

November 11, 2008

A special meeting of the Allendale Planning Board was held in the Municipal Building on November 11, 2008. The meeting was called to order at 7 p.m. by Mr. Quinn, Chairman, who announced that the requirements of the Open Public Meetings Act were met by the required posting and notice to publications.

The following members answered roll call: Mr. Barra, Mr. Bernstein, Mr. Fliegel, Mr. Quinn, Mr. Sirico, Mrs. Sheehan, Mr. Thomas and Mr. Yevchak. Mr. Tatosian and Mr. Herndon were absent. Also present was Mr. Dunn, Board Attorney.

Mr. Quinn announced that the only matter on the agenda this evening is the site plan application of 475 Franklin, LLC. Paul Kaufman was present as attorney for applicant.

Mr. Quinn said Mr. Dunn has done some research on the legal arguments and he will turn the meeting over to him for his report.

Mr. Dunn said at the last meeting a legal issue was opened with regard to this application addressing things like the Board's jurisdiction over the matter, the standing of the applicant in the matter, and the necessity to deal with certain things that were not included in the application. In particular, the concern that he addressed directly was the Board's ability to act with regard to this matter if a subdivision was not included as part of the site plan application.

This was discussed previously by the Board with Mr. Cotz, counsel for some objectors, and Mr. Kaufman, counsel for applicant. Briefly, their positions were that Mr. Kaufman urged the Board to consider that this is a developable lot as it stands – specifically, unit 21 which is the subject of this application and for which Mr. Kaufman's client, 475 Franklin Turnpike is a contract purchaser. Further, that this is a developable lot in its own ownership and does not require any subdivision as a predicate or component of the site plan approval. His reasons for stating this is that Unit 21 is a condominium unit and under condominium law, Title 46, Section 8B-4, a State statute, indicates that a condominium unit is a parcel of real property and as such is entitled to all of the rights and benefits of any land owner of a parcel within the State. He also suggested that the establishment of the condominium by the Planning Board originally was by its resolution and the title established unit 21 as fee simple which together with that resolution gave him the standing and integrity of this lot as a separate standing lot. Mr. Cotz argued to the contrary that this was always part of lot 14 with no separate designation under the Borough's tax rolls for unit 21.

Mr. Dunn said the Board asked the parties to present briefs or any materials they may have. Mr. Kaufman and Mr. Cotz both presented briefs and responses to each other's briefs that he reviewed. His review of their submissions and consideration of the applicable law with regard to condominiums and site plan development and cases relating to lots, subdivisions and site plans is such that he has come to the conclusion that this is not a developable lot as it stands before this Board in the present application .

The establishment of this unit 21 as a condominium unit by the Planning Board in 1983 together with the fee simple title which the applicant enjoys in this property does not rise to the level that this becomes a developable lot any more than the establishment of title in any other lot necessarily comes to that conclusion.

Mr. Dunn continued that Mr. Kaufman supplements that with the Statute that he cited previously saying that this is a parcel of land. He added that there is no question that under our law condominium units and associations and developments cannot be discriminated against. They are entitled to the same rights and enjoy the same real property rights that all other land owners do and that concept and principle pervades the whole discussion.

Mr. Dunn said that Mr. Kaufman believes it is clear from reading the statutory background and historical data of that statute that the purpose and intent of the statute is to establish condominiums and condominium units as actual interests in real property and to make it clear that real property owners of those condominium units have the same rights as other real property owners. Mr. Dunn said the suggestion that the condominium has a right to development would mean that in 1983 the Borough established 21 individual lots and that each had their own development rights. In response to that suggestion, Mr. Kaufman said that would not apply here because this was a particular and unique single family residence within this condominium and he went to some length to suggest that the limited common elements as they are called in their master plan, master deed and bylaws, essentially makes this lot so the common elements do not apply or are not affected. Mr. Dunn said that may or may not be the case in the case of the common elements on unit 21, the proposed development.

Mr. Dunn said it seems to him that a condominium association has a reasonable expectation when it is formed with 21 units that the common elements are shared by 21 unit owners or members. He does not know how that translates in terms of property rights, but he believes it needs to be a concern of the Board. He said his office has gone into this in some depth and the bottom line is that he believes that this application needs to have consent and approval and endorsement of the parent condominium association. The applicant clearly, contrary to what Mr. Cotz has suggested, does in his opinion have a standing to make the application and there are cases in the Appellate Division that indicate that a developer can do so. In other words, the application can be made even though he has not yet secured the full rights of ownership or application. It should be clear that if the Board makes a ruling with regard to this, it is not because of that suggestion. He feels that the applicant has standing and the Board would have the option to proceed with the application, but would have to do so conditioned upon an understanding that the approval for a site plan development of a unit would be endorsed by the Association to the Planning Board.

Mr. Dunn said the board has talked about this off and on from a year ago when the application was before it and also at the prior meeting and in correspondence between himself and Mr. Kaufman where he urged him to address these issues, but at this point

that has not occurred. Mr. Dunn said it is his understanding that it is Mr. Kaufman's position that the application presented does not need a subdivision approval or therefore the approval of the other people in the condominium association, the other unit owners, members or the association itself. Predicated on that, Mr. Dunn suggested to the Board at this point before proceeding at the cost and expense of many people, that the Board make a determination as to whether or not it is appropriate to proceed further.

Mr. Dunn said he has reviewed this carefully and in view of the circumstances he suggests to the Board that it make the determination as to whether or not it wishes to proceed and it would have the power and authority, but subject to the conditions as he indicated. However, his recommendation would be that they not do that at this time in view of the position of the applicant.

Mr. Dunn said he is recommending that a determination be made and he does not like to do this to an applicant, but the objectors and the people here this evening have the right to have some assurances with regard to the extent of the risk or what that risk is with regard to something that may impair property rights. He said there are rights of all parties appearing in the matter that need to be considered.

Mr. Quinn asked Mr. Kaufman if he would agree to the stipulations presented by Mr. Dunn if the Board were to proceed. Mr. Kaufman said, "No. I will not concede on the issue or waive any rights. I think Mr. Dunn is wrong." He added that he is prepared to proceed.

Mr. Bernstein concurred with Mr. Dunn's findings and opinion that the Board needs the consent, approval and/or endorsement of the Association to the extent that it wanted to proceed.

Mr. Fliegel moved to deny the application without prejudice since the applicant will not agree to the conditions imposed by the Board. Motion seconded by Mr. Bernstein.

Mayor Barra said he is going to abstain from voting for the following reason. Last year when the Borough was attempting to negotiate a settlement between the applicant and the concerned citizens of Allendale, he was approached by both parties to try to bring them together to reach a resolution that might work. He indicated to both parties that he did not think it was a good idea since he is a sitting member of the Planning Board and would be dealing with this matter. Both parties wanted him to participate and he did so at quite a few meetings. He said he felt in order to elicit a candid and open dialog he wanted them to be candid with him and therefore he felt things would be said to him that might prejudice his thinking when it came to a vote. He indicated that he would abstain from the vote and both parties acknowledged and agreed, so he therefore abstains from the vote this evening.

Mr. Kaufman said at no time did he ever question the Mayor's ability to be fair about this application notwithstanding his assistance in trying to bring about a resolution between the objectors and the applicant. This decision is his own choice and if he felt that the

Mayor would not be fair and objective, he would have asked him to recuse himself at the beginning.

On roll call, Mr. Bernstein said this is not something that has been taken lightly; certainly not by the Board Attorney or the members of the Board. He has read the briefs, he has read Cox and MLUL and he voted yes. Mr. Fliegel concurred with Mr. Bernstein's statement and voted yes. Mr. Quinn said he too is concerned about a precedent being set whereby any condominium owner can attempt to subdivide the property. He therefore voted yes. Mr. Sirico, Mrs. Sheehan and Mr. Thomas voted yes. Mr. Yevchak did not vote since he was not present at all of the hearings.

Mr. Dunn said he will attempt to have a resolution of memorialization prepared for the Board's meeting on November 20.

On a motion by Mr. Fliegel, seconded by Mr. Sirico, the meeting adjourned at 8:05 p.m.

Respectfully submitted,

Barbara Knapp