OCEANPORT PLANNING BOARD
MINUTES
August 11, 2010

Chairman Widdis called the meeting to order at 7:30 p.m. and announced that the meeting had been advertised in accordance with the Open Public Meetings Act.

Chairman Widdis led the flag salute.

MEMBERS PRESENT: Mr. Ibex, Mr. McCarthy, Mr. Savarese, Mr. Kleiberg, Mr. Sullivan, Mr. Gervolino, Ms. Flor, Mr. Fichter, Mr. Whitson, Mr. Widdis

MEMBERS ABSENT: Councilman Bertekap

OFFICIALS PRESENT: Jeanne Smith, Board Secretary, Rick DeNoia, Board Attorney and William White, Board Engineer/Planner

BOARD BUSINESS:

1. Minutes of the meeting of June 23, 2010 were approved as presented on a motion from Mr. Kleiberg and a second from Mr. Savarese and approved by the eligible Board members.

2. Minutes of the meeting of July 14, 2010 were approved as presented on a motion from Mr. Whitson and a second from Mr. Kleiberg and approved by the eligible Board members.

OLD BUSINESS:

3. 275 Port Au Peck Ave. Associates, LLC
   Request for Administrative Correction on Resolution for
   Preliminary Major Subdivision Approval – Condition #9

Chairman Widdis recused himself from the matter due to a conflict. Mr. Whitson assumed the Chair.

Mr. Sullivan recused himself from the matter due to a conflict.

Robert Inglima, Jr., Attorney for the Applicant, explained the reason that they were before the Board, gave a summary of the transcripts of the 2 hearings, testified what and where basements were discussed during the hearing and that there was no discussion to impose a condition prohibiting basements and should not have been included in the resolution of approval and respectfully requested that the Board consider their request to administratively correct an error in the resolution.

Mr. Fichter stated that his review of the transcripts state that the basements would be constructed above ground water? Mr. Inglima answered yes, that all construction would be above the ground water.

Mr. Kleiberg asked Mr. White if he had any issue with the request. Mr. White answered that one of the conditions was that they satisfy his review letter which requested additional soils information as that which was submitted was inconclusive as to the elevation of the seasonal high ground water table and that the finished floor was set a 2’ above the seasonal high so there would be no sump pump issues or wet basements. Mr. White continued that until he was provided with that information he could not set the height of the finished floor to the lowest floor which meant that some of the homes would not have basements. Presently the plan proposed 3 of the 12 dwellings to be built slab on grade and even those would have to provide that separation so there would be no issue with the groundwater table.

Ms. Flor stated that the Applicant then agrees to meet all those conditions of Mr. White’s letter for final approval.

Mr. DeNoia stated that the application only has preliminary approval and must meet the requirements and conditions before final approval would be granted including engineering and that the question before them was the prohibition against even having the opportunity to present engineering consistent with the ability to provide a basement and that the request was to remove the prohibition and allow the engineering to determine which houses if any could have a basement between now and final approval.

Mr. Inglima concurred and stated that Mr. Lorie's firms was preparing the information that Mr. White requested.

PUBLIC:

As there was no one from the public Mr. Whitson closed that portion of the hearing.

Mr. McCarthy commented that his review of the testimony was that the issue of basements was discussed a couple of times in connection with drainage issues but it was never discussed as a subject and that there was not enough discussion to justify the blanket restriction contained in the resolution.

Mr. Whitson also commented that he had carefully reviewed and that there was no discussion concerning a prohibition of basements by the Board and was not sure why it was in the resolution.

Mr. McCarthy made a motion to approve the request which was seconded by Mr. Savarese and received the following roll call:

AYES:	Mr. Ibex, Mr. McCarthy, Mr. Savarese, Mr. Kleiberg, Mr. Gervolino, Ms. Flor, Mr. Fichter, Mr. Whitson
NAYES:	None
ABSTAIN:	None
ABSENT:	Councilman Bertekap
INELIGIBLE:	Mr. Sullivan, Mr. Widdis

Ms. Smith stated the motion carried, application was approved.

Mr. Whitson stepped down and Chairman Widdis resumed as Chairman. Chairman Widdis stated let the record reflect that Mr. Sullivan had resumed his position to hear the next matter.

4. PB File: 2010-01
   T-Mobile Northeast
   Block 65, Lot 37
   196 Monmouth Boulevard
   Request for Use and Bulk Variances

Chairman Widdis asked for the record those members that had read transcripts of the previous hearing on this matter to be eligible to participate. Ms. Smith answered that all Board members for the matter were eligible to participate.

Mr. Pryor, Attorney for the Applicant, stated that this was the scheduled continuation date for the application of T-Mobile for which testimony began at a prior meeting. Mr. Pryor continued that a procedural issue had been brought to his attention earlier in the day and briefly explained he was told that there was an operating agreement for the LLC that requires any transaction by the LLC have approval of both members of the LLC – Bill Hazely who signed the owner's authorization for the subject property and Mrs. Hazely, his wife. He continued that the owner's authorization that was submitted for the application signed by Mr. Hazely indicates that he is the managing member of the LLC and that he was authorized to act on behalf thereof. Mr. Pryor stated that it would appear there was some issue as to whether or not the owner's authorization that was required for the application was, in fact, fully valid or whether or not an amendment could be secured.

Mr. Pryor discussed and commented at length as to why he thought testimony should not proceed that evening including possible prejudicial effect if a decision was rendered based upon hearings that took place when there was an owner's consent issue. Mr. Pryor stated that should the Board decide to not proceed with the application, he would like the opportunity to review the operating agreement of the LLC to determine if there was an ownership consent problem and if there were a legal effect from that. Mr. Pryor acknowledged that Mrs. Hazely was present and that she objects to the application

Mr. DeNoia summarized the issues at hand including the operating agreement, the allegation that the second member of the LLC had not consented or agreed to lease/contract that created the opportunity for T-Mobile to potentially place a tower on their property and then asked Mrs. Hazely to make whatever statement she chose and then have Mr. Pryor to respond accordingly.

Susan Hazely, 749 Norwood Avenue, Long Branch was sworn in stated that she was a 50 percent owner of Lucky Charm Real Estate, LLC, the owner of the subject property of the T-Mobile tower application and then testified that she was very much against the cell tower and had no idea that her husband with whom she was estranged, had gone forward with this as he had approached her months ago and would not agree to it. Mrs. Hazely further testified that she would not accept any amount of money to put a tower that could cause cancer or otherwise ruin people's home value and that their corporation agreement states that Mr. Hazely could not act alone.

Mr. Widdis asked Mr. Pryor if he had any questions for Mrs. Hazely.

Mr. Pryor answered no and stated that they would need to see the operating agreement and that they would need to get further information before proceeding.

Mr. DeNoia stated based on the testimony that evening it would be inappropriate to continue and that he did not believe that moving the matter forward was in the best interests of Oceanport, the Board or the application by T-Mobile.

Mr. DeNoia then summarized two options on how to proceed for the Board's consideration including dismissing the matter without prejudice and after resolving, reapply and proceed or the Board accepts jurisdiction based upon the information given to the Board as there was no indication that anyone misrepresented or defrauded in any way, a meeting was scheduled, testimony was given, and Mr. Pryor was for the first time hearing about an agreement, which he may or may not, upon reviewing that agreement, agree with the conclusions of the attorneys who are saying she needed to agree or not agree.

Mr. DeNoia continued that the Board has the right to carry and adjourn this particular matter to a date certain without having to re-notice or go through the entire process. The next available meeting was September the 22nd which would give Mr. Pryor five weeks to get a copy of the agreement, review it, get it to T-Mobile's legal department, he can negotiate, either independently or through other counsel, with the other member of the LLC to determine whether that position was or was not something that could be altered and if September 22nd he returns and was unable to resolve all of those issues, then at that particular time the Board can dismiss without prejudice and based on the fact that Mr. Pryor had never seen the agreement, to dismiss him that evening without giving him that opportunity might not be as fair.

Mr. DeNoia stated further that he would suggest Mr. Pryor start anew when he does return including his experts and if he agrees to do that Mr. DeNoia believed there would be no prejudice and the application would not have to go through completeness review and expenses that he has not created through his own effort or through his lack of effort and that was what he was recommending.

Mr. Pryor stated he would agree to that from a procedural position it terms of resuming but recommended that if they did continue that arrangements be made for a larger facility. Ms. Smith responded that had already been discussed and addressed.

Ron Gasiorowski, Attorney with offices in Red Bank, New Jersey stated he was representing a group of citizens who were opposed to the application and that he was the person that alerted Mr. DeNoia to the issue and had provided him with a faxed copy of the agreement. Mr. Gasiorowski stated that his position was for a dismissal without prejudice so that they could start from a clean slate and expressed his concerns regarding not having a specific time period or carrying the matter.

There was additional discussion amongst Mr. Gasiorowski, Mr. Widdis, Mr. DeNoia and Mr. Pryor regarding the tolling of time, extensions,

Robert Holden, 7 Blue Point Cove, stated it was his understanding that they were going to move forward that evening despite my earlier objection to lack of jurisdiction to the board, because of the failure of the applicant to properly serve notice. Mr. Holden also objected to the decision that a copy of the lease between the Applicant and property owner did not have to be provided. Mr. Holden also commented that it was not fair for so many people to take the time to prepare for the meeting and not be able to continue because an operating agreement had not been disclosed and why he felt the Board should dismiss with prejudice. Mr. Holden also expressed his concern with having to wait until September and remember testimony to cross examine a witness and that if they begin anew there was no guarantee that the testimony would be the same.

Mr. Pryor responded that the suggestion that the LLC should have been reviewed was inappropriate and that he had an authorization from a property owner who indicated in writing, under oath in his owner's consent, that he was authorized to act on behalf of the LLC, and its entirely inappropriate to suggest that there should have been further action taken on top of that. Mr. Pryor also responded with explanation as to why the lease terms were proprietary and that he was willing to provide a copy of the lease with the financial terms redacted. Mr. Pryor continued that they supplied a transcript of the last hearing to the Board and that one would be provided for every meeting and that copies could be obtained from the municipal files.

Mr. Pryor presented his argument as to why he thought they should follow Mr. DeNoia’s suggestions to carry the hearing to a date certain and that a dismissal would be prejudicial to the Applicant and that he would agree to an extension to September 22nd subject to obtaining a satisfactory consent.

There was lengthy discussion amongst Mr. Pryor, Mr. Holden and Mr. DeNoia regarding the viability of the application being able to continue, the impacts of the application being carried, what was prejudicial and what was not, allegations that notice was not done properly and why Mr. DeNoia believed the notice was correctly done under the statute, the issue of the owner’s consent and the sworn affidavit obtained by the Applicant from the owner and its validity. Mr. Holden stated why he thought the application should be dismissed with prejudice.

John Bonforte, 111 Horseneck Point Road, was sworn in and asked if they could forget all the legal stuff and have a discussion about the tower, the pros and cons being that everyone was there.

Mr. Widdis answered that they would not be taking any testimony.

Mr. DeNoia responded that due to certain restrictions under the land use law they could not have a discussion as he suggested.

Mr. Bonforte asked if they could look at the map which Mr. DeNoia said yes.

Mr. Gasiorowski stated that he had examined the municipal file and understood that one of the witnesses that was to continue testimony at the next hearing had been transferred and that the Applicant would likely have a new expert and expressed concern that there could be multiple experts testifying and that he did not wish for his clients to spend money for their own experts without knowing if they would be proceeding. Mr. Gasiorowski gave his solution to the problem stating that they would like a date certain and to advise the Board no less than 2 weeks prior to that date whether or not the Applicant would be proceeding.

There was discussion amongst Mr. Pryor, Mr. Gasiorowski and Mr. DeNoia as to how to address the concern including transcripts being provided to Mr. Gasiorowski's experts, the likelihood of 3 or more evenings of testimony, how much notice prior to, the availability of experts for cross-examination which can not be done through transcripts, the idea of starting over to correct issues such as Mr. Holden's allegation that the notice was deficient, the importance of having submitted the language of the lease and any impacts it may have on the zoning. Mr. Pryor agreed to provide the lease after redacting the financial information,

Mark Wietzke, 46 Bradley Avenue, was sworn in and expressed his thoughts concerning statements of prejudice to T-Mobile and that it was the Borough that was actually the subject of all the prejudice, the duty of T-Mobile to perform due diligence regarding the LLC and its operating agreement and stated why he thought the application should be dismissed with prejudice.

As no one else stepped forward to speak, Mr. DeNoia summarized the concerns as to how to direct the Board to act on the application, outlined the reasons for dismissing with or without prejudice, the advantages of having a certain date for continuing or starting over completely.

There was lengthy discussion between Mr. DeNoia, Mr. Pryor and Mr. Gasiorowski concerning if and when a new notice would be done and when they would be advised that the application would be or would not be proceeding, reasons for dismissing without prejudice, why and why not the Applicant should be provided an opportunity to examine the LLC agreement. Mr. Pryor was asked for his comments to which he replied that there was no legal basis for dismissal of the application and why the issue before them was not a jurisdictional issue but a procedural one.

John Gentile, 427 Port Au Peck Avenue, requested to make a statement, was sworn in and gave a statement concerning his involvement, research he performed regarding the LLC and why he thought T-Mobile should have done the same.

John Patti, 1 Blue Point Cove, was sworn in and identified himself as the party that had notified everyone beyond the 200' area surround the subject property and offered comments including that T-Mobile had not performed due diligence, that he found out in two days that there were two people to this LLC and did not understand why they were being given the benefit of the doubt, why he thought the application should be dismissed with prejudice.

Mr. Pryor stated that he was not conceding at that point that the LLC required Mrs. Hazely's signature

Robert Rumsby, 5 Blue Point Cove, was sworn in, offered his comments regarding the lack of due diligence on the part of T-Mobile, stated that they should be able to come back after doing their homework and that the application should be dismissed without prejudice for the opportunity to return.

Mr. Widdis closed the public portion of the hearing and asked for the Board's comments.

Mr. DeNoia stated that he had enough information to rationalize legally sustaining either position, dismissing it without prejudice and having the application start over, or carrying it to a date certain based on them starting over when they do, in fact, come in and asked for the Board's comments and questions in order to make the decision on the appropriate action for the application.

Mr. Whitson stated he thought the application should be dismissed without prejudice.

Mr. Gervolino stated he agreed with Mr. Whitson's statement.

Mr. Sullivan stated he thought the application should be carried to the September 22nd meeting.

Ms. Flor deferred to Mr. DeNoia however thought that it should be dismissed without prejudice.

Mr. Fichter stated he felt the same way that it should be dismissed.

Mr. Kleiberg stated dismissed.

Mr. McCarthy stated dismissed without prejudice.

Mr. Savarese stated he has been in both positions – the applicant's and the Board's, understood T-Mobile's position and that it should be carried.

Mr. Widdis stated he thought it should be dismissed without prejudice which made it 6-to-2.

Mr. DeNoia stated based on the sentiment of the public and the Board and that T-Mobile whether successful or not successful, to not have jurisdictional issues be the basis of the problem, but let substance and testimony and the land use law be determinate of what was or wasn't entitled in Oceanport and explained for the public what that meant, and as Mr. Pryor was willing to restart the testimony, would resolve the issue of the one radio engineer from meeting one and a new radio engineer at meeting and potential differences in testimony and he could sustain legally either position, recommended that the Board dismiss without prejudice, allow Mr. Pryor to comment and then have the Board vote.

Mr. Pryor stated he did not have extensive comments, read the opinion of the Board and asked that if there were a need to refile the application, that he be granted a waiver of fees upon re-filing.

Mr. Widdis answered that where they could they would but that the engineer –

Mr. Pryor stated escrow fees he understood. Mr. DeNoia stated they would be fair and accommodate where possible.

Mr. Pryor asked if there would be a resolution drafted that would be adopted at the next board meeting memorializing the Board's action?

Mr. DeNoia answered yes to provide some finality there should be a vote and a resolution memorializing that vote and that he would be provided with a copy.

There was some additional discussion on what needed to be resolved to proceed.

Mr. Gasiorowski requested that the LLC operating agreement be marked as an Exhibit.

Mr. Pryor stated he didn't think it could be made part of the record as he had not had an opportunity to review it and the Board would be acting on the basis of an operating agreement it hadn't seen, and he didn't think it should be part of the record.

Mr. Gasiorowski stated he could call his witness the wife and have her identify her signature, mark and submit for the record as Mr. Pryor acknowledges that it exists

There was lengthy discussion between Mr. Gasiorowski, Mr. Pryor and Mr. DeNoia arguing the ability to enter the operating agreement as an exhibit, the problem of the Board having already been polled with a 6-to-2 vote to dismiss, the purpose of identifying the source of the issue, that the Board's poll was based upon the agreement.

Mr. DeNoia made the decision to accept the document so that in the future it would provide the opportunity to see it as part of the record and asked Mr. Gasiorowski to lay a foundation for the record and describe the document.

Mr. Gasiorowski asked if Mr. Pryor would stipulate to the authenticity of the document.

There was a brief pause in the proceeding to allow Mr. Pryor to speak with Mrs. Hazely after which Mr. Pryor stated he still objected to its marking as an Exhibit but that it does appear to be the operating agreement

Mr. DeNoia advised Mr. Gasiorowski that it would be accepted as an exhibit.

Mr. Widdis commented that there should be some testimony on it.

Mr. DeNoia answered that if they were to do that there need to be more foundation, asked Mr. Gasiorowski to show Mrs. Hazely the agreement and make sure its valid.

Mr. Whitson asked why they were taking testimony on an application they were dismissing.

Mr. DeNoia answered that it was only for authenticating the basis of the agreement

Susan Hazely, having been previously sworn, remained under oath testified that the document consisting of numbered pages 1 through 31, identified as Exhibit O-1, was the LLC operating agreement as was dated, that it was her signature on the agreement and that it was the document referred to earlier in the hearing after which the Lucky Charm Real Estate, LLC Operating Agreement, pages 1-31, dated November 29, 2001 was marked as **Exhibit O-1**.

Anne Marie Ippolito, 1266 Turf Drive, stated that she has a child that attends Maple Place School and asked would every parent of Maple Place child be notified?

Mr. Widdis answered no.

Ms. Ippolito asked then she would have to notify every parent of a Maple Place child?

Mr. DeNoia explained that notice would be done pursuant to the municipal land use law and that she could alternately tell the neighbors but that was not an issue and that there was no obligation for the applicant to tell everyone at the school.

Mr. Whitson made a motion to dismiss the application without prejudice which was seconded by Mr. McCarthy and received the following roll call:

AYES:	Mr. Whitson, Mr. McCarthy, Mr. Kleiberg, Mr. Gervolino, Mr. Widdis
NAYES:	Mr. Savarese, Mr. Sullivan
ABSTAIN:	None
ABSENT:	None
INELIGIBLE:	None

Ms. Smith stated the motion carried..

The Board adjourned for a brief recess at 8:44 p.m., which was unanimously approved by the Board members present. Mr. Widdis called the meeting back to order at 8:52 p.m. with all members present.

RESOLUTIONS:

3. John and Ellynn Kahle - As the Resolution was made available to the Board previously, Mr. DeNoia summarized the Resolution after which, Mr. McCarthy made a motion to approve the resolution which was seconded by Mr. Savarese and received the following roll call:

AYES:	Mr. McCarthy, Mr. Savarese, Mr. Kleiberg, Mr. Gervolino, Mr. Whitson
NAYES:	None
ABSTAIN:	Mr. Widdis
ABSENT:	Councilman Bertekap
INELIGIBLE:	Mr. Ibex, Mr. Sullivan, Ms. Flor, Mr. Fichter

4. Anthony Burdi - As the Resolution was made available to the Board previously, Mr. DeNoia summarized the Resolution after which, Mr. Whitson made a motion to approve the resolution which was seconded by Mr. Kleiberg and received the following roll call:

AYES:	Mr. McCarthy, Mr. Savarese, Mr. Kleiberg, Mr. Gervolino, Mr. Whitson, Mr. Widdis
NAYES:	None
ABSTAIN:	None
ABSENT:	Councilman Bertekap
INELIGIBLE:	Mr. Ibex, Mr. Sullivan, Ms. Flor, Mr. Fichter

5. Eric & Michele Leiner - As the Resolution was made available to the Board previously, Mr. DeNoia summarized the Resolution after which, Mr. McCarthy made a motion to approve the resolution which was seconded by Mr. Savarese and received the following roll call:

AYES:	Mr. McCarthy, Mr. Savarese, Mr. Kleiberg, Mr. Gervolino, Mr. Whitson, Mr. Widdis
NAYES:	None
ABSTAIN:	None
ABSENT:	Councilman Bertekap
INELIGIBLE:	Mr. Ibex, Mr. Sullivan, Ms. Flor, Mr. Fichter

PETITIONS FROM THE PUBLIC: None

ADJOURNMENT: As there was no further business, the meeting was adjourned at 8:57 p.m. on a motion by Mr. Whitson which was seconded by Mr. McCarthy and approved by the Board.

Respectfully submitted,

JEANNE SMITH
Secretary