

Township of Manalapan
120 Route 522 & Taylors Mills Road
Manalapan, NJ 07726
(732) 446-8367

Planning Board Minutes
April 28, 2022

The meeting was called to order with the reading of the Open Public Meetings Act by Chairwoman Kathryn Kwaak at 7:30 p.m., followed by the salute to the flag.

Roll Call: Daria D'Agostino, Secretary

In attendance at the meeting: Barry Fisher, Todd Brown, John Castronovo, Alan Ginsberg, Daria D'Agostino, Kathryn Kwaak, Jack McNaboe, Barry Jacobson, Steve Kastell

Absent from meeting: Richard Hogan, Brian Shorr

Also present: Ronald D. Cucchiaro, Planning Board Attorney
Brian Boccanfuso, Planning Board Engineer
Jennifer Beahm, Planning Board Planner
Lisa Urso-Nosseir, Recording Secretary

Mr. Cucchiaro swore in Brian Boccanfuso, Professional Engineer and Jennifer Beahm, Professional Planner.

Minutes:

A Motion was made by Mr. Castronovo, Seconded by Mr. Fisher to approve the Minutes of April 14, 2022 as written.

Yes: Brown, Fisher, Ginsberg, D'Agostino, Castronovo,
Kwaak, McNaboe, Jacobson, Kastell
No: None
Absent: Hogan, Shorr
Abstain: None
Not Eligible: None

Resolution: PMA2149 ~ Village at Battleground Neighborhood
Association, Inc., c/o Association
Advisors NJ
2 Yates Road ~ Block 6513 & 6514 / Lot 1
Amended Preliminary and Final Site Plan

A Motion was made by Mr. Fisher, Seconded by Ms. D'Agostino to approve the Resolution for PMA2149 for new signs for the Village at Battleground Neighborhood Association.

Yes: Brown, Fisher, Ginsberg, D'Agostino, Castronovo,
Kwaak, McNaboe, Jacobson
No: None
Absent: Hogan
Abstain: None
Not Eligible: Kastell, Shorr

Ordinance 2022-07: An Ordinance of the Township of Manalapan, Amending and Supplementing Chapter 95, "Development Regulations," of the Code of the Township of Manalapan Pertaining to the Definition of "Flex Space"

Ms. Beahm explained that this is a modification of a definition. The Master List does not specifically speak to this one way or the other. Therefore in Ms. Beahm's opinion, this is substantially consistent with the Master Plan.

A Motion was made by Mr. Fisher and Seconded by Mr. Castronovo, that Ordinance 2022-07 is substantially consistent with the Master Plan.

Yes: Brown, Fisher, Ginsberg, D'Agostino, Castronovo,
Kwaak, McNaboe, Jacobson, Kastell
No: None
Absent: Hogan, Shorr
Abstain: None
Not Eligible: None

**Application: PPM2106~Mercer Realty Partners, LLC
51 HWY 33 ~ Block 79.02 / Lots 4.01, 4.02 & 7
Preliminary and Final Major Site Plan**

Ron Shimanowitz, Esq. appeared on behalf the applicant, Mercer Realty Partners, LLC. The application was carried from the March 10, 2022 meeting, but that was simply for scheduling. The presentation commenced at the February meeting. Mr. Cucchiaro interrupted Mr. Shimanowitz just to see if there were any other attorneys present this evening that wanted to enter an appearance this evening. There were no other attorneys present.

Mr. Shimanowitz continued and said at the February meeting, he presented three witnesses, one of which was Mr. John Kainer, who is a principal of the applicant. We presented our planner, Mr. Dan Block, as well as our site

engineer, Renee Antiss. He said on April 18, 2022, we submitted to the Board revisions and responses to the review letters and we are prepared tonight to summarize those revisions so that the Board is up to date with what we are now proposing. One major change in the plans is that we have made some changes to eliminate all waivers and variances - this is a straight up Preliminary and Final Site Plan application with no variance or waiver relief. Mr. Shimanowitz stated he would like to call Ms. Antiss, for the purpose of solely to talk about the revisions. He also has new witnesses which is the architect, and the traffic engineer.

Ms. Beahm stated she wanted to interject. She said there was a question at the last meeting about the jurisdictional issue about whether or not this is actual flex-space, and based upon what was proposed and the realistic options associated with what is proposed, associated with the warehouse and the other proposed uses. She believes that at this point, because this is a jurisdictional issue, we should deal with that matter first.

Mr. Cucchiaro stated he did have an opportunity to speak with Mr. Shimanowitz ahead of time, so that it wasn't something that they would be discussing for the first time tonight. Mr. Cucchiaro said as Ms. Beahm stated, there was a two-fold issue at the first meeting. The first issue was whether there had to be full tenancy of all the uses, or whether there was just required set-aside. The second issue, is what he would call the set-aside of the non-warehouse space being 'phantom' space, and not viable for the other uses that would allow it to be defined as a flex-space. The significance is that flex-space is permitted, and if it is a permitted use, then the Planning Board has jurisdiction to hear and consider the site plan application. If it is not a permitted, then it would require a Use Variance which would have to go to the Zoning Board, and the Planning Board would not have jurisdiction. The resolution of that issue is necessary to understand which Board proceeds with the application.

Mr. Cucchiaro said there is a case, *DePetro v. Wayne Township Planning Board* and he cited the case to Mr. Shimanowitz so he would have an opportunity to read it - and he has, and we've discussed it. Mr. Cucchiaro's reading of the case says that when there is an issue as to jurisdiction of a Board having to do with the interpretation of an Ordinance, the Municipal Land Use Law under 40:55D-70b vests exclusive jurisdiction to resolve that issue with the Zoning Board. This Board may recall the application of Countryside Developers. There was an issue with the term warehouse/ distribution facility. That went to the Zoning Board, but in that instance, there was an objector who brought it to the Zoning Board. It was resolved and this Board did have jurisdiction and we proceeded and there was a record that was made, but the issue of what it meant in the Ordinance was resolved by the Zoning Board.

Mr. Shimanowitz said he disagrees with Mr. Cucchiaro's position for several reasons. We object to the whole process of what has happened here. We submitted an application, it was given a date for a hearing and we proceeded with the hearing. We presented experts and went forward with our presentation and he thinks it is highly irregular to keep bringing this issue up now. We reserve that and object on that basis, but the DePetro case that Mr. Cucchiaro refers to is actually helpful to the applicant. It really dealt with a new use that had not been known in Land Use Law and an interpretation was necessary. It is quite the opposite here - the uses that are in the definition of flex-space are well known to even the common reader of the section of the Ordinance. Whether or not there is a requirement to use a set aside, or percentage of each of those uses, is clear and not in need of an interpretation. There is no percentage required, there is no set aside required, it simply says as long as you have two or more of these uses, and then it goes on to list the categories. There is nothing ambiguous about that definition, there is nothing that needs to be interpreted by the Zoning Board, so we would object to that process. He would also add when you read DePetro and you read the cases around it, the Planning Board does have some interpretative powers. It's not as if you can't look at an Ordinance and in certain instances, interpret what it means. We feel we are properly before the Planning Board and it has jurisdiction and we should have the right to proceed with presenting our case.

Mr. Cucchiaro said the argument is an interpretation. The argument that you need not interpret it, is an interpretation of what the Ordinance means. The argument as to what the standard of review is when interpreting an Ordinance, it requires you to interpret the Ordinance. Here, he believes the fundamental fact is that the interpretation of the Ordinance turns on whether this Board or the Zoning Board has jurisdiction. There are other interpretations that have to do with the setback or a buffer, that would not change the interpretation. It is a fundamental issue as to which Board has jurisdiction. He understands the applicant doesn't feel it is a complex issue, but the complexity of the issue is not what drives the process. The process is driven by what jurisdiction the MLUL grants to each Board and in his interpretation of the DePetro case, it says that when you have a jurisdictional issue that flows from the interpretation of an Ordinance, §70B says it's the MLUL. We agree to disagree, Mr. Shimanowitz, and we had some very Land Use expert conversations about it. Mr. Cucchiaro says his question is to Mr. Shimanowitz because it will drive how we proceed tonight, so based upon your statement, does the applicant reject voluntarily going to the Zoning Board?

Mr. Shimanowitz said yes, we do not feel we need to go the Zoning Board. Mr. Cucchiaro said he just wanted to make sure he understood correctly. Mr. Cucchiaro said so what the Planning Board needs to do tonight as an initial matter, is make a determination whether number one, going with Mr.

Shimanowitz' legal argument, or accepting Mr. Cucchiaro's legal argument. If the Board accepts Mr. Shimanowitz's argument, then the Board will proceed with having the hearing tonight. If the Board agrees with Mr. Cucchiaro's interpretation of the law, and considering that the applicant will not voluntarily go to the Zoning Board, then the Board has to make a threshold determination as to whether it can proceed without understanding whether it has jurisdiction. There are some cases, like an Edison Zoning Board case, TWC Realty where a Zoning Board decided very early on it didn't have jurisdiction, but that had to do with not an Ordinance interpretation, it had to do whether the aspects of that case represented a re-zoning or not. The court held that you should heard the testimony and then made the decision. Here, there is no professional testimony on what the Ordinance means, that is a legal issue, not any kind of professional issue, and it goes to the jurisdiction. If the Board determines that the jurisdictional issues need to be resolved, and considering that the applicant will not go to the Zoning Board voluntarily, he believes the Board can consider a denial of the application without prejudice until the jurisdictional issue can be resolved, whether it be by going to the Zoning Board or if there is a jurisdiction challenge to the Board's decision.

Mr. McNaboe said to Mr. Shimanowitz that he mentioned that we were bringing it up at this point. This was never brought up to you in all of your pre-application meetings with our professionals? Mr. McNaboe said he was shocked that Mr. Shimanowitz would use that term, that you are hearing about it for the first time. Mr. Shimanowitz said absolutely not - he doesn't want to give a misimpression. It was absolutely brought up - it was brought up in your professionals review letters, particularly by Ms. Beahm in her review letter, but having had it brought up and then coming to this Board and publicly noticing, and swearing in witnesses, either the Board has jurisdiction or it does not. We started getting into issues about landscaping and details like that - if the Board didn't have jurisdiction, why did you have us spend that much time during the hearing? That is what he meant. Clearly, he didn't mean to give that misimpression - it was absolutely brought up. In fact, since it was brought up early on and we gave our position on it to your professionals, and then we said let's go to the Board, we thought we were good and moving forward and we had jurisdiction. Now we are debating whether the Planning Board has jurisdiction at this point in time.

Mr. McNaboe said we have many flex-space operations in town, most of them are the typical plumbers/electricians/painters, etc. and they have all strung together in a place where they need to park their trucks and spare equipment and keep it out of the weather. However, it's not a 95% / 1% / 1% breakdown, those businesses are spaced out more evenly. Here it seems like you have a warehouse and only 3% to make up the letter of the law for flex-space. Flex is not a problem, but none of them resemble your proposal. Mr. Cucchiaro said professionals do not determine jurisdiction at a TRC meeting - that is for a

Board to determine at a public hearing. It really didn't come up at the hearing until later on, but it certainly came up and it was discussed. He just wants to be clear that records need to be made - decisions need to be made by the Board.

Mr. Cucchiaro said we wouldn't be sending the application to the Zoning Board - the applicant has declined to go to the Zoning Board. The Board would be denying it without prejudice until such time as the jurisdiction has been adjudicated in whatever venue is appropriate and then it can, or it might not, come back to the Planning Board.

Mr. Ginsberg asked what would be the difference in the Planning Board denying it before hearing it, or hearing their arguments through this evening, and then denying it? Mr. Cucchiaro said you shouldn't be holding a public hearing if you do not have jurisdiction. If you make a determination that the relief that is necessary, it requires to you make a determination that they are here properly. In Mr. Cucchiaro's interpretation of *DePetro*, you can't do it - you shouldn't be hearing applications where you do not have jurisdiction to hear. In the Countryside Developers case, when that issue was raised by an objector, there was a very quick Zoning Board process and it was adjudicated and it came back to the Planning Board where they had jurisdiction.

Mr. Ginsberg said in his opinion, this is not flex-space, then technically he does not believe the Planning Board has jurisdiction. Mr. Cucchiaro said but you don't even have that ability to make that decision - that is the Zoning Board's decision, and that is the problem. This Board doesn't have the ability to interpret the Ordinance. That jurisdictionally is exclusively with the Zoning Board and we have to respect that decision, as we did in the Countryside case. Mr. Cucchiaro said that your determination that is not flex-space exceeds what your jurisdiction is here, and that is why he is saying that has to be resolved before we can continue. Mr. Ginsberg said based upon what you just said, he does not believe the Planning Board has jurisdiction to hear this. Mr. Cucchiaro said we do not have jurisdiction to determine jurisdiction. Mr. Brown said he would echo Mr. McNaboe's comments in regard to the spirit of this and he would also support Mr. Ginsberg's comments that we should probably should not be heard by the Planning Board. Mr. Brown said if we were to go that way, what would the proper procedure be? Mr. Cucchiaro said you would just deny it without prejudice and the applicant would have various options. The applicant could voluntarily go to the Zoning Board and seek adjudication, or the applicant could go to court and say the Planning Board was wrong. Either way, the court or the Zoning Board would have jurisdiction to render decisions, not the Planning Board. Ms. D'Agostino said she would have to agree with Mr. Cucchiaro's position.

Mr. Shimanowitz said before the Board moves and takes action, he requested a five minute break to discuss these matters with his client. Mr. Cucchiaro recommended that we give the applicant as long as they need to come to a decision.

The Board took a break to allow the applicant to discuss their position.

When the Board returned, Mr. Shimanowitz said on further reflection, the applicant is of the following mind. Faced with what they heard in the Board's deliberation and based on Mr. Cucchiaro's opinion, the applicant is faced with two alternatives. One being the Planning Board denying the application without prejudice, or alternatively, the applicant going to the Zoning Board for an interpretation. The applicant is going to choose going before the Zoning Board for the interpretation. The one clarification the applicant would request is to make it very clear as to what the issue is before the Zoning Board, so we don't appear before the Zoning Board and they say what do you want us to do, or what are you asking us? The Planning Board raised the question and you want an interpretation. We need to know exactly what you want the Zoning Board to look at, interpret and respond to with certainty. Mr. Cucchiaro said the Planning Board doesn't want to limit the applicant, so the applicant is free to ask whatever they want from the Zoning Board. The Planning Board's primary issue is the interpretation of that portion of the Ordinance which lays out just the permitted uses and whether that Ordinance requires that the collection of flex uses being proposed are viable, or whether there is any such 'phantom' use or whether Mr. Shimanowitz's interpretation is correct that the Ordinance does not go into that at all, and so long that there is any proposal for the collection of uses, it satisfies the Ordinance.

Mr. Cucchiaro said he would work out with Mr. Shimanowitz the method of getting to the Zoning Board. What he would like to do is just transfer the application to the Zoning Board for the interpretation. We will figure out the precise manner in which he can get on the Zoning Board agenda as quickly as possible.

Chairwoman Kwaak asked Mr. Cucchiaro for clarification if the Board has to do a Motion to carry the application? Mr. Cucchiaro said we would do a Motion to carry, after interpretation by the Zoning Board. Mr. Shimanowitz said is this how the Countryside case was handled? Mr. Cucchiaro said it was a little different because an objector brought his own application in that case. Mr. Shimanowitz said he would like the application to remain pending before the Planning Board and put it on pause until we go through the process. Mr. Cucchiaro said that is what we did with Countryside.

A Motion to carry the application of PPM2106 - Mercer Realty Partners, LLC, until after its interpretation at the Zoning Board was made by Mr. Castronovo and Seconded by Mr. Brown.

Yes:	Brown, Fisher, Ginsberg, D'Agostino, Castronovo, Kwaak, McNaboe, Jacobson, Kastell
No:	None
Absent:	Hogan, Shorr
Abstain:	None
Not Eligible:	None

Chairwoman Kwaak opened the floor to the public for questions or comments. Seeing none, the public section was closed. The next meeting is May 12, 2022.

Ms. D'Agostino made a Motion to end the meeting at 8:25 pm and it was agreed to by all.

Respectfully submitted,



Lisa Urso-Nosseir
Recording Secretary