

# TOWNSHIP OF MIDDLETOWN

Planning Board  
One Kings Highway  
Middletown, NJ 07748-2504

JOHN DEUS  
Chairman



Organized December 14, 1667  
"Pride in Middletown"

SANYOGITA S. CHAVAN, P.P., A.I.C.P.  
Director of Planning

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## PLANNING BOARD MEETING MINUTES OCTOBER 7, 2020

A Regular Meeting of the Planning Board of the Township of Middletown was held in the main meeting room at Town Hall, One Kings Highway, Middletown, New Jersey, at 6:30 P.M. on October 7, 2020.

The notice requirements provided for the Open Public Meetings Act have been satisfied. Notice of this meeting was properly given by transmission to the Independent, the Star Ledger and the Two River Times and by posting at the Middletown Township Municipal Building and filing with the Township Clerk on January 9, 2020.

To ensure the health and safety of our residents during the COVID-19 pandemic, Middletown Township Planning Board changed the format to a virtual meeting, via WebEx. The Middletown Planning Board notified the Independent, the Star Ledger and the Two River Times of the Meeting Change.

All notification was given pursuant to the Open Public Meetings Act at least 48 hours prior to this meeting.

Roll call was taken with the following members present in the main meeting room at Town Hall: Mr. Deus, Mr. Rathjen, Mr. Colangelo, Ms. Eteson, Mr. Schweizer

The following members present via WebEx: Committeeman Kevin Settembrino, Mr. Berson (logged in at 6:48 pm), Mr. AmecAngelo.

Also present: James Gorman, Board Attorney; Robert Keady, PE, Board Engineer; Sanyogita Chavan Board Planner; Erin Uriarte, Board Secretary; John Adams, MIS; Thomas Incorvaia, Assistant Planner (online).

A salute to the flag followed. The Board Secretary read the agenda.

### APPROVAL OF MINUTES

**August 5, 2020** - MR. SCHWEIZER OFFERED A MOTION TO APPROVE THE MINUTES OF AUGUST 5, 2020, SECONDED BY MR. RATHJEN. ALL PRESENT, ELIGIBLE MEMBERS VOTED IN FAVOR BY VOICE VOTE.

### RESOLUTIONS

**#2019-205, Fred & Barbara Meisler, Block 962, Lot 14, 385 Highway 35, Resolution Dismissing Application without Prejudice** – MR. RATHJEN OFFERED A MOTION TO APPROVE THE RESOLUTION, SECONDED BY MR. SCHWEIZER.

Roll Call:

Ayes: Rathjen, Settembrino, Eteson, Colangelo, AmecAngelo, Schweizer

### **Many Neighborhoods. One Middletown!**

Belford ◦ Chapel Hill ◦ Fairview ◦ Harmony ◦ Leonardo ◦ Lincroft ◦ Locust ◦ Middletown Village  
Monmouth Hills ◦ Navesink ◦ New Monmouth ◦ North Middletown ◦ Nut Swamp ◦ Oak Hill ◦ Port Monmouth ◦ River Plaza

Nays: None

### **PUBLIC COMMENT**

Mr. Deus opened the meeting to the public for anyone who wishes to comment on items not on the Agenda, however no one appeared.

### **ADMINISTRATIVE MATTERS**

**Payment of Vouchers** – Mr. Rathjen indicated that he has reviewed the invoices and recommends their approval.

MR. RATHJEN OFFERED A MOTION TO APPROVE THE PAYMENT OF VOUCHERS FOR OCTOBER 7, 2020, SECONDED BY MR. SCHWEIZER. ALL PRESENT MEMBERS VOTED IN FAVOR BY VOICE VOTE.

### **OLD BUSINESS**

None

### **NEW BUSINESS**

**#2020-200, Middletown Walk, Block 825, Lots 53, 55, 64, 66, 67, 76-78 and Lots 54, 70 and 81; located in the Circus Liquors Redevelopment Area; Kings Highway East, Application for Amended Preliminary and Final Major Subdivision and Amended Major Site Plan in Accordance with the Circus Liquors Redevelopment Plan** – Mr. Gorman noted that the Notices are in order and the Board has jurisdiction to hear this matter. He further explained that the Board has heard this application and made a decision back in December 2019. There is a legal term known as Res Judicata, which prevents the Board from hearing a matter that has already been decided. He noted that the Board had decided on this issue and it went unappealed. At this time, the Board can waive Res Judicata and decide hear the full application. He noted there are a few new members who were not present during the previous hearing, however he has reviewed the transcripts and the issue regarding roof top decks was discussed, ad nauseam, and decided.

Board Members recalled discussions from the previous hearing, noting resident concerns driving the decision to not have roof top decks.

Mr. Giunco advised he does not feel that res judicata would apply because the removal of 40 roof top units would qualify as a substantial change. He has case law to substantiate that position. The applicant meets the standards of Pressman v. Cash and Hackensack Weiner. Series of cases that are applicable...

In the first instance, res judicata is a principal of law that bars a party from relitigating a second time that which was previously litigated. That is clear in Hackensack v. Weiner. In that instance it applies to final judgements of a tribunal and has been applied to Board. However, in Pressman Cash and other cases they determined that in order for Res Judicata to apply there must be no substantial change and the conditions surrounding the property. In this circumstance, the removal of 40 units from the roof decks is that substantial change. For that, he would like to apply, or refer to, a series of cases...

First, Home Builders v. Northern New Jersey Paramus Borough and in that case, the application sought to construct five feet where 40 feet is required and it was denied. 14 Months later the applicant applied and they said it did apply because the relief sought was identical. In contrast to that case, Tzeses v. The Board of Trustees of South Orange – court recognized a substantial change in number of units.

Russel v. Tenafly goes a little further – Boards are required to literally construe facts in favor of the applicant. During this site plan review there was a case called Stochel v. Planning Board of Edison and in that case, the court held that the Planning Board Site Plan review was never intended to include legislative or quasi-judicial power to prohibit a permitted use. Under the redevelopment plan, the roof top decks are a permitted use. A follow up case determined that the Board had no authority to decide at site plan based on its view, that a use permitted under its ordinance is inconsistent with principals of sound zoning. That was Wawa Food Market v. Planning Board and was a 1988 case. In that case the Courts said, the Site Plan review gives the board wide discretion to assure compliance with the objectives and requirements of the site plan ordinance, it was never intended to include the legislative or quasi-judicial powers to prohibit a permitted use.

A further case along the same lines, Shakoor Supermark v. Old Bridge and in that case the court held that noise and traffic generated by intensification of a permitted use may be addressed by imposing appropriate conditions and restrictions as a condition of site plan approval, rather than barring the proposed use. In another case, Dunkin Donuts v. North Brunswick, a Planning Board has no authority to deny an application based on existing off-site conditions, including conditions in this case as on Carriage Lane. In Cox Koenig, it says a site plan may not be denied premised on concerns related to Municipalities beliefs as opposed to Land Use powers and polices the power which zoning ordinances are adopted.

Mr. Giunco submits that the change of 40 units being removed along the area of which there was a compliant along Carriage Lane, the interior remaining units are the units for which they request roof decks. That is a substantial change and secondly, he would suggest that the Board's actions to deny this use is contrary to the case law that was just discussed. The Board did not have the power to make a judicial or legislative determination as to whether ordinance is capable or valid or invalid. The court is saying that the ordinance is decided by others and the proper remedy is to seek to abate the concerns through design criteria rather than the denial of that use. It seems to him, that it was the applicant's intent to modify the application to remove the roof top decks from the Carriage Lane units to address the concerns that were raised. Mr. Giunco suggests that there is a substantial change which permits the Board to hear the application and the case law is clear that legislative action is not within the Board's powers. A denial of a permitted use in this redevelopment plan is an exercise of legislative power by this Board. He is requesting that the Board consider those factors and permit his client to present their application to modify the plan by eliminating roof decks along Carriage Lane.

Mr. Deus asked why they did not appeal the Board's decision back in December. Mr. Giunco explained that his client was under a contractual obligation and the land sellers were not in a position to grant an extension. The applicant is required to begin construction by December of this year and they felt the appeal process would not allow for them to meet the contractual obligations.

Mr. Gorman stated that he interprets the case law different and feels that Res Judicata would apply. It is up to the Board to decide if a substantial change has been made or they can decide to waive Res Judicata if they feel it was not a substantial change. He agreed that roof top decks are permitted in the redevelopment plan, however the issue has been discussed and decided and was not appealed.

Chairman Deus recalled the issue being discussed ad nauseam and stated that contractual obligations are not the fault of the Board.

Committeeman Settembrino asked if this is being sent back to the Board on remand. Mr. Gorman advised it is not.

CHAIRMAN DEUS OFFERED A MOTION TO NOT REHEAR THE ROOFTOP DECK PORTION OF THE APPLICATION, SECONDED BY MR. RATHJEN.

Roll Call:

Ayes: Deus, Rathjen, Settembrino, Berson, Eteson, Colangelo

Nays: AmecAngelo, Schweizer

Ms. Uriarte advised the motion passes with a 6 to 2 vote.

Chairman Deus advised it is okay to move on with the application. Mr. Giunco stated that the applicant is requesting a change in the phasing plan, to become compliant with the redeveloper's agreement. He summarized that all Affordable units will be constructed by the time 50% of the townhouse units are constructed. Again, this is in accordance with the Redeveloper's Agreement.

Ms. Chavan advised the Planning Department has no problem with that change.

Mr. Giunco indicated the second request is in regard to the temporary construction basin.

James Kennedy was sworn in and accepted as an expert Engineer. Mr. Kennedy explained that the shift in the basin's location is being done due to a request by the Freehold Soil Conservation District. There will be no impact or detriment on the development plan. Mr. Keady confirmed the FSCD requirement.

Mr. Kennedy noted that they are also seeking to relocate the sales and construction trailers, to a location directly across the street from where they had been approved. This provides for safer access and parking. He noted that the trailers are temporary, as is the basin. All temporary material will be removed for final design.

Chairman Deus asked if there is a sales trailer for the Affordable units. Ms. Chavan explained that the Township's Affordable Housing office will be handling those units.

Mr. Giunco advised that the final request is for an extension of approval. He noted the unprecedented COVID emergency and the statutory allowance that was in place in before COVID. Mr. Gorman agreed this is not an unusual request for projects of this size; the clock has been ticking since their original approval. COVID will be considered in the tolling period once the emergency is declared to be over.

Chairman Deus opened the hearing for members of the public via WebEx.

Danielle Donohue, 35 Carriage Lane, was sworn in and indicated she is not in favor of the extension being granted. She has concerns with construction process being dragged out over several years and asked that the phasing plan be adjusted to minimize impact on the neighbors. Mr. Gorman explained that the applicant is entitled to extensions under the law, the other changes proposed are to comply with outside agency requests, noting that is another reason for granting an extension. The remaining site plan, as approved, will remain as is.

Committeeman Settembrino advised that the Redevelopment Plan would remain in place either way.

William Donohue, 35 Carriage Lane, was sworn in and asked for clarification on the tree line between the properties. Mr. Giunco advised there is no change proposed to the previously

approved buffer area. Mr. Donohue indicated concerns with flooding in his neighborhood. Mr. Gorman explained that is not part of this application.

Gerald Mahood, 29 Carriage Lane, was sworn in and asked questions related to the change in the temporary basin. Mr. Kennedy explained the changes were requested by Freehold Soil Conservation District in order to capture sediment during the construction process to mitigate run-off and prevent any downstream impact.

Rosemary Newberry, 9 Kennedy Court was sworn in and asked questions related to the traffic study now that the Commercial component is no longer moving forward. Mr. Gorman explained that traffic was discussed as part of the previous approval, the traffic improvements were tied to the commercial portion of the redevelopment, which is not before the Board this evening.

Laura Patten, 23 Carriage Drive, was sworn in and asked questions related to the FSCD request and soil testing. Mr. Kennedy explained the calculations that spurred the change, nothing that FSCD did not and does not test soil. DEP has not done environmental testing. The Environmental Studies are on file as part of the previous application. Ms. Patten expressed concerns with flooding.

Matthew Mauro was called by did not answer. He indicated audio issues and requested to type his question.

Ms. Chavan called several phone callers by number, however no one responded. She indicated that Mr. Mauro's question related to environmental concerns that were part of the previous application. All documents are still on file should anyone wish to make an appointment to review them.

CHAIRMAN DEUS OFFERED A MOTION TO CLOSE THE PUBLIC PORTION OF THE HEARING, SECONDED BY MR. COLANGELO. ALL PRESENT MEMBERS VOTED IN FAVOR BY VOICE VOTE.

MR. SCHWIEZER OFFERED A MOTION TO APPROVE THE REQUESTS FOR THE ENLARGEMENT OF THE TEMPORARY BASIN, RELOCATION OF THE SALES AND CONSTRUCTION TRAILERS, MODIFICATION TO THE PHASING PLAN AND FOR AN EXTENSION OF APPROVAL. THIS MOTION WAS SECONDED BY MR. RATHJEN.

Roll Call:

Ayes: Deus, Rathjen, Berson, Eteson, Colangelo, AmecAngelo, Schweizer

Nays: Settembrino

### **ADJOURNMENT**

CHAIRMAN DEUS OFFERED A MOTION TO ADJOURN THE MEETING AT 8:11 PM, SECONDED BY MR. SCHWEIZER. ALL PRESENT MEMBERS VOTED IN FAVOR BY VOICE VOTE.

Prepared by:



Erin Uriarte,  
Board Secretary