

**MAYWOOD PLANNING BOARD  
MINUTES  
July 26, 2018 Closed Session #2018-09**

Chairman Frank Lichtenberger made a motion to go into Closed Session. Rick DeHeer seconded the motion. All eligible members present voted in favor of the motion.

**BOROUGH OF MAYWOOD PLANNING BOARD  
Closed Session Resolution # 2018-09**

BE IT RESOLVED by the Planning Board of the Borough of Maywood, pursuant to the provisions of the Open Public Meetings Act, that the Maywood Planning Board met in closed session to discuss the following subject matter(s): Pending litigation

which subject matter(s) is (are) permitted to be discussed in closed session pursuant to the following designated sub-section(s) of Section 7 of the Open Public Meetings Act:

- Sub-section 1 dealing with material rendered confidential by express provision of Federal or State law
- Sub-section 2 covering a matter in which release of information would impair a right to receive federal funds
- Sub-section 3 involving disclosure of material that would constitute an unwarranted invasion of privacy, including material related to an individual's personal and family circumstances, without the express written consent of the individual involved
- Sub-section 4 pertaining to collective bargaining agreements and the terms, conditions and negotiations thereof
- Sub-section 5 dealing with the acquisition of real property, the setting of bank rates, or the investment of public funds where discussion thereof would adversely affect the public interest
- Sub-section 6 dealing with tactics and techniques used in protecting the safety and property of the public where disclosure could impair such protection or investigation of violation of the law
- Sub-section 7 dealing with pending or anticipated litigation, contract negotiations, or matters falling within the attorney-client privilege
- Sub-section 8 concerning personnel matters dealing with employment, appointment, termination, or terms and conditions of employment of any person or persons, or the evaluation, promotion or disciplining of employees unless all employees involved consent to disclosure thereof

( ) Sub-section 9 involving deliberations after public hearing on a matter which may result in the imposition of a civil penalty or the suspension or loss of a license

AND BE IT FURTHER RESOLVED that, as precisely as can be determined at this time, the discussion conducted in the said closed session can be disclosed to the public upon taking final action thereon, provided disclosure shall not violate the attorney-client privilege or constitute an undue invasion of privacy; and

BE IT FURTHER RESOLVED that the Planning Board of the Borough of Maywood  
(X) Will return to open session after this meeting.  
( ) Do not envision that they will return to open session after this meeting but reserves the right to do so.

Date of Passage: 7/26/18 Time: 7:43pm

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Board Attorney Kara Kaczynski introduced the Borough's Joint Insurance Fund (JIF) counsel, Mary McDonnell for the Empire Real Estate Holdings, Inc. vs. Borough of Maywood and Maywood Planning Board litigation. Board Attorney Kaczynski updated the Board on the status of the litigation. She explained that she and Ms. McDonnell had a case management conference with the Court 2 weeks ago. At that conference, the Judge outlined the schedule for discovery/depositions and set the trial date for the end of 2019. The Court ordered mediation in an effort to have the plaintiff and defendant resolve the problem. Mediation is an opportunity to discuss a proposal that would work for both parties.

Ms. McDonnell provided some of her background as a trial attorney. She explained that she represents the Borough and the Board although she is paid by the JIF. She described the perils of litigation as the expenditure of time and money. She mentioned the fee shifting provision whereby the prevailing party could have their attorney fees paid by the non-prevailing party. She then advised the Board to work on a solution to the problem.

Zoning Officer James Mazzer believes that settling the case is in the best interest of the Borough. He noted that the plaintiff's tenant Metro Ambulance is already in place at the location. If the Borough and the Board come to a settlement, the tenant's use of the property could be controlled.

Ms. McDonnell notified that the Board that the Court ordered mediator is retired Judge Carver. She advised that the Board must entertain settlement options as directed by the Court. There are 2 weeks to discuss the settlement with the Board before briefs are due to the Court.

Chairman Lichtenberger reminded the Board that the decision to deny the Applicant's use was unanimous. He asked if the Judge reviews the application history before rendering a decision. He specified that the Applicant had leased the property without a Certificate of Continued Occupancy, jackhammered the curbs, etc. Both Board Attorney Kaczynski and Ms. McDonnell emphasized that the Court does a complete review of the application and transcripts of the hearings prior to rendering a verdict.

Board Attorney Kaczynski detailed the proposal by the plaintiff:

- 14 parking spaces on the property
  - Board Engineer had agreed that 13 spaces were viable, but the 14<sup>th</sup> space would need to be reconfigured
  - Spaces 1-6 on the south side of the building would be for passenger cars only
  - Spaces 7-14 on the north side of the building would be for ambulances, ambulettes and other transport vehicles

Chairman Lichtenberger interjected that the DEP approval for the property is unknown. Ms. McDonnell suggested including that the settlement would be contingent on DEP approval. The DEP buffer size is unknown, however, if the DEP designates a buffer greater than what is depicted on the site plan, the Applicant would be required to return to the Board. She added that the request to bifurcate the case was denied by the Court. There are two options:

- Non-binding mediation to settle
- Prerogative writ trial which may be followed by a civil rights trial

Ms. McDonnell added that the discovery phase could be lengthy and expensive.

Chairman Lichtenberger believes that litigation is too costly and that settlement is the best option. Members of the Board agreed that settlement is in the best interest of the Borough.

Ms. McDonnell recently observed approximately 24 vehicles parked on the property. If a settlement is reached, the Borough could enforce the agreed number of vehicles. Currently, the tenant has no limitation on the number of vehicles on the property.

Board Attorney Kaczynski listed the options and limitations that the Board may consider as it relates to the plaintiff's proposal:

- Use
- Parking spaces
- Ingress and egress
- Paving and striping
- Curbing

Anthony Klymenko noted that the Applicant testified to cleaning up the brook after he took ownership of the property. Ms. McDonnell said that the DEP representative would be notified of that fact. Chairman Lichtenberger added that the Applicant testified that he tampered with the brook on the record.

Board Attorney Kaczynski reiterated that DEP approval would be a condition of the settlement. Chairman Lichtenberger stated that the DEP would establish the buffer size and drainage requirements. Ms. McDonnell added that DEP jurisdiction supersedes municipal approvals.

Board Attorney Kaczynski asked the Board to list items for the proposal to the plaintiff:

- Repair/replace curbing
  - It would not make sense to have the curbing restored to the original condition until we have an agreement since vehicles need to access the property
  - Allow certain curb cuts
- Define ingress and egress

Ms. McDonnell reported that the plaintiff claims that no accidents have occurred at the location since the tenant took occupancy but this statement has not been verified.

Board Attorney Kaczynski continued to list items the Board would want included in the proposal to the plaintiff:

- Restriction on the number of parking spaces

Chairman Lichtenberger is concerned that the tenant wished to expand the business. Ms. McDonnell responded that the business growth would need to be at an alternate location if a settlement was in place since the agreement would define the number of vehicles permitted. Zoning Officer Mazzer would enforce the settlement conditions.

Harry Hillenius asked why go through this process since the DEP may deny the application. Ms. McDonnell replied that the Borough needs to be prepared if the DEP approves the application. John McManus asked if Bergen County approvals would be required since the property fronts on a county road; the address is 191 West Central Avenue. Secretary Charlotte Panny asked if State of New Jersey approvals were required because the location is near an access road to a state highway. Board Attorney Kaczynski does not believe that state approvals are required but a condition would be added that the plaintiff seek approvals from all entities having jurisdiction including the DEP and Bergen County.

Board Attorney Kaczynski reminded the Board of the plaintiff's proposal in regards to number of parking spaces:

- 14 parking spaces on the property
  - Spaces 1-6 on the south side of the building would be for passenger cars only
  - Spaces 7-14 on the north side of the building would be for ambulances, ambulettes and other transport vehicles

Board Attorney Kaczynski repeated that the buffer size required by the DEP could affect the number, configuration and circulation of parking spaces. Secretary Panny believes that it is the burden of the Applicant to seek DEP approval. Board Attorney Kaczynski agreed that it is up to the Applicant to seek DEP approval but believes that a DEP letter of interpretation would be beneficial.

Board Attorney Kaczynski continued to list the plaintiff's proposal to the Board:

- Approve Metro Ambulances use of the property and other contractors like HVAC, etc. with similar limitations

Discussion amongst the Board ensued with unanimous agreement that the Metro Ambulance use could be approved but any other use unpermitted in the zone must come before the Board. While the Board acknowledges that contractor use has similarities to non-emergency medical transportation use, each application is unique and must be reviewed by the Board.

Chairman Lichtenberger feels that settlement will fix the problem between the parties and the DEP decision will affect the ultimate settlement. Board Attorney Kaczynski agreed that the settlement and DEP determination should be pursued concurrently. She asked the Board to authorize an offer prior to mediation. The Board discussed multiple items in their proposal to the plaintiff:

- Propose 10 parking spaces on the property
  - Spaces 1-5 on the south side of the building would be for passenger cars only
  - Spaces 6-10 on the north side of the building would be for ambulances, ambulettes and other transport vehicles
- Authorize counsel to increase to 12 parking spaces on the property if necessary to settle the matter
  - Spaces 1-6 on the south side of the building would be for passenger cars only
  - Spaces 7-12 on the north side of the building would be ambulances, ambulettes and other transport vehicles
- Define ingress and egress per the site plan
- Angle parking spaces by 45°
- Pave the parking area
  - Zoning Officer Mazzer feels strongly that this must be done to protect the brook
  - Necessary stormwater management and quality will be determined once the extent of the paving is confirmed
- Repair the curbing once the curb cuts are determined
- Limit use to Metro Ambulance only
- Seek approvals from all entities having jurisdiction including the DEP and Bergen County

Ms. McDonnell felt that this counter proposal was fair. Gary Neumann asked what the timing would be for the plaintiff to seek DEP approval. He was concerned that the Applicant continues to delay seeking DEP approval in order to keep the business operating with approximately 24 vehicles on the property. Board Attorney Kaczynski explained that if the counter proposal is accepted, the number of vehicles on the property would be immediately reduced while awaiting DEP approval. Anthony Klymenko has experience with the DEP and believes that letters of interpretation are issued quickly. Gary Neumann requested that the counter proposal include a requirement to keep the property well maintained. Chairman Lichtenberger is concerned that plaintiff may not remove the snow properly and believes that dumping snow into the brook is illegal.

Chairman Lichtenberger made a motion for Board Attorney Kaczynski and Ms. McDonnell to present the counter proposal above to the plaintiff. Secretary Panny seconded the motion. All eligible members present voted in favor of the motion.

Ms. McDonnell noted that the Mayor and Council must also approve the counter proposal. The mediation is scheduled for Thursday, 8/30/18 in Hackensack and invited members of the Board to attend.

Chairman Frank Lichtenberger made a motion to return to the regular order of business. John Gargagliano seconded the motion. All eligible members present voted in favor of the motion.

Respectfully submitted,

Tara Grunstra  
Planning Board Recording Secretary