

**MINUTES OF REGULAR PLANNING BOARD  
MEETING HELD ON THURSDAY, JULY 19, 2018**

Chairman Blewett called to order the regular meeting of the Board and announced the meeting was duly advertised in compliance with the Open Public Meeting Act by notice dated July 10<sup>th</sup>, 2018 sent to the Daily Record, Suburban Trends and posted on the bulletin board and website at Borough hall. All stood for the Pledge of Allegiance.

**PRESENT: BLEWETT, KAUFMAN, KOLDYK, MORREALE, RUNFELDT, TAORMINA, TERRERO, WILD AND BRIGHTMAN (ALT. #2)**

**ALSO PRESENT: BOORADY, ENGINEER AND NEISS, COUNSEL**

**ABSENT: MARINO AND REHFUSS (ALT. #2)**

Chairman Blewett stated the first item on the agenda is approval of the April 19<sup>th</sup>, 2018 minutes.

Ms. Ward mentioned the members that can vote are Blewett, Kaufman, Koldyk, Morreale, Terrero and Wild.

Mr. Koldyk made the motion to approve the minutes.

Mr. Terrero seconds.

**Roll call:**

**Yes: Koldyk, Terrero, Blewett, Kaufman, Morreale and Wild**

**No: None**

**Abstain: None**

Ms. Ward mentioned they're approved.

Chairman Blewett stated the next item on the agenda is memo from the governing body to conduct a preliminary investigation to examine whether certain properties should be in a condemnation area in need of redevelopment pursuant to N.J.S.A. 40A:12A-1, et seq. What follows is three resolution. Resolution R18-141 from the governing body adopted June 18, 2018 concerning property known as Block 22, Lot 305 on the municipal tax map also known as 275 Comly Road should be considered in the study area.

The second is Resolution #R18-142 from the governing body adopted June 18, 2018 concerning the property known as Block 5, Lots 23, 32 and 34 on the municipal tax map, also known as 14 Beaver Brook Road, 10 Beaver Brook Road and a vacant parcel of property with no formal address should be considered in the study area.

The third is a Resolution #R18-143 from the governing body adopted June 18, 2018 concerning the property known as Block 3.05, Lots 305 and 305.5 on the municipal tax map, also known as 117 and 107 Main Street should be considered in the study area.

Now I was under the impression that the planner was going to be here. Was there somebody else coming to discuss these?

Ms. Ward stated no. You have an email here that 275 Comly Road is going to be tabled. Arthur do you want to explain this to the board? I believe you had conversations on this matter.

Mr. Arthur stated I was on the phone quite awhile today. This property which everyone is familiar with is the former Valero Station and I was made to understand that it has been sitting like that, and I saw it again tonight for the better part of ten years. All of a sudden out of nowhere I guess they are the brothers' Vita decided that they are going to try and market this to a nationally recognized brand. More than that I can't tell you because the attorney who represents the Vita brothers doesn't know whether or not this is actually going to come to fruition. There is a letter of intent that has been apparently executed by the those parties and based on discussions today with that attorney, as well as Doug Doyle, the borough's redevelopment attorney, because the

Vita Brothers have an intention to clean up the property and do something with it there was a decision made to recommend to the board, as Joan says, to table that particular resolution until perhaps next month's meeting, or the next time the board gets together to give them the opportunity to see what is going to be with that.

Mayor Runfeldt stated Mr. Chairman, if I may, just to give some additional information, over the past 10 years we've had some conversations with the brothers' Vita about this and they have attempted to mark this property before. They've come in with a couple of different major nationally recognized chains and the deals have fallen through in the past. There has not been much action on this probably in the last two or three years and we've been asking them to do something about it, and now all of a sudden as Arthur mentioned, miraculously within a week of this being on the council's agenda all of a sudden they've got something new for us.

We are willing to give them another shot if the board would so like to table it and see what they come in with. They have been told that there are certain things that we need to know by next month, otherwise it will be on the agenda next month.

Chairman Blewett stated okay. If the board wanted to go ahead with the study, would that have any impact on this?

Mr. Neiss mentioned technically no, but the thought process was why spend the money on a study on a property that may not be part of a redevelopment plan.

Chairman Blewett stated all right. So if it falls through, then we just consider this resolution at a later point and time.

Mr. Neiss stated correct.

Ms. Ward mentioned I have it scheduled for the August 16<sup>th</sup> meeting. We have a public hearing on for that date.

Mr. Neiss stated oh we do because I wasn't sure.

Ms. Ward mentioned we just deemed the steel company application complete today so it is on for the 16<sup>th</sup>.

Mr. Neiss stated I told the attorneys it was dependent on whether or not we were going to meet so that's fine.

Chairman Blewett asked the mayor and Jim to comment on the other two resolutions in the council's action in passing the resolutions.

Mayor Runfeldt stated why don't we go to the property on Beaver Brook, quite honestly we are looking in one area but we should look at everything. I have had conversations with Mr. Wolfson, of Mort's Family Group, and they had probably about two years ago agreed to take the buildings down and then unfortunately when we were doing our redevelopment study, we said leave them up a little bit because it is probably good for the study that the buildings are there. Now it is time to take them down again and he is willing to do something there. We may want to hold off on doing that. Give me a month to see if he can come up with some concrete plans to either take the buildings down or start developing the property himself, otherwise we may be acting a little too soon.

Ms. Ward asked do you want to table this resolution until the August meeting too.

Mayor Runfeldt stated the upper Main Street we can talk about but at least with regards to but the Beaver Brook table it.

Chairman Blewett mentioned the upper Main Street we are just curious because that is part of the existing property right that has already been demolished, so why would that be included in this study area?

Mayor Runfeldt stated I believe what is going on is the developer is looking into the possibility of

decreasing the size of the proposed building at what we call the Wexford site, which personally I'm all in favor of, but I think a five-story structure is a little too much there. However, he would like to move some of the units that he would be losing there to the upper Main Street site. So in the process of just doing the cost involved I believe he is going to be looking for some sort of pilot designation for that area. In order to get the pilot designation one of them is you have to be an area in need of redevelopment. I think we had designated it as an area in need of --

Mr. Neiss stated rehabilitation.

Mayor Runfeldt mentioned right. But in order to get the pilot that he is looking for we need to determine if it is an area in need of redevelopment now.

Chairman Blewett ask so does the board have any other questions or discussion, or does somebody want to recommend an action. We have been asked to table 14 and 10 Beaver Brook Road and then the Comly Road facility, so that means we could go forward with R18-143 if the Board would like to do that?

Mayor Runfeldt asked Arthur is this the type of thing that we could have the developer pay for the study.

Mr. Neiss stated technically it is our study, it's the board's study that's being undertaken. There is no legal prohibition for the developer or the redeveloper paying for the study, but that would be something that would have to be negotiated with them. We couldn't come right out and make them pay for it.

Mayor Runfeldt stated okay.

Chairman Blewett asked is there more time warranted for negotiation.

Mayor Runfeldt asked what action are we taking tonight if we were --

Chairman Blewett stated well if we were to take action on that one resolution, we would recommend that the study take place and move forward with it right?

Mr. Neiss mentioned yes that would be the goal. I mean there is still quite a bit that needs to be done before because Paul needs to do the actual study and engage in that, and it is always better to have your ducks in a row before you start walking down the path I would say that, but there would be nothing to preclude those discussion if they were going to be taking place from occurring at any time.

Mayor Runfeldt stated then there is no need to delay this one.

Chairman Blewett mentioned any action? I would assume we would need a recommendation and a vote to move forward on this?

Mr. Neiss stated there doesn't need to be a formal resolution of this, just having it in the minutes would be sufficient.

Ms. Ward mentioned we would send a memo.

Mr. Neiss stated and a memo saying that we are going to undertake the study and proceed in that fashion.

Ms. Ward mentioned they would have to put money in our budget for the study.

Mr. Neiss stated Paul has set forth like \$6,500 for his work in that regard. Yeah somebody will have to pay for it.

Mr. Terrero asked is this amount the base scope of one project or all three resolutions.

Mr. Neiss stated I think he broke it down you know piece by piece.

Ms. Ward asked do you want to inform the council that the other two are tabled until our August 16<sup>th</sup> meeting so they know what is going on.

Chairman Blewett stated so is there a motion from the board to allow the R18-143 to move forward?

Mr. Terrero moved it.

Mr. Morreale seconds.

**Roll call:**

**Yes: Terrero, Morreale, Blewett, Kaufman, Runfeldt, Taormina, Wild and Brightman (Alt. #2)**

**No: None**

**Abstain: Koldyk**

Ms. Ward stated okay I'll do the memo.

Chairman Blewett stated okay. Next on the agenda is Item 3 Mel's Land Use: Liability Policy Training and Information.

Ms. Ward mentioned we'll turn it over to Arthur. Arthur when we have completed the training if you would just sign off on this sheet.

Mr. Neiss stated I'll do that.

Ms. Ward mentioned I have you down Pat. Pat is the chairman of the board of adjustment and he is here tonight to listen to the presentation.

Mr. Neiss stated we don't have a projector.

Ms. Ward mentioned Danny said we didn't need a projector, the flash drive just goes in the computer and you can show it on the wall.

Chairman Blewett stated but we need the projector.

Ms. Ward mentioned the board of adjustment training we had the verbal presentation because we didn't have laptop. Perry stated we could do it manually.

Mr. Neiss gave a verbal presentation on Mel's.

Mel is tired of paying money to defend planning board members and what the handout calls zoners in deference to your board, so what they are doing if you folks can be educated about what perhaps not to do, they can potentially avoid cases and/or liability. Having gone through this from my perspective, and I am an attorney and I deal with this stuff every day, but it seems like common sense to me and it will be common sense to you I guess.

So if I can turn your attention to the first slide, I will try to move through this quickly. The first slide I want to talk about is delays. Delays don't usually give rise to liability suits. So if somebody comes in and their application is delayed, more often or not you folks will say to the applicant, we consent to the adjournment and therefore there is not going to be any liability or potential liability as a result of the delays.

The courts consider you guys are really like judges, you have most of if not all of the indemnities that judges have. So if I'm a litigant and I go before a judge and I think that the judge has called me a name that I don't like, I can sue that judge but that case is going nowhere because a judge is indemnified from his official acts.

I have to tell you I went through the ordinances and I didn't find an indemnification ordinance in

our ordinances and I don't know if there exists such a thing. There should be and it is permissible under New Jersey State Law but I didn't see it when I went through all of the ordinances. I would respectfully request that if there is no such ordinance indemnifying your folks, as well as the mayor and council, that that be put on the books as quickly as possible.

Mayor Runfeldt asked can you give us sample.

Mr. Neiss stated of course.

Mr. Boorady asked would professionals be included.

Mr. Neiss stated you have your own problem don't look at me to help you.

Mr. Boorady asked are attorneys and engineers included. Would professionals be included, like if a traffic engineer came here or a planner or engineer, would they be indemnified as well from any action?

Mr. Neiss stated I think the way most ordinances work is if you are an employee of the borough and/or you have a professional relationship with the borough, I believe that most ordinances for indemnity would indemnify that from official acts. But apart from that, you have your own insurance coverage and we'll talk about insurance a little later in this presentation.

Mr. Boorady asked but since there is no ordinance, a board member is not indemnified if there is no ordinance.

Mr. Neiss stated no. Under New Jersey State Law the potential exists for indemnification, most municipalities have an indemnification ordinance on their books to make it clear that these are the circumstances under which an employee may seek indemnification and that happens quite a bit that employees do seek indemnification. I'm rather surprised that we don't seem to have one in our ordinances. It has to be there maybe I overlooked it.

Mr. Taormina asked so without the ordinance the borough doesn't have to indemnify employees or members of the board.

Mr. Neiss stated it doesn't have to but let's take an example. I'm an applicant and you call me a name and you say that I'm not worth the paper I'm printed on and what have you. I decide I'm going to sue you individually. Generally those lawsuits don't happen. It is when a board acts as a board and denies the applicant and the applicant is aggrieved that the applicant comes up with a number of claims.

Well he said that I was a so and so and he said he'd somehow tilted the board against my application so I'm going to sue the whole board. But one of the claims is against you for defamation let's say, in that event New Jersey State Law says that you are indemnified, you should be indemnified. I would imagine that the borough would then, the mayor and council would be a position then to pass a resolution for your indemnification both for attorney's fees, as well as for any damages that ultimately result from the applicant against you individually.

Mr. Taormina stated but without the ordinance they don't necessarily have to.

Mr. Neiss stated that's correct.

Mr. Taormina asked then who indemnifies me.

Mr. Neiss stated you would have to sue the borough for indemnification in that event.

Mr. Taormina mentioned gotcha I was just wondering.

Mr. Neiss stated I think you should expect a whole spade of lawsuits.

Mrs. Brightman asked what about errors and omission insurance don't we have that and wouldn't that cover.

Mr. Neiss asked with errors and omissions.

Mrs. Brightman asked would that cover somebody.

Mr. Neiss asked you mean the borough having errors and omissions.

Mrs. Brightman stated yeah.

Mr. Neiss mentioned what you are talking about now is an insurance policy that's different than an indemnification. An indemnification basically says, no matter what happens if you get sued you have to incur attorney's fees and if damages are leveled against you, I as your indemnitor will indemnify you. Insurance is a little different it works a little differently.

Insurance is basically saying we have a duty to defend or not depending on how the policy is written, and we have an obligation to cover the damages, again depending on how the policy is written. If you engage in certain acts, certain intentional acts, the insurance policy may say, sorry we are not going to pay any damages that accrue against you we are just not going to do that.

An indemnification, however, is a stronger more robust form of protection to you and the other members of the board. So again most communities, most municipalities have indemnification provisions in their ordinances for people who sit on boards and for employees of the borough. I'm just surprised that we don't have one, but I'll have one sent over to I guess it is DiLorenzo & Rush.

Mr. Boorady stated yes.

Mr. Neiss stated the Mel's tells you that the number of land use disputes that result in lawsuits is really very small, but obviously this program is intended to educate you for that. As I said earlier, land use is a judicial function and has the same broad immunities as does a judge or a court.

When talking about property, what you are talking about is whether or not government has the right to take private property and there are two ways that that can happen. On the one hand the government as we saw earlier tonight, the government can condemn property if it is needed for a public purpose. Another way the government can condemn property is something called inverse condemnation.

If because of regulations, the applicant or developer cannot use his property to achieve an economic goal that developer can argue that these regulations are so onerous that my property has been legislative zoned into inutility and that is what inversion condemnation. It happens more frequently than not in and through the New Jersey Department of Environmental Protection which is a strong way that happens.

They say there is an area in say a single family zone that is protected and protectable, but the guy who owns the property says wait a minute I want to build something here. I have the right it is a single family zone but DEP says no, it has to be a park or something else that could very well be an example of inverse condemnation.

The other side of the coin is as the handout points out that while property use can be legislated and regulated in your zoning ordinance you do just that, the flip side to that is that people can't do whatever they want on their property. The reasonable regulation is an appropriate governmental tack and something that government can engage in.

Moving on to the slide called fee shifting, fee shifting is something that happens in the law only in a very narrow band of circumstances. What that means is I have a contract with Joan and my contract says that in the event there is litigation between us, the prevailing party shall pay the attorney fees of the losing party that is by contract.

There are laws that say a very similar thing; if I sued you for, for example, a violation of my civil rights, there is a federal statute that says, if I prevail because you have violated my civil rights, you are going to pay my attorney fees in addition to any damages that I accrue as a result of your civil rights violation.

There are other kinds of fee shifting laws as well. One of the most notable laws is called LAD which is the law against discrimination which exists here in New Jersey. If I'm discriminated against I can recover potentially damages from you, as well as my attorney's fees in bringing on such a suit. Now these thing may seem not within your wheelhouse because you folks are focused on land use and zoning ordinances and what have you, but it is important for you to be aware that there are such things as fee shifting provisions. In the land use context one of them is some called RLUIPA, the Religious Land Use and essentially what it says, is that you cannot create a zoning scheme that you can use against me if I'm a religious organization.

Recently you may have heard that there were a couple of lawsuits, one in I guess it was Middlesex County or down that way with a Muslim Temple who wanted to build a temple and the town said no we are not having you guys here and they lost on that. Under RLUIPA they recovered their attorneys' fees and I was made to understand the total amount recovered in that lawsuit was \$7.5 million dollars. The attorneys' fees were \$5 million of that \$7.5, so that is something that the borough can ill afford to be involved in and it would be best if we tried to avoid that kind of thing.

You may have heard about Mahwah with the Orthodox Jews putting up I guess they are like PVC pipes that go up the side of utility poles to create like what is called an Eruv, an area in which the religious Orthodox Jews can carry objects, can do things that they might not normally be able to do and the town said no we are not going to let you do that. Well that became a tremendous lawsuit and that wasn't under the RLUIPA but it certainly was violations of their civil rights. I think that case has now been settled and resolved, but that creates an enormous potential problem and enormous potential liability for borough.

If I'm the attorney representing the plaintiff in that case and I work thirty hours on the case that means the borough is going to recompense me my thirty hours. In certain other kinds of cases the attorneys get what is called Lodestar. I go to court and I say, your honor I worked thirty hours on this case but look at this result I achieved, I should get a premium for what I did and the judge says you know what you should. So instead of getting my hourly value for thirty hours I could get my hourly value plus a premium for having brought such a lawsuit. They want you to know that there is potential and those lawyers are out there.

RLUIPA stands for the Religious Land Use and Institutionalized Persons Act.

Moving right along, the standard under RLUIPA I should at least mentioned to you, no government shall impose land use regulation that creates a substantial burden on religious exercise unless in furtherance of a compelling governmental interest that is the least restrictive way of accomplishing that objective. In other words, no regulations unless it is the very least you have to do and you have to have a compelling governmental interest. As an attorney, I'm going to tell you that is a tough, a tough hurdle to get past and it is not going to happen. It does happen but not in most cases.

Everyone is familiar with the first amendment, the first amendment to the constitution says that you are entitled to your opinion and you are entitled to express yourself in most ways that you want to do that with certain notable exceptions. You can't scream fire in a crowded theater and you can't do stuff like that, that's a reasonable regulation on your first amendment right. In terms of places like adult book stores or adult movie theaters, and what have you, there have been attempts over the years to restrict them; for example, from a certain number of feet from a residential zone so that kids generally don't have to see this kind of garbage. Some of those regulations are a bit too restrictive and the courts will say, you can't do that and they'll give guidance to some extent on how the ordinance can be changed in order to make it less restrictive and a little bit more constitutionally valid let's say.

I think you all know that if you deny an application and the applicant is not happy about it, the applicant has recourse to the Superior Court in an action in lieu of prerogative writs. When I started my career practicing in New York and when I came to New Jersey and heard things like action in lieu of prerogative writs and vicinages for counties, it was like where am I, am I in the Game of Thrones. What the applicant gets in court is not monetary damages, the applicant gets injunctive relief, a direction to you; for example, that says, sorry you were arbitrary, capricious and unreasonable in denying this application. So I as the judge I'm going to reverse it and remand it back to the board for reconsideration or else I'm going to tell you, you guys are so full

of it that I'm just going to grant the application right here right now. Those are the three results of an action in lieu of prerogative writs not monetary damages. Some people try for that but it didn't work very well for them.

These case studies, I think it is slide 15 for those of you who are counting, I thought these were very interesting and I didn't get all of them right either, and I would respectfully commend them to you. The first one is one where the developer voluntarily offers to give the town \$200,000 to offset some of the off-site costs of that, and then the question arises is it legal for the governing body to accept the strictly voluntarily contribution from the developer. Anybody?

Show of hands who thinks it is legal for the governing body to accept that money from a developer? You think it is? Shall I assume everyone else is a no? The no's definitely win.

What that is it smacks of pay-to-play. If I can bribe you by saying, oh you know I've got some money and I'm going to pass it around to the town that violates the ethical considerations that governs land use, so that would be a no because it says that favorable land use decisions can go to the highest bidder and this town does not want to be in that position. I think in that scenario everyone is pretty much aware, or should be aware that the MLUL has provisions for off-site improvements and how those are allocated as between the town and the developer.

Case Study #2, I don't think I've seen this with this board but you know some land use boards actually go to the site and see the development, or see the property and will talk with the developer and/or his attorney or professional while they are out at the site. So in this instance, one of the board members gets into a heated dialogue with one of the parties and this board member was later recused from further deliberations. So the question becomes is it legal for other members of the board who were at the site meeting who heard this altercation, is it legal for them to continue in the proceeding or should they also recuse themselves. Does anyone want to take a stab at that one?

Several board members stated it is legal.

Mr. Neiss stated it is legal for that one member to recuse him or herself. The rest of the board members can sit in, those circumstance because the recusal of that one member is an adequate cure at least that is what was found by one court.

If you do go to a site or for a site visit, whatever information is gleaned from that site visit ought to be put on the record so that everyone is aware of it, because when you make a decision the thought process is that you are making a decision as a board. You are all hearing the same evidence and you are all coming to your own conclusions predicated on what it is that you see.

Everyone has their point of view and that is what happens in trials too. At trials, the jury and the court they weren't there so they don't know what happened so they have to rely on evidence, documents, testimony, and other forms of evidence in order to instruct them on what happened. Everyone comes with their own conclusion and that's what a jury does, but at the end of the day they all have to see eye to eye and come up with a verdict, but clearly we all see things differently.

Case Study #3 an experienced developer received a Superior Court order instructing the town to approve a project after considerable delay, the planning board then willfully ignored the court ruling and rejected the application anyway. The developer sued both the town and the members of the board personally. The town settled out of court and a jury found 3 members personally libel awarding damages of \$5,000 against each of them.

The question is will discretionary immunity protect members of the planning board from punitive damages even if they willfully ignored the court order. The answer to that is yes. In a case out of West Orange the court said that isn't great what the planning board did, but if we sanction people like yourselves with monetary damages who is going to want to sit on a board? Nobody is going to want to do that because they face the fear of ultimately having a judgment against them. In order to protect the integrity of the board the courts generally find that individuals like yourselves are entitled to immunity.

Chairman Blewett stated so in this case they were actually found guilty right?

Mr. Neiss stated the jury came back but on appeal, those Planning Board members argued on appeal, wait a minute we are entitled to immunity from all of this and in fact they got immunity under the Appellate Division.

The next Case Study #4, a religious institution applied for variances to build a school in a residential zone, this is more for your board than it is for us here. A board member lived nearby in a nearby development and coached her neighbors on what questions they should ask at the hearing. She did not recuse herself from the deliberations. So was the board member who helped residents draft their objections entitled to personal immunity in that circumstance? The answer is no. The board member basically went out and was giving ammunition to people in order to develop her own agenda for how that project should go down.

Next topic area is conflicts of interest. In this case during the hearing on a case involving the application to build a senior citizen home, the mayor created a storm when he said that this nursing home under consideration might be a good place for his mother to live. This case was called Grabowsky v. Montclair went all the way up to the Supreme Court.

The question for you is did the mayor by saying that his mother, this would be a good place for his mother to live did the mayor create a conflict of interest for himself by saying that? The answer is no. It was an offhanded comment by the mayor and he was joking.

The applicant was granted site plan approval but an objector, Mr. Richard Grabowski, objected and brought the matter before the court and that's how the case came up. The objector gave up the notation that the mayor's comment reflected some kind of conflict of interest on appeal, but ultimately the Supreme Court found that because the mayor and a sitting liaison to the governing body were members of the church that was not just within 200 feet of the proposed property, but right next door and the applicant had created a hole in the fence that separated the two properties so that people could go to the religious services right next door at the church and come back to the assisted living facility, the Supreme Court found the mayor in that instance and the Councilman Lewis had conflicts of interest because of their affiliation with the church, rather than because the mayor said yeah this would be a great place for my mom to live.

The next case I thought was an interesting case related to a parking lot. The town bought land for a parking lot and the mayor then enters into an agreement to lease some of the spaces for his business. Subsequently, the town puts out bids to pave it over. Before voting on the contract award the mayor went to the municipal attorney and asked whether he could vote on the award, whether or not it was a conflict of interest because his company had used many of the spaces.

Interestingly enough the question was did the mayor qualify for the "acting under the advice of counsel/defense". The answer to that is yes and the reason he qualified is for that is: One, he got the advice before he took any action on the awarding of the contract. Two, the person he got the advice from, the municipal attorney, was in a position to be able to say with some authority that this did not violate an ethical prescription. Three, the mayor in that instance fully disclosed every aspect of what it was that the municipal attorney was considering and gave him all the facts. Four, he, the mayor, complied with that person's advice. Under those four circumstances the mayor was not in a conflicted position.

Some of you have come to me over the course of time and said you know could this be a conflict or could this be a problem for me, or for the board or what have you. I welcome that and urge you to continue to do that. If you perceive any basis for a conflict, David told me that he owns property or some relationship with the Valero Station, it is a prudent thing not to be involved in that if you can avoid it. That is the way this should work. I exist, my door, my email and my phone are always open to each of you, if you ever have a question concerning whether or not you have a conflict it is better to know in advance that way you can rely on the fact that I have given you advice one way or the other. If you don't listen to me well you take your chances as they say.

Slide 40 relates to what we discussed earlier about inverse condemnation. In the case of the Highlands Protection and Planning Commission, I assume you folks are familiar with the Highlands Regulations, you just can't develop there it is just virtually impossible to do that. But the commission itself has the ability to grant waivers in certain cases. One of the main reasons they will grant a waiver is if they determine that you can make a claim for inverse condemnation

that is one of the criteria for granting a waiver in that circumstance.

The next one is an interesting one. A Muslim congregation proposed to build a conforming mosque and education center on a site of a former hotel. Within two months of hearing the mayor and council adopted a revised zoning code that required the church to seek a conditional use variances if located in a residential zone. The citizenry came out up in arms and in court the town argued that the area had winding roads and there were other properties where the mosque could locate, although these properties were substantially more expensive. The mosque on the other hand argued that its consultant found that the traffic would not be a problem and that the area already had an educational and other similar uses.

The question is did the court accept the town's position that is was not in violation of RLUIPA because the mosque could locate on other properties. The answer is no. The town's position was not accepted there was a violation of RLUIPA in that circumstance.

Chairman Blewett asked because they couldn't exercise their right to develop the property as they wanted.

Mr. Neiss stated the regulation was such that they could not develop the property that is ultimately what the court found.

Mr. Taormina mentioned they passed that regulation specifically to block this development.

Mr. Neiss stated spot zoning.

Here is a question that is going to play into your consideration I guess, you've been working on By-laws for us and so the questions would be to you Chuck, do you believe that you have the right if somebody is sitting here and they are going on and on and on about an application, do you as the chairman have the ability to say wait a minutes, you are getting into an area that is irrelevant to the matters that we are hearing here so I'm going to limit you to another minute or two, or I'm limiting it to five minutes for everything. Do you have that ability as a chair?

Chairman Blewett stated I thought I did. Are you going to tell me differently?

Mr. Neiss mentioned by you saying that you are shutting down my first amendment right, to say what it is that I think and believe, I'm entitled to express it aren't I not?

Chairman Blewett stated no.

Mr. Neiss stated no because this is a judicial or quasi-judicial proceeding, and you, as chair, serve as the judge for keeping everything in order. I think it is important, before walking in tonight I looked at the By-laws and you have that right under the By-laws and this is one of the areas that you may want to flush out a little bit in your By-laws. The MLUL says that you shall have By-laws and as I think you know your By-laws are little outdated at this point.

As a Board you have enough experience I think to be able to look at the currently existing By-laws and say you know we have this situation where this guy did this and maybe that is something we should think about.

Joan raised a question whether or not the board could take action against a member who doesn't show. Apparently there is a board member that does not show but is a member. The By-laws can reflect something about that and if these are your regulations, your governing principles, so I would respectfully request that you feel comfortable enough to be able to think about it and make suggestions that you think are appropriate and maybe even necessary.

Chairman Blewett stated it was interesting enough to see that the chair has the right to issue a subpoena I was surprised.

Mr. Neiss mentioned yes you do.

Chairman Blewett ask who wants one.

Mr. Neiss stated the question is who are you going to issue that too?

The final topic is indemnification of defense if you are sued. Fortunately New Jersey law allows town to defend and indemnify their officials and employees for claims that arise from their performance of their official functions. This can even include punitive damages and defense costs from criminal proceedings at least under some circumstances. The mayor's and council's authority in this regard is very broad.

We already talked about insurance and we are not going into that again.

I think the last thing I will say is MEL provides a special policy to land use board member who complete this course. You've sat here and listen to me speak for the last how many minutes, there is no premium because the purpose is to motivate you as members to attend this class. This special policy covers members personally from many cases that otherwise would be excluded under all other policies.

Specifically when board members are sued personally for their action as part of the land use board and not indemnified, the MEL's special policy will provide up to \$50,000 the annual aggregate in defense coverage for the following four risks: One, criminal acts, the policy will cover criminal acts. Two, willful violations. Three, self-dealing and illegal profit. Four, condemnation.

The difference, however, with the MEL's policy is that you can only be reimbursed under this policy if you are acquitted of those kinds of charges. Now that is a very important word reimburse. What that means is that if you get sued and you are brought into a criminal proceeding, you may have the cost of paying for all of that and then if the MEL decides that you are a worthy candidate under the special policy, then we'll reimburse you, but you are going to be out of pocket for all of that while that matter is pending.

Last there are several other precautions that the MEL wants to discuss with you. One, create an environment where your staff and attorney are encouraged to tell you what you should hear and not necessarily what you or the public wants to hear. If there is litigation, be guided by the attorney representing you that would be me guys.

Two do not meet with applicants or opponents to an application by yourselves never a good idea.

Three, avoid saying anything that can be construed as bias both at meetings and elsewhere. For example, in one case a board member said at a very contentious hearing, "we are not going to do anything that is contrary to the wishes of the public". Comments like that make it very difficult to defend the board like that in court.

I've have concluded my MEL's presentation and if you have any questions, I'll take them?

Chairman Blewett stated very colorful. Does everybody have to initial it?

Ms. Ward mentioned no Arthur is going to sign off on it.

Chairman Blewett thanked Arthur.

Next item on the agenda is the draft By-law for the board's review. This document was sent out to the board and thank you for Arthur for drafting and providing those references. So a number of individuals had sent comments to me and Joan, and Joan sent comments to me that we would like incorporated. I guess the question is how should we proceed? Should we talk about them? The whole document is filled with chairman as opposed to chairperson, or some other general terminology and it refers to his opinion.

Ms. Ward asked do you want it he/she.

Chairman Blewett asked I don't know. If everybody is agreed, chairperson and their opinion or their perspective, should we use that and have Joan edit the document, or what is the best way to go about this?

Mr. Neiss stated insofar as chairman throughout some of it is really necessary. For example, even on the first page the chairman, in my experience people take out the word chairman and substitute the word chair to avoid gender issue.

Chairman Blewett stated okay.

Mr. Neiss asked where else would you –

Chairman Blewett stated you know if you say the chair or his designee, to me it would be their designee or something like that.

Mr. Neiss stated the chair is one word.

Chairman Blewett stated well the chair or his designee that implies that it is a him, so the chair or their designee seems appropriate in this one statement.

Mr. Neiss stated I'm not sure I understand because the chair is one person.

Chairman Blewett mentioned it could be male or female.

Mr. Neiss stated correct.

Chairman Blewett stated in this case it is implied it is a he because it says his.

Mr. Neiss mentioned one could substitute the word its and make the chair an adamant object which he is on more than one occasion.

Chairman Blewett stated I would respectfully argue that their is just as effective. The real question I have is there any reason why we should use chairman, I'm assuming not.

Mr. Neiss mentioned chair will function just as well. Whoever has possession or making the changes to the document can change that globally throughout.

Chairman Blewett asked do you just want to walk through some of the questions that we had is that all right.

Mr. Neiss stated sure.

Chairman Blewett mentioned maybe I'll go through mine first. I did have the chairman and he or his, but in Section 4 I was a little confused by the secretary shall be a citizen member of the Board. What does that mean and how does that apply to us?

Mr. Neiss stated it doesn't.

Chairman Blewett stated okay.

Mr. Neiss mentioned you can decide, Joan you live in town right?

Ms. Ward stated no I live in Pequannock now.

Mr. Neiss mentioned the secretary is not a member of the Board and the secretary can come from any place.

Ms. Ward stated my official title is clerk of the Planning Board, and then the Board designates me as secretary.

Chairman Blewett mentioned we as the Board hire that individual so it could be anybody in essence.

Mr. Neiss stated that is right it doesn't have to be a citizen member of the Board or otherwise.

Chairman Blewett stated that was a little confusing so I guess we can do something about that.

I had a question because if we don't have a secretary can we actually proceed with the meeting?

Mr. Neiss stated a secretary is an integral part of the Board's functioning, somebody can serve as a secretary if Joan, for example, was sick and just could not get here.

Ms. Ward mentioned then one of my co-workers would fill in for me.

Mr. Neiss stated right. Somebody must serve as the secretary in order that the minutes will be published, in order that the machine will be on, so in order to observe the riggers and the obligations of a public meeting, a secretary functions in that capacity.

Ms. Ward mentioned I had someone from the clerk's office cover me when I was in the hospital at that time and we knew about it in advance.

Chairman Blewett stated the question I had should we state that.

Mr. Neiss mentioned again these are your By-laws and you are going to live by these so you amended them, so you should do whatever you think is right.

Chairman Blewett stated well that is my opinion.

Mr. Neiss asked do you want me to serve as the clearinghouse. You know these are your By-laws too so you should make changes/suggestions.

Mr. Koldyk asked will that sentence cover it if a vacancy occurs in this position, the Board shall promptly appoint a new secretary. It will only be for one meeting a vacancy.

Chairman Blewett asked my point was can we actually have a meeting without the secretary and I think the answer is no somebody needs to perform that roll.

Mayor Runfeldt stated I assume one of us can be the secretary if we needed to.

Ms. Ward mentioned you really just need somebody to operate the equipment and take the roll call.

Chairman Blewett stated as long as we know how to run the machine.

Mr. Neiss mentioned the MLUL mentioned there shall be a secretary. In order to have minutes you have to have somebody who is responsible for either taking or arranging for those minutes.

Chairman Blewett stated so if the secretary is not available, we are able to appoint one of us or find somebody else internally.

Ms. Ward mentioned right. When I came back I transcribed the meeting. They did the recording and took the attendance and the votes.

Chairman Blewett stated I was thinking that.

Mr. Neiss mentioned I'd like to propose that we add in here that Joan Ward shall not miss any meetings.

Chairman Blewett stated she almost never has.

I think we adjusted the meeting to 10:30 but we do have the option under special circumstances to continue.

Mr. Neiss stated some boards say there will be no new testimony after 10:30.

Chairman Blewett stated under Section 4, Article 4, it says the public can be excluded from certain portions of the meeting. Do we need to delineate specifically which ones? For instance when we talk about personnel matters.

Ms. Ward mentioned we have resolutions that we adopt, one for personnel and the other for litigation matters. That is posted on the agenda and it states what you are doing and it's adopted that evening by the Board.

Mr. Neiss stated I've been in meetings where this has happened, sometimes the board decides at that very meeting that it wants to go into executive session for one reason or another. Those reasons are limited to the Open Public Meetings Act exceptions which are as you said, personnel or litigation. But you are absolutely correct, before going into that executive session an announcement would have to be made to say that board is going into executive session to discuss litigation and then we can kick everybody out.

Chairman Blewett mentioned okay. I guess my question really was do we need to provide examples of who can be excluded and when?

Mr. Neiss stated no because that is really covered by the Open Public Meetings Act. As long as we reserve the requisites of going into executive session, it is not necessary to add it in.

Chairman Blewett mentioned all right. We did write this clause about the absentee members.

Mr. Neiss stated I added that in.

Chairman Blewett mentioned I guess the question is because that is an appointed position who has the ability to terminate that individual?

Mr. Neiss stated actually it is not you, the board, but really the governing body. The governing body has to have some type of hearing on the question. A recommendation could be made by the board to the governing body that this member be considered for termination and that person could either appear or not before the governing body.

Ms. Ward asked would that be the governing body or the mayor because the mayor appoints the planning board members except for the council liaison.

Mayor Runfeldt stated I appoint the individuals.

Mr. Neiss mentioned the governing body, otherwise he could be viewed as an autocrat.

Mayor Runfeldt stated I am for the planning board, I mean I make the appointments without advice and consent of the governing body.

Mr. Neiss mentioned in this case I will check it but I do believe it would have to be something of a hearing before the governing body.

Ms. Ward stated usually all board members let me know in advance if they cannot make a meeting due to vacation, business trip or a family emergency. We have one member that has not been in attendance since the January of 2017 meeting.

Chairman Blewett stated we understand that, but in this case it says that the chairperson or vice chair will direct the board attorney to submit a complaint to the governing body so that basically covers us.

Where we say how we notify the chairperson and I want to add in the secretary because Joan is the one that gets all the calls. I don't think I've ever gotten a call that says I'm not going to be here.

Ms. Ward mentioned I they usually contact me by telephone or the emails.

Chairman Blewett stated I modified it I don't know what the original was. Just say something to notify the secretary by telephone or email.

Mr. Neiss mentioned that's fine if that works for this Board.

Chairman Blewett asked does anyone have any objections.

Ms. Ward stated this way I know whether we have a quorum or not.

Mr. Neiss mentioned absolutely.

Ms. Ward stated otherwise we could be in trouble.

Chairman Blewett asked the order is a little different here. Joan is that the way we do it?

Ms. Ward mentioned no.

Chairman Blewett stated we need to reverse C and B.

Ms. Ward mentioned it is just the opposite.

Chairman Blewett stated just reverse C and B. This is the order except for the flag salute and the Sunshine Law.

Ms. Ward mentioned right.

Chairman Blewett stated Section 2 in Article 7 generally what I was saying, the board attorney shall serve as the chairperson's designee to swear in all witnesses giving testimony before the board. That is generally the way it happens.

Mr. Neiss mentioned that is fine.

Chairman Blewett stated that was it for my comments. Joan you had the third Thursday of the month is when we meet regularly.

Ms. Ward mentioned yes that in your resolution.

Chairman Blewett stated we use to have the option to meet the 1<sup>st</sup> and 3<sup>rd</sup>.

Ms. Ward mentioned we use to have work meetings but they Brian said we shouldn't have the work meetings that we should just have a regular meeting on the cases.

Chairman Blewett mentioned it will always be the 3<sup>rd</sup> Thursday.

Mr. Neiss stated I don't understand that.

Ms. Ward mentioned our work meeting were like our regular meetings, repetitious and the public wasn't in attendance so he thought they were a conflict. If the applicants wants to schedule an informal committee meeting, we still do that.

Mr. Neiss stated I don't especially agree with that, like some of the more busy ones like Montclair we have meetings twice a month. One is a work session and one is regular meeting of the Board.

Ms. Ward mentioned well our work sessions were almost similar to what our regular meetings.

Mr. Neiss stated well right because there is so much to get done so it almost doesn't matter. The notion to have an applicant meet with a committee that is in the earlier phase of the development.

Ms. Ward mentioned correct.

Chairman Blewett stated we are going to stick to once a month, the third Thursday.

Ms. Ward mentioned unless you need a special meeting.

Mr. Neiss stated and that raises the question of does our ordinance contemplate special meetings.

Ms. Ward mentioned yes. We have a fees for it, application and escrow fees so we are covered.

Mr. Neiss stated okay that's terrific. Do you know that I've heard of a case, but a town that shall remain nameless in Hudson County, where Board members actually get paid to come to special meetings. I don't want anybody to get any ideas okay.

Chairman Blewett stated we need to change that to 7:30 to 10:30.

Mayor Runfeldt asked can we discuss 7?

Ms. Ward mentioned we tried 7 but you said you couldn't make it and I believe Chuck couldn't make 7 either.

Chairman Blewett stated I can make 7 but I might be running in here.

Mayor Runfeldt mentioned that's what I would be doing too.

Ms. Ward asked what's your pleasure.

Chairman Blewett asked do you guys want to do it earlier.

Mr. Kaufman stated I like 7.

Mr. Taormina mentioned I agree.

Mr. Koldyk asked what is it 7 to 9.

Chairman Blewett stated 7 to 9 with the option to go later.

Ms. Ward mentioned no 7 to 10.

Mr. Neiss stated 7 to 10.

Ms. Ward mentioned we'll have to adopt a resolution.

Mr. Neiss stated you'll have to adopt the resolution and publish it because it was already published your meeting schedule for the year.

Ms. Ward asked do you want to change it now or January 1<sup>st</sup> it is up to the board.

Chairman Blewett stated I would prefer to get through the by-laws and adopt them and then if we have to publish we publish. It is really not going to impact too many people right.

How about other comments? You had some right? You guys didn't have comments?

Mr. Morreale mentioned I had questions and Joan answered them through an email.

Chairman Blewett asked does anybody have any other questions or updates, or anything that you want to change on that.

Ms. Brightman stated I sent you the possibility of teleconferences attendance of a meeting if you want to consider that? It means nothing to me, but I just amended my by-laws and we allow for that. I don't know if you can do that with the planning board?

Mr. Neiss stated technology poses a real problem for the Municipal Land Use Law. A similar question to this one is should board members be talking off-line by email between themselves about an application.

Ms. Brightman mentioned no it is a violation.

Mr. Neiss stated they should not be. Communicating with Joan about an application saying I'm

not going to be here that kind of ministerial communication is fine. There are communities that I'm involved with where board members actually do have substantive discussion about applications that violates the due process of applicants. If an applicant gets denied and finds out that there were these communications going on, you can bet your bottom dollar that this is going to become part of the lawsuit that comes later.

With regard to conference calls and being a part of the meeting, the law doesn't permit that at this point and time. I don't know what the rules would be for skyping because you would have to be able to see the evidence that is being put forward by the applicant and maybe using skype you might be able to see it. It is sort of an iffy proposition at this point and time.

Mr. Boorady stated a witness could be called in correct by phone? Let's say a neighbor who has testimony on --

Mr. Neiss stated at this point given what the nature of the law is I wouldn't do that.

Mr. Boorady mentioned I thought there was case on that that a witness could call in.

Mr. Neiss stated the purpose of a hearing is to hear and see. Many times Appellate decisions say, look we weren't there so we couldn't gauge the demeanor of the witness. We couldn't engage what was going on in the court room, we can't evaluate that. All we get at the Appellate Division is a hard cold record. One could argue that having a witness phone it in is tantamount to that.

Chairman Blewett mentioned so if there are any other comments and you wouldn't mind being the clearinghouse --

Mr. Neiss stated I have no problem being the clearinghouse.

Chairman Blewett mentioned if you could update that and send it back.

Mr. Neiss stated sure.

Chairman Blewett mentioned if anybody has any other thoughts, pass them to Arthur.

Mr. Neiss stated I would ask you to take a look through them because all of you have enough experience with the board and dealings with applicants to be able to say this sound a little off and maybe we can do it this way, or that's not the way we do it. These that I provided are more or less like generalized By-laws. These are what you are going to live by, so I would again ask you to take a look at them and if you do have any comments just email me and I'll incorporate them all.

Chairman Blewett mentioned we want to prioritize the ordinance so I think the indemnity ordinance should take precedence.

Ms. Ward ask do you want the draft By-laws on the August meeting so you can review them again.

Chairman Blewett said sure.

Ms. Ward mentioned if you could update them and email them to me Arthur.

Mr. Neiss stated if you are going to do this I would ask that you take a look at the By-law sooner rather than later and that way you can get a copy and I'll red line them.

Chairman Blewett stated you have mine already but I can send them again.

Mr. Neiss stated would you please just to be on the safe side.

Chairman Blewett thanked everyone for that input.

Ordinances I guess we will carry that because Sal is not here.

We do have one other item with new business which is the selection of the traffic expert. We had a meeting earlier with the committee and Jonathan is going to summarize what we discussed.

Mr. Terrero stated prior to the meeting we reviewed the traffic proposals for the project for the traffic pattern changes down by the Wexford site just to get a better understanding of that how it affects not just the site but the surrounding areas.

We sat with Tom and we actually saw a preliminary plan and what they are proposing. We discussed the different traffic engineers' proposals and the consensus is we are recommending JDA to be hired based on their application, and also past history with the town and what they performed for the town so we are presenting them as a viable option.

Chairman Blewett asked if there is any discussion. We did have two other applicants and it was Simoff Engineering and the other one was Judd Riociola. I think one of the things at least in my opinion sent me in JDA directions is they actually took an active interest in the application. They came in and they reviewed what existed at the time and so there was some due diligence put into it you know what they sent to us. The other proposals were very limited to a few pages in context.

Mayor Runfeldt stated JDA has a history of doing work both with this board and the board of adjustment.

Chairman Blewett mentioned yes. So I guess if there are no concerns or objections, we would like a voice vote to kind of ratify that choice.

Ms. Ward asked for a voice vote in favor to hire JDA as your expert.

Board: Aye.

Chairman Blewett asked anybody opposed.

Board: None

Chairman Blewett stated hearing none we will go with JDA.

Okay is there any other new business?

Ms. Ward mentioned we have a meeting on August 16<sup>th</sup> and we have a public hearing on the steel company application on Beaver Brook Road.

Chairman Blewett asked is there a motion to adjourn.

Mr. Terrero moved to adjourn.

Mr. Morreale seconds.

Meeting adjourned 9:04 P.M.

Respectfully submitted:

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Joan Ward, Secretary

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Charles Blewett, Jr., Chairman