

HILLSBOROUGH TOWNSHIP PLANNING BOARD

APPROVED PUBLIC MEETING MINUTES

July 01, 2021

Chairman Carl Suraci called the in-person Planning Board public meeting of July 01, 2021 to order at 7:32 p.m. The meeting was held in the Courtroom of The Peter J. Biondi Building. All stood for the Pledge of Allegiance.

Chairman Suraci announced: This meeting has been duly advertised according to Section 5 of the Open Public Meetings Act, Chapter 231, Public Law 1975 ("Sunshine Law"). Notice of the 2021 Annual Meeting Schedule has been provided to the officially designated newspapers, the Township Clerk, posted on the Township's Website, and available at the Hillsborough Township Municipal Complex. **Further notice has been provided to the same that as of July 01, 2021, the remainder of 2021 Planning Board meetings will be held in person at the Peter J. Biondi Building. Live virtual participation will no longer be available.**

Application documents have been made available on the Township's website at <https://hillsboroughnj.civicclerk.com/>. Complete applications files are available in the Planning and Zoning Department for inspection, in accordance with the public meeting notice.

ROLL CALL

Mayor Shawn Lipani – Present
Robert Wagner, Jr. - Present
Deputy Mayor Frank DelCore - Present
Robert Peason – Present
Carl Suraci, Chairman – Present
Neil Julian, Vice Chairman – Present

Nathan Santaromita – Absent
Ron Skobo – Present
Kenneth Hesthag, Secretary – Arrived 7:36 p.m.
John Ciccarelli (Alt. #1) – Present
Curt Emmich (Alt. #2) – Present

Board / Township Professionals: David K. Maski, PP, AICP, Township Planning Director; Eric Bernstein, Esq., Board Attorney (Eric M. Bernstein & Associates); Christina Restuccia, CCR, Covering Board Court Reporter; and Caz Bielen, Videographer.

EXECUTIVE SESSION

- The Board will convene to discuss litigation and Attorney-client privilege matters – RE: Campus Associates, 20-PB-13-MSP

Mr. Bernstein advised the public of the matter of Executive Session and that no formal action is expected to be taken.

A motion to go into Executive Session was made by Mayor Lipani, seconded by Deputy Mayor DelCore. All were in favor, none opposed; motion carries.

The Board left the room to enter into Executive Session.

A motion to come out of Executive Session was made by Mayor Lipani, seconded by Deputy Mayor DelCore. All were in favor, none opposed; motion carries.

Mr. Bernstein stated all Board members now present, along with Mr. Maski and himself, were also present for the Executive Session. The Board was given an update on the ongoing litigation matter for Campus Associates and the status of same. No formal action was made at this time. There is a related item on the agenda for later this evening. At this point the Board can return to the regular agenda.

Chairman Suraci continued with the agenda items.

CONSIDERATION OF MEETING MINUTES

None

CONSIDERATION OF RESOLUTIONS

- Hillsborough 206 Holdings 19-PB-24-S/MSPV (2021)

A motion to approve was made by Mayor Lipani, seconded by Mr. Skobo. No further discussion.

Roll Call: Mr. Wagner – yes; Mr. Skobo – yes; Mr. Ciccarelli – yes; Mr. Emmich – yes; Mayor Lipani – yes; Vice Chairman Julian – yes; Chairman Suraci – yes. Motion carries.

- SunPower Corporation (Comcast Cable) – File 20-PB-02-SPV

Mr. Bernstein advised the Board there are two application resolutions before the Board; one for 2020, the other for 2021.

A motion to approve was made by Mr. Peason, seconded by Deputy Mayor DelCore. No further discussion.

Roll Call: Mr. Peason – yes; Mr. Ciccarelli – yes; Mr. Emmich – yes; Deputy Mayor DelCore – yes; Mayor Lipani – yes; Vice Chairman Julian – yes. Motion carries.

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- SunPower Corporation (Comcast Cable) – File 20-PB-02-SPV (2021)

A motion to approve was made by Mr. Wagner, seconded by Mr. Skobo.

Mr. Emmich said he recalled a discussion about the applicant installing additional landscaping along the roadway. He asked Mr. Maski if the wording was that the applicant would “consider” adding landscaping.

Mr. Maski said the landscaping would be reviewed at the time of compliance, and said he was satisfied with the wording in the resolution.

Roll Call: Mr. Wagner – yes; Mr. Peason – yes; Mr. Skobo – yes; Mr. Ciccarelli – yes; Mr. Emmich – yes; Mayor Lipani – yes; Vice Chairman Julian – yes; Chairman Suraci – yes. Motion carries.

- Hillsborough Board of Education (Sunnymead School Parking Lot) 21-PB-07-INF (05-13)

A motion to approve was made by Mr. Peason, seconded by Mayor Lipani. No further discussion.

Roll Call: Mr. Peason – yes; Mr. Hesthag – yes; Mr. Ciccarelli – yes; Mr. Emmich – yes; Deputy Mayor DelCore – yes; Mayor Lipani – yes; Chairman Suraci – yes. Motion carries.

PLANNING BOARD BUSINESS

- JSM at Hillsborough, LLC – File 20-PB-09-MSPV – Extension through October 29, 2021
- July 08, 2021 Agenda

Mr. Bernstein said the JSM application is scheduled to be before the Board next week. They will be looking for another adjournment, and an extension which the Board will have to grant. Mr. Bernstein said he did not believe the Board could act on an application scheduled to next week.

Deputy Mayor DelCore questioned the extension date requested.

Mr. Bernstein advised the Board can ask that of Mr. Wolfson next week.

Chairman Suraci asked if the Board could accept the extension next week but not set a date for the next hearing until all of the revised plans and documents have been submitted.

Mr. Bernstein said that is something the Board could consider and discuss next week.

The matter was tabled to the July 08 meeting.

BUSINESS FROM THE FLOOR *(For Matters Not on the Agenda)*

None

CONSIDERATION OF ORDINANCES

- **Ordinance 2021-12** – An Ordinance to Amend, Revise and Supplement Chapter 188 “Land Use and Development”, Article V “Districts Standards”, Section 188-106, “L-1, L-2, L-3 Light Industrial Districts, Most Notably Section 188-106 H, Entitled “Multifamily Inclusionary Overlay District” of the Township Code of Hillsborough

Mr. Bernstein advised the Board, that the ordinance before the Board is not for the members approval or disapproval, but to determine whether or not it is relative to the issue, consistent or not with the Master Plan and other actions the Township Committee has taken regarding the site. This comes out of Judge Shanahan’s ruling. This ordinance would eliminate the Board’s basis for denying the application related to the stream corridor and the downstream pipe study.

Mr. Maski said he had nothing to add.

Chairman Suraci asked if the Judge was essentially in agreement with why the Board denied the application, and is now directing that those provisions be amended out of the ordinance.

Mr. Bernstein said Judge Shanahan disagreed with what the Board decided. He is ostensibly telling the Township this has to be an “as of right” application to make it confirming.

Mr. Emmich asked if the Judge reviewed the transcripts and the comments from the Court Master.

Mr. Bernstein explained there was a rather extensive briefing with exhibits. The decision is rather lengthy for a Superior Court Judge to come out on with his decision. Judge Shanahan reviewed all of the information and basically said the Township had an obligation. Campus associates brought the original motion for the litigant’s rites, and Fair Share Housing

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Center, which has a seat at all tables, made comments that the Township be stripped of its immunity as to Campus Associates. Mr. Bernstein stated a significant amount of time was spent as to why the Township should not. Stripping the Township of its immunity would open it up to Builder's Remedy for potential applications at that site, and possibly others.

Open to the public.

Kristie Garcia - 166 Johanson Drive

- Ms. Garcia asked if the public could see the transcripts to find out the reason why the Judge decided on the 50 foot buffer rather than the 150 foot buffer. Ms. Garcia asked what the Township is doing to help the existing residents.

Mr. Bernstein answered, the Judge reviewed the agreement between the parties and the zoning in place, which ostensibly called for a 50 foot buffer, and that the standard from the NJDEP is a 50 foot buffer.

Mayor Lipani said, so the Judge agreed to the NJDEP's 50 foot buffer over the Township's 150 foot buffer.

- Ms. Garcia asked what the Township is doing now.

Chairman Suraci asked Mr. Bernstein to explain what the Judge has directed the Township to do.

Mr. Bernstein stated, the Township was advised in the Court Order that it had 45 days to adopt a conforming ordinance in pursuant to the Settlement Agreement between the Township and Campus, to create as indicated earlier; it was an "As of Right" application with no waivers and variances. The Township's failure to do so would open it up to a "Builder's Remedy Claim" and additional damages and sanctions beyond what the Court has already ordered and potential regarding the same, and the loss of immunity, which would leave the Township open to Builder's Remedy claims against Campus and any other applicant within the Township that wants to build.

- Ms. Garcia said she was glad the Town did not lose immunity. She asked if anyone was doing a downstream study now.

Mayor Lipani said the study cannot be requested by the applicant.

Deputy Mayor DelCore said since we cannot require the applicant to do it, we may have to look into how it can be addressed in a different way.

George Messina - 5 Hawley Road

- Mr. Messina asked if the catch basins were included.

Mayor Lipani noted there is stormwater. Everything is below grade.

- Mr. Messina said that makes it worse. This neighborhood is struggling. After the last two big storms the neighborhood was shut in for three days. Helicopters dropped water overhead. This development was built in 1955 and it was constructed fine for the time, but things change as more is constructed. Mr. Messina said he understands the hands of the Township are tied with litigation, but asked the Board to do the best they can. He added they do not want to be known as the "Lost Valley of Hillsborough".

Krzysztof Golas - 128 Johanson Avenue

- Mr. Golas expressed his concerns that any new development will just make things worse. He said he has lived in this development since 2010, and that his yard is always half full of water after a storm. Mr. Golas said there are two concrete pipes behind his property from Stellar Academy that dump water into his yard.

Sharon Garagi - 133 Taylor Avenue

- Ms. Garagi said she has seen the flooding worsen over the past sixty years, especially with development on the Route 206 side. Every time new development comes in, the residents are told it will make an improvement to the current conditions; but every time it gets worse.
- Ms. Garagi said her relatives live at 122 Johanson, which used to be by the storm swale until it was covered over. She said they had no water until after the Courland Development was built. Since then, she stated she has bailed water out of the back of their house several times. Ms. Garagi asked the Town to fight more.

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Maryanne Sawade - 142 Johanson Avenue

- Ms. Sawade said she has been speaking out in opposition to the Campus Development Associates. She said the petition to oppose this development has over 3,000 signatures and continues to grow. She said she and others have written letters to Judge Shanahan asking that he reconsider his decision that was rendered in favor of the development. The concerns presented during the application caused the Board to deny this application with a reasonable basis.
- Ms. Sawade said since the Board had denied the decision that the town would be prepared to defend its decision in court. She suggested the town is in a worse place now, having to pay undetermined amount of fees.

Deputy Mayor DelCore said it was understood if the Township lost, the fees would come out of the trust fund, not expected to come out of tax payer funds.

- Ms. Sawade commented, something is very wrong that the Judge could read through what transpired and rendered his decision. The Judge read through all that was provided about the flooding and did not care.

Chairman Suraci said, as Mr. Bernstein stated, the Judge was provided with a copy of all transcripts. The Judge's decision was to go with the State's regulations (NJDEP) as opposed to those of the Township. The Township's ordinance was in place for years. The primary goal seems to be to get affordable housing in.

- Ms. Sawade said she had read the NJDEP regulations, and noted it states theirs is a "minimum" requirement, and that towns should decide for themselves what best meets their needs. Ms. Sawade said it is irresponsible to meet the minimum and not take into consideration the needs of the Township.

Deputy Mayor DelCore reiterated, everything seems to take a backseat to affordable housing. This is where the courts have mandated the towns go, and we are falling in line. If this is the way things are going, nothing is going to stop the affordable housing process moving forward.

- Ms. Sawade said given the flooding concerns, the Campus development should never had been on the list, and asked how it got there.

Mr. Bernstein said Campus Associates was one of the nine intervenors in a lawsuit against the Township. They have been seeking to have their project included into the projects since 2015. Campus had affordable housing applications on the site in the previous Round that never occurred. The situation involving the application became a balancing issue. Failure to come to an agreement would have left the Township open potentially to a Builder's Remedy claim; a nonconforming situation; no settlement agreement with Fair Share Housing; and a lot more litigation and housing, then there is currently agreement for, which is still not insignificant.

The Township Committee had to make certain decisions they were not happy about. There were a number of discussions over the years before the Township came to settlement. Since Campus was not going away, failing to come up with an agreement would have been significantly more problematic township wide. The Committee had to look at all of the situations and all of the projects. There are projects all over town that the Committee has in the plan. Campus got itself in the mix when the Supreme Court rendered its decision in 2015 and have been pushing their development ever since.

- Ms. Sawade asked if Hillsborough submitted a plan to the Courts, and at some point, it was decided it was not enough?

Mr. Bernstein said the Township had numerous conversations with the intervenors, the Fair Share Housing Center, which is an advocate for the fair share housing community, and Special Court Master over this property and a number of others. There were clear attempts to exclude this and other properties, but all of the intervenors got into the mix at the insistence of Fair Share, the obligations found per the calculations done by Judge Jacobsen's decision, and per the Court Master. The number could have been significantly larger than the Township ultimately had to agree to. It could have been significantly worse if we had lost our immunity.

Chairman Suraci said Hillsborough has seen the impact over the past twenty years.

Mr. Bernstein said Hillsborough Promenade came out of the last round. At least with this round, Hillsborough actually got some affordable housing out of it, which we have an obligation to build. As Mayor Lipani and Deputy Mayor DelCore have said many times; these are balancing acts. Until such time that the Legislation steps up and does what it is supposed to do and address the requirements under the Fair Housing Act, the Courts have been left with no other alternative but to become intervenors in this situation and address each accordingly. Any town that has chosen to ignore its obligation has done so at significant risk. That is why out of 320 towns, only 3 lost their immunity. Every discussion and every decision was difficult.

- Ms. Sawade asked if there was a way it could have been taken out of the plan.

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Mr. Bernstein said the Township tried everything. Keeping it out came at a significantly higher cost than the Township thought it could afford.

- Ms. Sawade spoke on the 2008 Board of Adjustment denial. She said the reasons for that denial remain the same, and then read from the 2008 BOA resolution. She said this is information that should be shared with the Judge.

Mr. Bernstein said there are two very different issues from the Zoning Board's decision until now. One is luck, and two is failure. The luck was that the Courts were determining how to impose Rounds 3 and 4 of the COAH obligation, which is not in existence, courtesy of Judge Leveck's decision in 2015. There was no truly binding obligation in 2008 to build affordable housing, though Hillsborough was a Court Town at the time. The second was the failure of the applicant to appeal.

Mr. Maski said the applicant was not the owner of the property, but the contract purchaser, in 2008. For whatever the reason, the applicant at that time decided to walk away. The owner appealed and was found at that time to have no standing because they were not the applicant. .

- Ms. Sawade gave a review of the timeline of flooding for the development, from 1956 - 2011. She said if this development goes through, then the current storm system needs to be redesigned. Ms. Sawade said it is not a matter of "if" there will be flooding, but when.
- Ms. Sawade further spoke against approval of the ordinance and of the Campus development. She said if this development is approved and built as designed, it will cause more flooding, and in more homes than before. When this happens, the residents will be forced to take some legal action against whoever is involved and whoever makes that decision. The residents don't want that to happen; they just want the right thing to be done.

Meryl Bisberg - 4 Hickory Hill Road

- Ms. Bisberg said she is aware the ordinance provides no obligation of the developer to do a study. She said it has been pretty clearly stated that there are problems with drainage. Ms. Bisberg asked if the Board and the Township will take on the commitment to do that study.

Deputy Mayor DelCore said that matter would be for the Governing Body, not the Planning Board.

- Ms. Bisberg said at the least, the Township would want to execute on that study before a shovel goes in the ground. Was the developer saying there may be a reason to have to do a study, which we do not want to pay for, but if the study is done and shows you cannot build without some amount of expense; is the Township going to be willing to take on that expense.

Chairman Suraci said regardless of the outcome of a study; it is of no interest to affordable housing, to the Courts, or the Fair Share Housing Center. The Deputy Mayor has been saying this for years. We have more strict requirements than the NJDEP and the Judge said the "gold standard" is that of NJDEP. At the end of the day, a report will not have an impact.

Mayor DelCore said this board cannot make those decisions, so it is not for discussion here. He said the Township will certainly look at alternatives that might be possible, but what they are is something he could not commit to for anything that might happen in the future. That is a matter for the Governing Body.

Mayor Lipani said regardless, the project has to be approved "as is".

- Ms. Bisberg said it seems the developer is acknowledging there is an issue.

Mayor Lipani said their engineers in testimony said there is no issue. The Judge ruled against having to do a study. If he thought there was a need, he could have ruled to have the study done. He chose to take the testimony and licensing of the applicant's engineers, and said it did not have to be done.

Deputy Mayor DelCore said every application that comes before the Board has to be engineered to not make the situation any worse. The engineering has to be built so that runoff is not exacerbated by the project. They have to deal with it within their own contained water management system. The applicant is not responsible to deal with all of the surrounding areas. They are only obligated to deal with the runoff on their own application. If there are other issues, then we have to take a look at that.

- Ms. Bisberg asked if there was any concern about flooding back in 2019, when the commitment for the settlement for fair share was made.

Deputy Mayor DelCore said of course it was. That is why the engineering has to not make the situation worse.

- Ms. Bisberg asked how these decisions are made before doing planning and zoning.

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Deputy Mayor DelCore suggested the public talk to their Legislators about that issue. Hillsborough has been mandated through the Court process, and there is no way we can go through an application process until the zone is set up.

- Ms. Bisberg referenced the Master Plan and Affordable Housing Plan.

Deputy Mayor DelCore explained the Element is not specific to an inclusionary zone. That ultimately cannot happen until the Township knows what is being proposed and what can be agreed to with Fair Share and the Courts.

Mr. Bernstein said we still need to amend the Fair Share and Housing Element Plan because the obligation, unlike the past two rounds, was without definition. The Courts twice litigated all the way to the Supreme Court, the issue of what the numbers were and what the numbers cover. The Courts are relying upon a decision rendered by the assigning Judge in Mercer County on a formula. There is no absolute formula even under the Court decision as to how many units any municipality is supposed to be obligated to do, which is different than Round 1 and Round 2 when everyone had assigned numbers from COAH.

Fair Share's argument from 1998 – 2015 was always that towns deliberately zoned so that you could not build affordable housing. However, what they found over the last six years is that is not the case. They found towns can zone for affordable housing, and if no one builds it or does not want to build it; you cannot have it. So this notion that towns are solely responsible for how affordable housing is created has been debunked. The same is true for the Master Plan and Reexamination. We can zone areas for affordable housing in town. Unless we build it, or if no one is interested in putting all affordable on it, the town is in violation because we have not provided an opportunity for affordable housing. West Windsor zoned for affordable housing but since no one wanted to build it, they were found to be noncompliant.

The process is not set up to come before the Planning Board or Zoning Board to see if an application works or not, and if it works, we include it in the plan. It is set up the opposite way because the legislature has ostensibly refused to address the issue for the last thirty years. The reason for the Supreme Court stepping in in 2015 was because no one else would do it. Hillsborough is more problematic because there is still vacant land and sewers. Towns without vacant land and sewers are slightly different, but not by much. The fact that the Master Plan talks about this being done by 2018 is immaterial to the litigation.

- Ms. Bisberg asked if the Environmental Commission was involved with the settlement negotiation with Fair Share and Campus in May, 2019.

Mr. Bernstein said no; nor was the Planning Board or Zoning Board. The negotiations were between the Township, and the Intervenors, Fair Share Housing, the Court Master, and His Honor. The Environmental Commission is advisory to the Planning Board and Zoning Board. Environmental issues do not impact this situation for this or any other municipality. Every town in this state had the same set of issues; it is not special to Hillsborough.

- Ms. Bisberg said this is one of the worst areas to build. She asked what can be done to get out of it.

Chairman Suraci said the Planning Board denied the application, not on a whim, but based on facts and very legitimate concerns. The Judge ordered the Township to fix its ordinance to make the problem go away.

Mr. Emmich noted the Planning Board was sued because of it.

Chairman Suraci said affordable housing has the clout of the Courts. The Judiciary does not want to oppose the Supreme Court. The issue is with the Legislature, which has abdicated its responsibilities and has done nothing in years to even raise this issue.

Deputy Mayor DelCore told Ms. Bisberg he recognizes her point, but this body cannot address what she is asking it to do. This Board is being asked to recommend this ordinance that the Judge has said must be recommended, back to the Township Committee. The Township Committee needs to finalize the ordinance, and then the applicant will be back, as the Judge indicated we have to do. The Judge instructed the ordinance has to be amended to change the buffer and that the applicant is not required to pay for the downstream study.

- Ms. Bisberg questioned actions taken by the Township.

Mr. Bernstein said irrespective of what the Township Committee did or did not do in 2019, this applicant believes they have a Settlement Agreement, and are entitled to their application as a right, and that the Governing Body had an obligation, and that the Planning Board did not do the right thing. The motion for litigant's rights was filed within the timeframe and the Governing Body took actions.

Mayor Lipani said if the Judge thought we were negligent, we would have lost immunity, which we did not.

- Ms. Bisberg asked the next steps.

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Mr. Bernstein said the Planning Board will recommend to the Township Committee to adopt the ordinance. The Committee will consider the ordinance at the July 13 meeting and hopefully adopt. The consequences of failing to adopt the ordinance will be significantly larger than the current consequences we are dealing with. Assuming that is the case, the applicant will come in with what is ostensibly an “as of right” application with no variances and ask for an approval. Based on an “as of right” application, they will probably get that approval.

Ms. Bisberg said the applicant stated they are handling the water associated with their application, and that the problems with the flooding and existing drainage issues are with Township prior to this application, which many of those present have reiterated. The Township needs to make a commitment.

Mr. Bernstein said the decision on the application will be for the Planning Board. It will be up to the developer and internal Township departments to ensure that the application is built in conformance with what has been approved. What happens after is another issue that will have to be addressed at the time.

Deputy Mayor DelCore said matters that are not related to the application have to be dealt with differently.

Grant Kolmer - 144 Taylor Avenue

- Mr. Kolmer commented he would like to hear what is going to be done for the residents of this neighborhood.

Deputy Mayor DelCore reiterated that matter is not for this Board, but for the Governing Body.

No more questions or comments.

Close public

Mr. Bernstein advised the Board the motion would be to recommend to the Township Committee to adopt Ordinance 2021-12, according to the determination by his Honor and related and use obligations.

Chairman Suraci said that is the expectation of His Honor.

Mayor Lipani said it is more of a directive.

Chairman Suraci reiterated this action is not adopting the ordinance. The Township Committee will have its public hearing at the July 13 when final action will be taken. At some point after that, Campus will come back before this Board at a future date.

A motion, as referenced by Mr. Bernstein was made by Mr. Wagner, and seconded.

Roll Call: Mr. Wagner – yes; Mr. Peason - “reluctantly yes”; Mr. Skobo – recused; Mr. Hesthag – yes; Deputy Mayor DelCore – yes; Mayor Lipani – yes; Vice Chairman Julian – yes; Chairman Suraci – “unfortunate yes”. Motion carries.

There was brief discussion on upcoming meeting dates.

ADJOURNMENT

A motion to adjourn was made and seconded. All were in favor; motion carries.

The meeting adjourned at 8:48 p.m.

Submitted by:
Debora Padgett, Planning Board Clerk