

CMP POLICY & IMPLEMENTATION COMMITTEE MEETING

Richard J. Sullivan Center
Terrence D. Moore Room
15 C Springfield Road
New Lisbon, New Jersey
Friday, January 30, 2015 – 9:30 a.m.

MINUTES

MEMBERS IN ATTENDANCE: Chairman Mark Lohbauer, Candace Ashmun (via telephone), Sean Earlen, Paul E. Galletta, Robert Jackson, Ed Lloyd, Richard Prickett and Ed McGlinchey (2nd Alternate)

OTHER COMMISSIONER PRESENT: Alan W. Avery, Jr.

STAFF PRESENT: Executive Director Nancy Wittenberg, Stacey Roth, Larry Liggett, Susan R. Grogan, Paul Leakan, and Betsy Piner. Also present was DAG Kristen Heinzerling.

Chairman Lohbauer called the meeting of the Policy and Implementation (P&I) Committee to order at 9:40 a.m. and announced that Commissioner Ashmun was attending by telephone.

Ms. Roth noted the presence of a Commission quorum.

Ms. Heinzerling read the Open Public Meetings Act statement.

Ms. Roth said that those Commissioners present who are not members of P&I were welcome to participate in discussion but could not be allowed to vote. She said the Committee serves in an advisory capacity to the Commission and makes recommendations to the full Commission but does not take action.

1. Adoption of minutes from the October 31, 2014 CMP Policy & Implementation Committee meeting

Commissioner Prickett moved the adoption of the October 31, 2014 meeting minutes. Commissioner Jackson seconded the motion. The minutes were adopted with all Commissioners voting in the affirmative except Commissioner McGlinchey, who abstained.

Ms. Wittenberg announced that item #3 on today's agenda, the presentation by Winslow Township, was withdrawn.

2. Executive Director's reports

Barnegat Township Ordinance 2014-23, amending Chapter 55 (Land Use) by adding mixed use development as a conditional use in the Neighborhood Commercial Zone within the Pinelands Regional Growth Area

Ms. Grogan said that Barnegat Township Ordinance 2014-23 affects one zoning district in the Pinelands Area of Barnegat Township, the C-N (Neighborhood Commercial) Zone within the Regional Growth Area (RGA). The ordinance adds mixed use development as a conditional use within the C-N Zone to allow retail and commercial development on the ground floor and age-restricted multi-family apartments on the second and third floors. Previously, only commercial, retail and institutional uses had been permitted. The Commission's interest is how Pinelands Development Credits (PDCs) will be used for the residential component. The Ordinance permits a maximum density of 11 units/per acre with the required use of PDCs for 25% of all units. She said this was not the traditional PDC requirement of a base density with a PDC obligation on any bonus units; rather it is a mandatory percentage that will guarantee the use of PDCs. Ms. Grogan also said the sole property in the zone that will qualify for mixed use development is a 15-acre parcel on which some 42 rights would be required if the project were built to maximum density. She said that there is an old approval for this project but the developer is amending the application and photos have appeared in the newspaper of the proposed project. Ms. Grogan said a public hearing had been conducted but no one spoke and no written comment had been received. She said staff recommends approval of the ordinance, based on the fact that this is in the RGA and will mandate the use of PDCs.

Commissioner Ashmun moved the recommendation that the Commission certify Barnegat Township Ordinance 2014-23. Commissioner Earlen seconded the motion.

In response to a question from Commissioner Galletta if it were common to see age restricted housing on second and third floors, Ms. Grogan said that although she had not seen it in the Pinelands Area, she had seen it elsewhere. She added that the Township is supportive of the project.

Chairman Lohbauer called the vote and all voted in favor.

3. Plan Review: Discussion of policies, guidelines and procedures for the consideration of Memoranda of Agreement

Chairman Lohbauer said during the Plan Review process, the issue of Memoranda of Agreement (MOAs) had been raised and he had discussed it with Ms. Wittenberg. He thought perhaps the issue might best be reviewed by an *ad hoc* Committee consisting of representatives of state, county and municipal governments as well as the public. He said he was exploring the issue and more discussion will take place as to how to proceed. He noted the meeting materials included in today's packet reflect the complexity of the issue. He said he did not want to nominate a committee today but to begin considering it.

Commissioner Ashmun said when the Commission convened the *ad hoc* committee to discuss alternate design wastewater treatment systems, a relatively small group of Commissioners, as well as individuals with technical knowledge, had gathered helpful and useful knowledge. She said if the MOA review were undertaken by such a Committee, the full Commission would then review its recommendations and perhaps develop rules.

Commissioner Avery stated that although he was not a member of this Committee, he was here today to disagree with the formation of a committee for this particular issue. He said this is the one issue arising from Plan Review in which he was most interested. He said the end results of any study are likely to be controversial and he wanted as many Commission members as possible to work on MOAs themselves. He said he did not believe any external involvement was needed.

Commissioner Lohbauer reiterated that an *ad hoc* Committee would be purely advisory.

Commissioner Avery responded that no one was more aware of the requirement of eight votes to pass any motion by the Commission. However, he said he felt a working group recommendation would develop a life of its own and, should the Commission choose not to accept any recommendations, it would be accused of ignoring its own committee. He said a working group would have weight beyond that of the Commission.

Commissioner Lloyd said he agreed the MOA process needed examination. He had no strong opinion if it were to be done by an *ad hoc* or the P&I Committee but it needed to be open and involve the public.

Commissioner Galletta said he would like to poll the full Commission regarding changing the MOA process before proceeding. He did not feel the P&I Committee alone should decide how to proceed.

Commissioner Ashmun said the Commission needed to get as much information and be as efficient as possible.

Commissioner Jackson said the P&I Committee needed to deal with MOAs rather than the full Commission. He said there are certain things in the MOA process that need to be changed.

Ms. Heinzerling cautioned the Committee not to address any specifics of the recent past unless it chose to go into closed session.

Commissioner Jackson said he was not thinking of any specific MOA, but the Committee needed to look at foundational issues behind MOAs and not keep making the same mistakes.

Commissioner Earlen said he supported Commissioner Galletta's recommendation to go to the full Commission and see if there is an interest in taking up the issue. He felt this interest was a response to a sole application.

Commissioner McGlinchey said, prior to being a Commissioner, he had served on the *ad hoc* Septic Committee convened by former Commission Executive Director John Stokes. He said he

didn't disagree with polling the full Commission but hoped this could be an opportunity to reach out to and include some members of the public.

Commissioner Prickett said as long as he'd served as a Commissioner, MOAs have been a concern. He said he believed the Commission need to look at the procedure and saw no harm in listening to the public.

Commissioner Jackson said he supported Commissioner Earlen as long as the Commission had an opportunity to see if it needed to address what needs to be tweaked.

Commissioner Ashmun said she had recommended the formation of an *ad hoc* Committee in order to get input from the municipalities, counties and other state agencies with which the Commission worked to develop MOAs. She said they had all been on the other side of dealing with the issue.

Chairman Lohbauer stated: 1, this MOA review would in no way be a review of any previous applications, rather an evaluation as to how to proceed going forward; and 2, the Comprehensive Management Plan (CMP) does not call for a vote in order to establish a new Committee. He said he would ask all Commissioners of their interest in addressing MOAs but was not putting the question of establishing an *ad hoc* Committee to a formal vote.

Ms. Heinzerling said the Committee would meet in closed session to discuss matters related to attorney-client privilege.

At the suggestion of Commissioner Lloyd, the Committee chose to receive public comment prior to meeting in closed session.

4. Public Comment

Mr. Bill Wolfe recommended that the Commission impose an administrative moratorium on any waivers or MOAs until it performed a critical review of the status of "equivalent levels of protection" in an open and transparent way. He said this was a recommendation he had made during the discussions of the South Jersey Gas (SJ Gas) application in July 2013. He said the documents posted on the Pinelands Preservation Alliance's (PPA's) web site reveal that Commission staff had engaged with the applicant starting back in 2012. Also, he described other information that he characterized as showing conflicts. He said the Committee's upcoming closed session this morning would not constrain him from speaking about legal concerns related to the MOA. He said the public has no confidence in the Commission's Executive Director or the Counselor due to the revelations in the posted documents. He said the Commission needs to ask for whom its staff works. There had been ongoing conversations with the governor's office and the Board of Public Utilities (BPU). Mr. Wolfe said the Executive Director is supposed to review staff recommendations but that process was tainted by the interjection of SJ Gas. Referencing correspondence between SJ Gas and the Commission's counselor asking about the veracity of a statement he had made, Mr. Wolfe said he wanted his comments reviewed by staff, not by the applicant. Mr. Wolfe said the recusal process for Ed Lloyd (*at the time of the vote on the SJ Gas application*) had been reviewed by the New York Times and emails indicated that the

Governor's Authorities Unit had been involved in near real time. He said decisions are being made not by the Commission but by Trenton.

Commissioner McGlinchey said he took exception with Mr. Wolfe naming names and said he should speak only in generalities.

Commissioner Lloyd said he generally agreed with Commissioner McGlinchey's position but this is a tough situation in which the public is addressing the record that exists. He said he shared the concerns that the public should not attack individuals.

Ms. Fran Brooks, a resident of Tabernacle Township, asked if the Commission had a time frame for reviewing MOA standards. She also asked if this review would include an evaluation of existing public comment procedures.

Chairman Lohbauer responded that the schedule and scope for the review had not yet been established.

Ms. Georgina Shanley, a resident of Ocean City, NJ, said she had read the documents provided through an Open Public Records Act (OPRA) request on PPA's web site and she agreed this is a faulty process. She expressed concern with collusion between the applicant and staff. She said the MOA had been designed by the applicant before the BPU, the Pinelands Commission or the public ever knew about it. The public had not been allowed deeply into the process. For example, she said, at the April 11, 2014 Commission meeting, when asked if there had been any further meetings with the applicants (since the defeat of the vote approving the pipeline), Ms. Roth had responded, No. However, the emails posted on the PPA web site show evidence of communication. Ms. Shanley said the Commission cannot keep going into closed session. The CMP is being gutted for the sake of tax relief and jobs. There is no interest in protecting, preserving and enhancing the Pinelands; the Commission needs those who care deeply about the Pinelands, not politicians, serving on its Board.

Mr. Fred Akers, with the Great Egg Harbor Watershed Association, said he had been coming to these meetings for more than 10 years on a regular basis. He said he agreed with the concept of reviewing the MOA process and noted that he observed a significant change several years ago when the Commission introduced the concept of accepting cash payments. He said previous mitigation measures were required to be undertaken by the applicant. For example, he referenced the Robert Miller Airpark expansion requiring an offset for land for threatened and endangered species. He said he believed the money going into the fund was somehow trickling down to pay staff. If an applicant cannot provide the offset, then that may be an issue to review. He said he supported the review of the process and deals with cash payments.

Ms. Margo Pellegrino, a resident of Medford Lakes, said she hoped the Commission members who spoke out against a review of MOAs take a look at the process.

Ms. Marilyn Miller, a resident of Toms River, said she cannot imagine how Commission members feel being in a hot spot. She said she commended anyone who spoke up about the

MOA process. Also, she said the MOA process turns the Commission into a real estate agency. She said she had a passion for the Pinelands and was bothered that there is an MOA process.

Mr. Doug O'Malley, with Environment New Jersey, said he represented some 20,000 citizens. He thanked the PPA for its advocacy in using the OPRA laws to obtain the record to show what was happening during the 2012-2014 (S.J. pipeline application) process. He thanked Chairman Lohbauer for raising the issue of reviewing the MOA process. He said the Commission cannot be seen as a handmaiden of an applicant or the Governor's office. He said the posted documents show the level of involvement of SJ Gas in the process. Mr. O'Malley said the four governors who submitted the letter opposing the pipeline had been involved in the Pinelands process and had noted that there will always be an applicant pushing a particular agenda. Mr. O'Malley also said that although the Commission accepted extensive public comment, individuals were limited to only three minutes. However, SJ Gas was granted more than three minutes. The review of the MOA process needs to make sure this never happens again. He noted the delay of nominees to the Commission and said the quality of the Commissioner is necessary if the public is to keep faith in the Commission. He concluded by saying whether it is a pipeline in the 1970s or today, there needs to be an air tight process that does not allow an applicant to have undue influence over the process.

Mr. Marianne Clemente, a resident of Barnegat Township, NJ, said she had not planned to speak until she heard Commissioner Avery. She directed comment to Commissioner McGlinchey and said these names are public record so naming names is naming facts. She said the MOA process was designed for infrastructure issues to benefit Pinelands residents and clearly SJ Gas went beyond that limit. She said she supported a review of MOAs that included members of the municipalities and the public.

Dr. Emile DeVito, with the NJ Conservation Foundation, stated he was alerting the Commission to Assembly Bill 1958 that would make an exemption for agriculture in wetlands in violation of the Clean Water Act. He said that, if passed, the Environmental Protection Agency could revoke New Jersey's administration of the Federal 404 program. He said this represents a huge rollback of wetlands protection, and the Commission should determine how Pinelands wetlands standards and definitions might be affected.

Chairman Lohbauer allowed Ms. Clemente to address the Committee again but said that her question regarding conflict of interest would not be addressed due to current litigation.

Commissioner Avery noted that, at the January 16, 2015 Commission meeting, he had announced the acquisition of 1,200 acres by Ocean County as part of the MOA for the Robert Miller Airpark. He said actually it was 1,726 acres, as corrected by Ms. Theresa Lettman (*with PPA and in the audience today*). Also Commissioner Avery said it would be inappropriate for the staff **not** to talk with the public and with applicants. He said there is a pre-application process that expressly allows for such discussion and guidance.

Chairman Lohbauer added that there is a balance to be maintained.

Commissioner Lloyd said there is nothing wrong with staff talking with an applicant. Any such discussion must be part of the public record. He said his understanding of the MOA review was

that it must include the requirements related to 1. that the process must be open to the public and the Commission members; and 2. those substantive standards of the MOA must be clarified to be sure that the Commission protects the precious resources of the Pinelands.

Ms. Heinzerling announced that the Committee would now go into closed session and that it was possible that action would be taken. (*Note: action can be taken only by a quorum of the Commission. As there were nine Commissioners in attendance, a quorum was present.*)

At 10:55 a.m., Commissioner Lloyd moved that the Committee meet in closed session to discuss matters related to attorney-client privilege. Commissioner Jackson seconded the motion and all voted in agreement.

Members of the public and most of the staff left the room. Ms. Heinzerling said she would prepare the minutes of the closed session. The closed session commenced at 10:58 a.m.

The Committee continued its meeting in open session at 11:10 a.m.

Noting that this issue had not been on the agenda, Ms. Heinzerling read a resolution into the record regarding the maintenance of confidentiality by Commissioners in reviewing un-redacted documents. The text of that resolution (*PC4-15-02*) follows:

WHEREAS, in the course of working toward settlement of pending *OPRA* litigation *Pinelands Preservation Alliance v. Pinelands Commission* (*BUR-L-1744-14*), certain *Pinelands Commission* documents were produced in full and certain *Pinelands Commission* documents were produced in redacted form or withheld due to the confidential and privileged nature of these documents;

WHEREAS, individual board members have asked to review the documents that were redacted and/or withheld due to the confidential and privileged nature of the documents; and

WHEREAS, the documents were redacted and/or withheld under *OPRA* and in the ensuing litigation because certain privileges, including attorney-client privilege and deliberative process, attach to the documents; and

WHEREAS, in addition to *Pinelands Preservation Alliance v. Pinelands Commission* (*BUR-L-1744-14*), the *Pinelands Commission* is also defending other litigation, to which the documents pertain, related to its January 10, 2014 vote on the proposed Memorandum of Agreement between the *Pinelands Commission* and the Board of Public Utilities, *In the Matter of the Resolution Authorizing the Executive Director to Enter Into a Memorandum of Agreement With The Board of Public Utilities Regarding Construction of Approximately 15 Miles of 22-Mile, 24-Inch Natural Pipeline in the State Designated Pinelands Area* (*A-003035-13*); and

WHEREAS, due to the pending litigation, there is a need to ensure there is no inadvertent waiver of confidentiality or any privileges associated with the documents.

NOW, THEREFORE BE IT RESOLVED that *Pinelands Commission* acknowledges that the subject documents are privileged and confidential;

BE IT FURTHER RESOLVED that the Commission does not intend to waive any privileges attached to the subject documents and is specifically not waiving any privileges that attach to these documents when an individual board member reviews them; and

BE IT FURTHER RESOLVED individual board members remain under a duty to keep the documents and information contained in the subject documents confidential pursuant to N.J.S.A. 52:13D-25.

Commissioner Lloyd moved the adoption of the resolution. Commissioner Jackson seconded the motion and all Commissioners present voted in the affirmative with the exception of Commissioner Earlen, who voted No.

7. Other Items of Interest

Mr. Wolfe said that official action was taken today and he found it extraordinary at a Committee meeting.

Commissioner McGlinchey thanked Ms. Heinzerling for working to provide the documents to the members.

Commissioner Prickett reminded everyone of the upcoming Pinelands Short Course and encouraged attendance.

Chairman Lohbauer said he was not in the habit of commenting or responding to the public. However, today the Committee had heard some derogatory comments regarding the staff. The fact that Commissioners remain silent is not a reflection that public comment is condoned or that there is agreement. He said he took exception with derogatory comments and said he believed they merited an apology.

The meeting adjourned at 11:16 a.m. (moved by Commissioner Earlen and seconded by Commissioner Jackson).

Certified as true and correct:



Betsy Piner,
Principal Planning Assistant

Date: February 12, 2015