

BOROUGH OF CAPE MAY POINT

Planning Board

Meeting Minutes

Wednesday, November 20, 2019 at 7:00 pm

Cape May Point Fire Hall

Pledge of Allegiance

Opening

In compliance with the Open Public Meetings Act, adequate notice of this session has been provided by official announcement in the Star and Wave Newspaper and posting of the scheduled meeting dates on the official Municipal Bulletin Board, 215 Lighthouse Avenue, Borough of Cape May Point, New Jersey.

Roll Call

Present: Mr. Greenberg, Mrs. Busch, Mr. Fraatz, Mr. Keosky, Mr. Hood, Comm. vanHeeswyk, Mr. Casey, Mr. Murphy

Absent: Mayor Moffatt, Mr. Yunghans, Mrs. Leming

Also Present: Rhiannon Worthington, Secretary; Mr. Nathan Van Embden, Esq., Attorney

Minutes

Mrs. Busch asked about the accuracy of item 1.a.i.iii. Mrs. Worthington felt the item accurately represents discussion between the board members but stated she would listen to the minutes again and revise accordingly. She advised she would notify the board members of her findings and final determination.

The minutes from the October 16, 2019 meeting were reviewed and approved with amendment if needed, on a motion by Mr. Keosky and second by Comm. vanHeeswyk. All present voted aye except for Mr. Greenberg and Mr. Fraatz who abstained.

Business

1. Prior to review of the draft minutes, Mr. Casey made a motion to raise a question of privilege. Mr. Greenberg granted the motion.
 - a. Question of privilege relates to Board consensus reached at previous meeting regarding date NJDEP presentation was to be scheduled. Two questions were posed:
 - i. Why was the board member consensus overridden?
 - ii. Is there a means to prevent information from being received by board members "second hand"?
 - b. Mr. Van Embden asked for confirmation that the general discussion was in regards scheduling the presentation at a time that was most beneficial for the Board and public as well as worked within the speaker's schedule. Mr. Casey agreed.
 - c. Mr. Casey stated that after robust discussion at the meeting, information was released through the Taxpayer's Association Bulletin that the date had been rescheduled in conflict with the Board consensus. He felt that the change made was disrespectful to the board members who had spent time and provided valid reasons as to why the presentation should not occur in December.

- d. Mr. Van Embden stated that Board consensus was not required to schedule a presentation, primary concern is when the speaker is available, which he was not. He also stated he was not in favor of administrative tasks such as when a presentation should occur, taking up the time of the Board.
- e. Mr. Van Embden summarized by saying that even if the date was changed after the board meeting, it came to light that the presenter had a long standing appointment for the December meeting date and was unable to attend, requiring the presentation to be scheduled for a later date regardless.
- f. Mr. Van Embden noted that there was training facilitated by the same presenter at a recent City of Cape May Historic Preservation Commission meeting, and information was provided to all board members who would like to attend. Mr. Casey confirmed that this session and training could also be viewed on the City website as one of their regularly scheduled and recorded meetings.
 - i. Mrs. Worthington indicated she would email the link to the meeting recording to all board members for their review.
- g. Mr. Casey requested it be noted that his question was not answered and requested the discussion be tabled. Mr. Van Embden advised that would not be necessary as the date change was a moot point.
- h. Mr. Keosky responded as the Chair of that meeting and confirmed he was in support of the date change at that time. He indicated that it was later he understood the purpose of the presentation was to educate the Board, not the public, although the public was always welcome to be present, and no decision would be made as a result of the presentation. Once this was clear and there was no detriment to proceeding as originally scheduled, he notified various sources of publication, including the Taxpayer's Association and the Cape May Star and Wave, to notify those who would be interested regarding the change and the rationale. He noted he was dismayed by the lack of detailed reporting that occurred. Mr. Keosky stated that although the Board consensus was legitimate, the date change was a clear attempt to not further delay a process which started in February since the intent was to educate the Board members. This would have led to a full transparent discussion at the appropriate time.

2. Historic Preservation Subcommittee Update

- a. Mr. Greenberg advised the board that Mr. Yunghans will provide the update at the next meeting. Update will include Mr. Kinney's availability for a presentation.
- b. Mr. Greenberg stated that Mr. Kinney was unavailable on the 17th of December meeting and is waiting to hear from Mr. Greenberg or Mr. Yunghans as to when the presentation should be scheduled. Mr. Greenberg stated that as the Chairperson of the subcommittee, Mr. Yunghans would advise Mr. Kinney of an alternate date upon his return from being out of the country.
- c. Mr. Greenberg summarized his actions in regard to historic preservation since February, noting that he was away at the time it was reported by the Taxpayer's Association that a duty to form a subcommittee to address this concern had been designated to the Planning Board, but acted accordingly and urgently. It has since been confirmed by Mrs. Worthington and the Municipal Clerk that this action was never formally requested. He noted that Mr. Casey and his wife, President of the Taxpayer's Association, can speak regarding Board information if they choose to and is unclear how some of the secondhand information in question has been available to the Taxpayer's Association. Despite the lack of formal request, the subcommittee has pursued the topic in the interest of serving the public, with Mr. Kinney traveling to Cape May Point as well as Mr. Yunghans traveling to Trenton, both giving of their time and resources, as well as many others in the community. Mr. Kinney recently presented in the City of Cape May and information was provided to board members about the session; Mr. Greenberg and Mary Kelly, member of the community, were in attendance. Mr. Kinney has offered to meet to address the board so they can be better educated and return in the spring to offer the same information to the public. Mr. Greenberg hopes that by that time, the subcommittee would be ready to present its findings to the Board for discussion, leading to a determination by the Board if recommendation of historic preservation to Council is an appropriate action for the Borough. He clearly stated that at no time has he or any other member of the Board, that he is aware of, made recommendations directly to the Commissioners on behalf of the Board.

- i. Mr. Casey asked what prompted these statements and Mr. Greenberg responded that it was in direct response to comments in recent meetings regarding the actions of the subcommittee and board members. He reminded all concerned about transparency that every meeting is open to the public.

3. Exterior Lighting Discussion

- a. Mr. Van Embden reminded the Board they had discussed these issues 2 years ago and he located the draft resolution created by the previous solicitor and confirmed it had not been memorialized. He noted that the file included ordinances from Eatontown, Hunterdon County, Ocean Township and a model ordinance and a draft resolution. Correspondence indicated that this resolution had not been memorialized, for reasons unknown. He noted that the draft resolution is limited to the scope discussed at the last meeting.
- b. Mr. Van Embden advised the Board that Mrs. Worthington would distribute the resolution for review by board members for the next meeting. She noted she would also include associated minutes in the distribution, providing context regarding the previous discussions.
- c. Mr. Van Embden confirmed this work was completed before the Planning and Zoning Boards were combined so some members may not have participated.
- d. Mrs. Busch thanked Comm. vanHeeswyk for the article distributed via Mrs. Worthington about the Dark Sky Association and how important this issue is.

4. Joint Insurance Fund (JIF) Land Use Liability Training

- a. Mr. Van Embden summarized the purpose of this training and reviewed provided documents as required. Although board members are insured collectively, participation in this training meant each member would be insured by JIF personally for litigation.
- b. The main theme of the training is that board members should seek advise of counsel if unsure about any of their responsibilities or actions as member of the Board. You are only protected, and it is only “official” advice, if provided by the Board’s land use attorney.
- c. Basic principal of land use law is that no person has the right to use property in a fashion that threatens public safety or is so noxious that it materially impairs the rights of the adjacent property owners and the government does not have the right to adopt regulations that effectively prohibit all reasonable use of private property. Land use is a quasi-judicial function and has the same broad immunities afforded those involved. This often prevents land use claims from coming before municipalities.
- d. It is important for members to maintain quasi-judicial behavior by hearing all sides of case and refraining from pre-determined decisions or discussions. These immunities are not afforded to individuals who are violating someone’s civil rights and monetary awards can be awarded.
- e. Land use liability cases are expensive to defend due to fee shifting component.
- f. Review of cases exemplifying board member immunity, conflict of interest, reverse condemnation, religious considerations, noxious uses, illegal enforcement, meeting with applicants and board member indemnification.
- g. Meeting conduct was reviewed; examples of public comment were discussed. It was confirmed that while a group of people with like mind, present at the meeting, can be represented by one speaker, however, reading a letter representing individuals who are not present at the meeting would be insufficient. Mr. Van Embden noted that representation of a community is usually done by an attorney and not an individual of the community.
- h. Board Questions
 - i. Mr. Keosky commented that it seemed like most exposing time for board members is during findings of fact and asked if there were any suggested do’s and don’ts for this part of a hearing.
 - i. Mr. Van Embden responded that is the time when board members can most carefully justify your decision making. He noted that he feels that all the board members have done right by saying what they heard, how it was considered and how it affected

- decision making and should continue to do so. Members should not reference personal bias or external pressure.
- ii. Comm. vanHeeswyk mentioned having been advised in previous classes that the list of reasons provided in the MLUL book should be referenced, regardless of how convoluted the justification may be.
 - i. Mr. Van Embden clarified that would apply to a use variance only, however, yes, assuming good faith is behind the justification, then it is the correct way to proceed. It should not be done to cover ill intentions.
 - iii. Mr. Casey asked about disclosure of members of LLC or other business entity ownership.
 - i. Mr. Van Embden noted that it is generally disclosed as part of the application.
 - ii. Mrs. Busch noted that many times conflicts in Cape May Point are due to property location (neighbors). Mr. Casey noted it has occurred with attorneys as well.
 - iv. Mr. Casey expressed concern about not allowing all the public to speak and the impact that may have on the Board's understanding of the public opinion.
 - i. Mr. Van Embden stated that the rules indicate that the board should entertain the opinions of the public, however, a chairperson could request, after repetitious comments, that only new comments be presented. This is not intended to discourage the public from speaking, but to ensure all concerns and arguments for or against the topic are expressed. He noted this is at the discretion of the Chairperson and handled on a case by case basis.
 - ii. Mrs. Busch noted that the 4-minute limit indicated in the agenda is partially to address this situation as well. She also suggested that perhaps the Chair could indicate when limiting comment that all public should still speak, identifying themselves and their position, but indicating that they agree with a previous person or comment.
 - iii. Mr. Van Embden noted that the guidelines must be established during a meeting in a formal way, like the Board adopting the commentary added to the agenda regarding public comment.
 - v. Mr. Keosky asked about visiting the property and interacting with the property owner.
 - i. Mr. Van Embden advised that board members should visit the subject property and announce themselves as appropriate. They should not intentionally meet with the applicant or property owner and should not discuss merits of the application.
 - vi. Mr. Casey asked about suggestion to announce visit date and time with representation by counsel.
 - i. Mr. Van Embden said that can create sunshine law concerns/violations and should be managed carefully. He suggested site visit consist of viewing the property from the street and review via google maps.
 - vii. Mr. Casey asked about use of phone or camera to record site visit (video and/or images).
 - i. Mr. Van Embden advised that the video or images would not be evidentiary but could be used as noted for that board member. He noted that most site visits should be from the sidewalk and not include trespass on the subject property, however, in events where this may be appropriate a more formal visit should be arranged.
 - i. Mr. Van Embden clarified that board indemnification must be adopted by the governing body and is suggested but not required. Comm. vanHeeswyk to confirm the Borough's position regarding board member indemnification.
 - j. All board members present signed group affidavit, certifying attendance.

Public Comment

1. Public comment was opened at 8:05 pm on a motion by Mrs. Busch and second by Mr. Keosky.
2. Mary Kelly – 421 Cambridge Avenue CMP

- a. Asked for a repeat of the list of towns whose ordinance was used to create the draft ordinance that was previously discussed.
 - i. Mr. VanEmbden listed the municipalities Hunterdon County model ordinance, Eatontown exterior lighting guide and Ocean Township ordinance.
 - b. Noted that at previous meetings, counsel has successfully shortened public testimony, particularly when a meeting is running later into the evening, by asking if speaker has anything new to add after identifying self and position.
3. Public comment was closed at 8:07 pm on a motion by Mr. Keosky and second by Mr. Fraatz.

Board Information

1. Mr. Fraatz asked if the board would be reviewing the capital budget plan for consistency with the Master Plan.
 - a. Comm. vanHeeswyk and Mr. Van Embden confirmed it was within the Board’s jurisdiction to do so.
 - b. Mr. Fraatz requested a copy be provided to the Board for review once available.

Adjournment

The meeting adjourned at 8:10 pm on the motion by Mrs. Busch. All present voted aye.

Respectfully Submitted by:

Rhiannon Worthington

Board Secretary

Approved by Board 1/15/2020