Conversion issue, the statute that governs the conversion stipulates that an application for an approval to change a development from age-restricted to non-age-restricted may be submitted to the Board at any time before the 25th month after the effective date of that statute, which would have been before August 1, 2011. The Board also has the discretion to extend that period of time for an additional 24 months but the applicant is not asking for that.

Mr. Collins asked Mr. Pantel if the applicant is waiving any potential claim to apply to this Board or any other Board for the conversion of this property to a market rate facility. Mr. Pantel replied no, he feels as though the applicant should have whatever options are available to him. The statute provides that the Board would have to grant an extension of 24 months for the filing of a conversion application. This is not something they are asking for. The Municipal Land Use Law standards that govern whether or not the extension should be granted do not include language that indicates they should lose the ability to get the extension merely because of another piece of legislation that might give the applicant the ability to go through that conversion process. Since the applicant didn't apply by August 1, 2011 they would have to make another extension request for an extension of time in which the applicant can apply for a conversion. He hasn't done that so it is not something that is before the Board at this time but they are not prepared to waive that.

Going back to the minor subdivision issue, Mr. Pantel stated that that parcel is part of the development however it is a small triangle of under an acre. The property owner currently has a 90-year option to acquire that parcel at any time and he has already paid the full consideration for that parcel. It is not problematic to acquire that parcel and apply for a minor subdivision to incorporate it into this piece because it would be a variance free minor subdivision application. The Master Plan process found that this use was appropriate for this site and that is what the applicant is trying to do. Any deviations between the approved development and the current ordinance are not really material at all and are minor bulk issues. The applicant would have to also come back to the Board for modifications to meet the requirements of the Department of Environmental Protection and wetlands regulations.

Mr. Gleitz asked if the Board acts favorably on the extension request sought tonight, the applicant would have no standing to proceed with a conversion application immediately afterwards unless the Board grants an extension of the time period for which they have to apply. Mr. Collins replied that is the applicant's position. Without a waiver of the right to make application, they will have to fairly state that they have every right to come to this Board and ask for permission to convert. If the Board denies that extension, you can challenge that extension.

Mr. Pantel stated that if they were to request conversion, they would also have to request leave from the Board to extend the time period in which they have to make that application.

Mr. Lodato asked if they can apply the possibility of a conversion application in weighing tonight's decision. Mr. Collins replied that if the applicant receives this extension they can come in through June 2013 to get their final approval under the old Ordinance and begin construction. They also have the right to apply for a conversion which would include the request to extend the time period to apply for that conversion application for the very same reasons they are here tonight for the extension of this approval. The Conversion Bill, like the Permit Extension Act, was a legislative reaction to a perceived economic crisis and the ability to jump start the building industry by converting certain approvals to a more marketable and economically viable product and gain certain COAH credits as part of that process. The applicant is not waiving their right to apply so if you give the extension there can be an application and there can be a request for an extension. It is within the applicant's rights not to waive that but he has raised it because it is another issue for the Board to weigh in their decision on this extension.

Mr. Pantel stated that he does not believe, under the Municipal Land Use Law, that the Board can evaluate this request by balancing any perceived negative impact from a future conversion application. He doesn't think that is a standard in the MLUL in that the standards allow the Board to look at the number of units involved, the economic conditions affecting the applicant and the comprehensiveness of the development. The issues alluded to with respect to a possible impact on the community as a result of converting this project would have to be considered in the future if they are faced with an application of conversion. It would not be fair to deny this application based upon a hypothetical future application being made for a conversion from age-restricted to non-age-restricted. There is a dearth of case law on this is because it is very rare to see this issue litigated.

Mr. Collins advised that he disagrees with Mr. Pantel on that issue. He feels that in determining a retroactive request for an extension, the Board will have to consider the present circumstances. If the Ordinance has changed, the effect of that has to be weighed. The issue of the Conversion Bill should be taken into consideration because it wasn't present two years ago. This is a Planning Board, not a Board that rubber stamps. Other than as-of-right applications, this body is charged with balancing the good and the bad. The statute is discretionary, not mandatory, which is why he disagrees with Mr. Panel.

William Sitar was sworn in as owner and operator of the site. Mr. Sitar stated that he has owned the property since about 1981 and has spent \$2 million getting approvals for this property; from the subdivision that created Seabrook Village to an office park for Bell Labs that never happened due to lack of sewer capacity. In 1981 he received an approval for a two million square foot office park which never materialized because of the tremendous amounts of off-site improvements the Board imposed on him. He came back over the years for different approvals but in order to financially carry the property he built Twin Brook Golf Center because there was no office market in the area nor was there sewer capacity. The Golf Course was built in 1991 and has been operating there ever since. It is a first class facility and is always voted in the top 100 golf ranges in the Country. With that said, the golf course is a very expensive business to operate; they have tried over the years to help it make money and it just does not make money. The insurance, payroll, chemicals and the taxes are all incredibly high and he is continuously before this Board trying to change the site and do something with this property.

Mr. Sitar stated that he is here tonight because the plan approved is an alternative for this property and why should he lose this approval and start from scratch. This development, quite honestly, will never be built because it is the craziest design of any he has ever seen. He had entered into a contract with the previous developer who had designed the plan and eventually got into trouble because he laid out houses on wetlands. At that time, the contract to the developer was rescinded. Currently, the golf course is just not making money. They installed a miniature golf course that they were told would generate 500 games a day and it does 62 on a weekday and 180 on a typical weekend. Whatever he seems to do just doesn't seem to work. He can either shut the place down, and have it sit there, or it can be a recreational center and he will be hanging himself deeper and deeper. It would cost another \$3 million to put go-carts and whatever else on there. That is why he decided to hold on to this approval and come back with a whole new plan that will accommodate what the zone calls for.

Mr. Pantel clarified that Mr. Sitar means that there will be some modification to the plan to conform to the applicable wetlands regulations. Mr. Sitar has a concept plan which does not have houses on wetlands so that is where the modifications would come in.

Mr. Lomangino asked if the applicant made those modifications, would they come before this Board. Mr. Collins advised if the Board grants the extension this evening then yes it would come back before this Board.

Mr. Lomangino asked for any questions from members of the public however none were received.

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Mr. Lomangino stated that he does not believe, at this time, that the Board can grant an extension to a lot that does not exist. The minor subdivision lot does not exist, the applicant is going to find themselves back before this Board for modifications and the new Ordinance permits this type of development. How can an extension be granted for a piece of land that doesn't exist on the map right now? Mr. Pantel advised that the lot does exist; Mr. Sitar owns 98% of the property and as to the other portion he is under a 90-year contract to purchase and develop the property. He has also stipulated that as a condition of the extension they would agree to reapply for the minor subdivision approval to incorporate that small triangle into the main parcel. The Board clearly has the power to grant the extension of its prior approval since Mr. Sitar is the owner of virtually all of the property with a 90-year contract to purchase.

Mayor Skudera stated that he agrees with the Chair. There is no legal lot on this piece.

Mr. Pantel asked for Mr. Collins to comment. Mr. Collins stated that he is not sure because there is nothing that says what happens to a site plan approval on a lot configuration when the subdivision doesn't exist and as they sit today, it doesn't exist. There is no law that says the Board can't say they want to extend it conditioned on a new minor subdivision application to conform to the extended approval.

Mr. Lomangino stated that if the applicant is going to come back before this Board again, they plan on modifying the plans anyway and the use is still permitted then he feels it would be best to have them come in with their modifications as a whole new approval. There is no reason to grant an extension.

Mr. Pantel asked that this matter be carried for an additional hearing so that he can address the legal ramifications as he is troubled by that approach. This approval has been out there for a long time and there was a good discussion here tonight so he would hate to see the process abruptly ended with a decision along those lines.

Mr. Collins stated that the Chair has raised two issues; one with respect to the minor subdivision and one with the respect that the proposed use is now permitted in that zone. There was a discussion regarding the conversion issue but he didn't hear any Board members talk about that. He recommends to the Board that they make any comments that they want but if the applicant's attorney is asking that no vote be taken this evening, they should afford the applicant the opportunity to make their best case.

Mr. Lodato stated that he would be inclined to grant the extension if there was a waiver of the right to convert. He explained why he thought the overlay zone was placed on the IOP zone to allow for age-restriction.

Mr. Pantel stated that they are not prepared this evening to grant that waiver and they have heard the issues that were raised this evening so he would ask that the matter be carried so that these issues can be properly addressed.

Mr. Collins stated that Mr. Pantel is a highly respected Land Use attorney and it would be unfair to suggest that he should have anticipated all this issues before him. There is no law guiding us as this is a very unique situation. The Board has fairly raised some issues and he suggests that the applicant be provided the opportunity to address those issues.

Mr. Lomangino stated that he has no problem allowing this applicant to come back and provide more testimony.

After a brief discussion, Mr. Collins announced this application would be carried to October 12, 2011 with no further notice to the public.

Mr. Gleitz advised that he will not be available because he will be on his honeymoon; he will have someone from his office attend. Mr. Pantel advised that he will provide any written positions to Mr.

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Gleitz by the end of September. Mr. Gleitz stated that as long as he gets it before October 1st, he will be able to review it in time.

Mr. Lodato offered a motion to carry this application to October 12, 2011 with no further notice to the public, seconded by Mr. King. All eligible members voted in favor by voice vote.

EXECUTIVE SESSION – Mr. Collins noted that there is no need for Executive Session tonight. He added that he has filed a motion to dismiss the FLM case. The Borough has joined in that motion and he will advise the Board of the outcome on September 23rd.

OPEN PUBLIC DISCUSSION –

Mr. Lomangino noted that this is the point of the meeting when the public is allowed to speak on any matter not currently pending before the Board or regarding litigation.

Mr. Lodato offered a motion to close the public discussion, seconded by Mr. King. All present members voted in favor by voice vote.

ADJOURNMENT –

Mr. Lomangino advised Board members that the next meeting is September 14th and they will be hearing a continuation of The Falls Village.

Mr. Lodato offered a motion to adjourn the meeting at 9:00 p.m., seconded by Mr. King. All present members voted in favor by voice vote.

Respectfully Submitted,



Erin Swartz
Board Secretary

Approved at a meeting held on: September 14, 2011