

**Borough of Franklin Lakes  
Bergen County, New Jersey  
Mayor & Council/Planning Board  
Special Meeting Minutes  
September 21, 2015**

**Meeting Called to Order at 7:35PM**

**Sunshine Law Statement: Read into the record by Planning Board Chairwoman Vierheilig**

**Mayor and Council Roll Call:** Mayor Bivona (absent; arrived at 7:40PM), Messrs. Cadicina, Kahwaty, Kelly, Lambrix, Ms. Ramsey, Ms. Swist

**Planning Board Roll Call:** Mayor Bivona (absent; arrived at 7:40PM), Messrs. Gostkowski, Lauber, Lazerowitz (absent), Linz, Pullaro (absent), Sheppard, Ochs, Ms. Mucci, Councilman Kahwaty, Chairwoman Vierheilig

**Also in Attendance:** William Smith, Esq., Borough Attorney; Mr. Gregory Hart, Borough Administrator; Ms. Sally Bleeker, Borough Clerk, Ms. Beth McManus, Borough and COAH Planner; Mark Madaio Esq., Planning Board Attorney; Ms. Maria Berardi, Planning Board Secretary; Ms. JoAnn Carroll, Recording Secretary

**Salutation to the Flag**

**Moment of Silent Reflection**

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**Public Portion of the Meeting**

No public present

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**Planning Board Chairwoman Vierheilig:** stated the meeting would at this point go into Closed Session to discuss pending litigation.

**Closed Session Resolution: read into the record by Councilman Kahwaty:** Councilman Kahwaty, Councilman Cadicina

**All in Favor**

**Please note: Mayor Bivona has arrived at this point of the meeting, 7:40PM.**

**Meeting went into closed session at 7:40PM.**

**Ms. Beth McManus, Borough Planner:** handed out materials to the attendees; two meetings are planned; next meeting to take place on October 7, 2015 starting at 6PM; purpose of these special meetings is to bring everyone up to speed on pending litigation regarding affordable housing; will use this evening's meeting to give a background as to what we need to do to remain compliant and protected; give a basic understanding of the process; next meeting she will get into more specifics; the

handout covers much of the items that will be discussed but it is not a direct outline; in 1975 a court decision was made; Mt. Laurel 1; because of this case and subsequent cases 2, 3 and 4, we have the Mount Laurel doctrine; State Supreme Court ruled that municipalities had to constitutionally provide affordable housing for all income levels; eventually morphed into a system that we have today; the State agency, COAH (Council on Affordable Housing) which is part of the DCA (Division of Consumer Affairs) identifies municipalities affordable housing obligations and the rules the municipalities need to follow; not about housing types; it is about the number of affordable housing units; defined as “affordably controls;” almost always a deed restriction with a 30 year deed; occupied by a household that meets low and moderate standards; broken out by region in the State; Bergen County is in Region 1; Region 1 consists of Bergen, Hudson, Passaic and Sussex counties; all northern counties; in each housing region, COAH identifies income standards derived from HUD standards; based upon a maximum 80% of a regions median income; any housing that is created to serve those households must be priced accordingly; those sold have a lower price; a 2-bedroom low income house would sell for \$90k; a 2-bedroom moderate income house would sell for approximately \$136k; discussed rents of both a 2-bedroom low income apartment and a 2-bedroom moderate income apartment; significantly less than what you see on the open market; distinction between low income housing and moderate income housing; moderate is maximum 80% and low is maximum 50% of regions median income; other regulations apply besides low and moderate income units; to ultimately be compliant with all regulations is important; there are 100 pages of regulations regarding the administration of the units; most basic level is the affordable housing for New Jersey; once the State agency tells us what we need to do, we have to provide those units; the municipalities have to provide a plan; housing element and fair share plan; housing element is an element of the Master Plan; adopted by the Planning Board in the same manner as the Master Plan; purpose is to provide a policy direction to the Borough as to how the affordable housing will be handled; it is at its core a Planning Board document; it has to be implemented by the Council; ordinances may be included; ordinances for creating zones; includes resolutions that the Borough commits to providing the necessary funding of the plan; once the housing and fair share plans are adopted by the Planning Board, it goes to Council for its endorsement; the endorsement is the commitment to take action on the implementation documents and the approval for the plan to be submitted for review and approval by COAH; 1985 through 2015 was in place; a lot of troubles with it but ultimately it worked well; COAH handed out obligations; COAH did review and approval; municipalities in turn received substantive certification; that protection is very important; it is the “carrot” in the situation as opposed to the “stick; municipalities are not subject to exclusionary zoning law suits; Builder’s Remedy lawsuits; lawsuits are the “stick” for non-compliance with affordable housing; the person who files the lawsuit is almost always a developer; in a Builder’s Remedy lawsuit, the municipality does not have the same power to say no to a project; not legally the same criteria; similar to a beneficial use; develop has automatically the ability to state the municipality is in need of the development; the municipality is forced to provide to the courts that the development is in conflict with the principles of sound planning; not in conflict with the Master Plan; cannot rely on the Master Plan; the burden to deny is much higher; not filed before the Planning Board but before the court; strip the municipality of the power to control the use of land on those properties that developers identify as affordable housing; discussed the different round of COAH; all municipalities had the choice to submit plans to the court for approval; primary difference was a judge and special master would review the plan and not COAH; in 1999 third round should have started; however, this is when things started to go awry; COAH took five years too long to issue first set of third round rules; litigation proceeded that; five years into what should have been a 6 year period the set of third round rules were issued; gross share obligation; overturned in 2007; during this time the fair share housing act was amended; changed six

year time period to a ten year period; COAH redid rules in 2008; thrown out in 2010; court directed COAH to go back and produce a methodology to be consistent with the first and second round ; in 2014, COAH proposed draft rules; circulated around the State; very different from what COAH had produced in the past; COAH asked for comments; at this point COAH was under a very strict schedule to adopt rules; the deadline was October 22<sup>nd</sup>; on October 21<sup>st</sup>, the COAH Board met and they failed to adopt the rules; an affordable housing organization brought COAH before the Supreme Court; ultimately the court declared COAH a non-functioning agency; stated they could not be trusted to adopt rules; the Supreme Court took jurisdiction from COAH to issue obligations and to review and approve housing elements and gave it to the courts; municipalities no longer have a choice; they must go to the courts; it is a court system that is familiar with the process and has the capability to handle this process; capacity may be different in the future; decision came out on March 10, 2015; in addition, they did not create or assign municipal affordable housing obligations; they imposed a five month deadline for plan submittal to the Bergen County Court; the question is how are municipalities supposed to submit plans when they do not know what the obligations are; the five month deadline is on December 8, 2015; five months is generally based upon when municipalities filed before the courts to have their housing elements and fair share plans reviewed; Franklin Lakes did so and filed on July 2, 2015; courts feel their hands are tied; they feel they cannot extend the deadline; does not seem judges have flexibility; we are stuck for the time being with this tight deadline; municipalities are being forced to expend their resources to deal with the problem in a very short order; we do not know what we are supposed to be solving; Franklin Lakes is in a pretty good situation; Franklin Lakes has created quite a few affordable housing units; have 205 affordable housing credits; Franklin Lakes is a vacant land adjustment Borough.

**Mr. Lauber:** asked about the general requirements and where they come from.

**Ms. McManus:** stated all third round rules were either overturned or not adopted; we have COAH's second round rules adopted in 1993; in addition, we also have particular pieces of COAH's third round rules that were challenged by the courts but upheld in 2007; extension of expiring control discussed; we do have rules to satisfy the obligation; they are a bit incomplete and unclear; they were intended for a different period of time; they do form a very good starting point; everyone is familiar with these rules.

**Councilman Cadicina:** asked if the rules were from the first or second round.

**Ms. McManus:** discussed length of controls; court did recognize what was upheld in the past; believes the time is coming when the judges will figure out the obligations; believes there will be one or two judges who will be the front runners on this issue; other judges may follow suit.

**Councilman Kelly:** asked if there was any indication of a concerted effort to work together to try to get some attempt to address the inherent unfairness definition to come after the plans are submitted.

**Mr. McManus:** stated some municipalities have their attorneys filing on their behalf; doesn't know if Franklin Lakes would consider this; in terms of other out of the box efforts, unfortunately the legislature has no interest in taking up this issue; for the obligations, expects those judges that will hear the case, from Ocean County, are moving forward with bringing in experts that are dealing with affordable housing obligations; they will bring in the relevant experts; fair share housing center hired a planning expert; for Franklin Lakes, the fair share housing center proposed 358 plus 688 units; Franklin Lakes is a vacant land municipality; the 358 number was reduced to 109; there are also a consortium of

municipalities that got together and hired Dr. Burchell; he has worked with COAH in the past; his obligation for Franklin Lakes was very low in comparison; Dr. Burchell was brought on to produce a new set of methodology; unfortunately he became sick and could not finish the work or testify in court and no one at Rutgers can or will take his place; municipalities must take what Dr. Burchell did and complete the task; EConsult is knowledgeable about the subject; they should have no problem with completing the task at hand; they are not ready to testify; EConsult will be able to release a report at the end of the year.

**Mr. Madaio:** stated he is part of the group of attorneys that are dealing with this issue; they are meeting regularly; the substitute has been determined to be EConsult; additional issues to be discussed; Dr. Burchell's numbers are low and favor municipalities; several attorneys are petitioning the Supreme Court for an extension of the five month deadline; OPRA requests discussed; group has hired an OPRA attorney; there will be a meeting this week to discuss when EConsults will issue their report; EConsult will work with Dr. Burchell's report; doesn't think they will come up with the same number; the report will be a macro report; then the allocation is figured out for the regions; then it trickles down to the municipalities.

**Mr. Smith:** asked what was Dr. Burchell's methodology.

**Ms. McManus:** stated the court will be bound to follow the methodology from the first and second rounds; difference of opinion deviation permitted; Dr. Burchell's original report was intended to follow the first round methodology; calculates housing projections for the next ten years; identifies low and moderate income households that will be created; approximately 40% of the households created; State to region to County then municipality; stated we are moving towards a situation where judges are going to hear obligations; working with judges in Ocean County; moving towards a hearing in October; would decide whether that number should be a combination of fair share housing or Dr. Burchell; EConsult will not be ready until the end of the year; not sure how the judges will handle the situation; maybe Supreme Court will step in.

**Mr. Madaio:** stated he is not sure either; primary people have made applications to the Supreme Court; the judges are not giving another minute; they are hoping for some "marching orders" from someone else.

**Councilman Cadicina:** stated he would hope the Supreme Court would allow the municipality to secure their own expert.

**Mayor Bivona:** stated they are not going to allow extra time; has been working with a subcommittee for some time on how the obligations are defined and how we meet them; if we got before a judge and nothing has been decided, at least we will have our number in front of the judge.

**Ms. McManus:** stated it would be reasonable for municipalities to get more time; we have to assume that we will not; we must continue to be protected from Builder's Remedy lawsuits.

**Councilman Cadicina:** asked for confirmation that over 300 municipalities had asked for declaratory judgment.

**Mr. Madaio:** stated, yes.

**Ms. McManus:** stated we are left with a patchwork of formulas by county for figuring out affordable housing; the number starts at the State level; should be the same methodology but it doesn't prevent different judges from making different decisions; we are moving forward in an uncertain time; we continue to move forward until the court states we don't have to; number adjusted to 109 in 2001 due to the fact Franklin Lakes was subject to a builder's remedy lawsuit; ultimately the case was settled; Franklin Lakes does not have the land to provide 358 housing units; vacant and developable land shown; vacant land is land with no structures or structures that are small and unused; developable land can't be all wetland, open space or preserved farm land; mix of market rate and affordable housing; specified densities; Realistic Development Potential (RDP) discussed and defined; RDP must be planned for and satisfied; the unmet need is very different; municipalities must keep unmet needs in mind; look for opportunities to provide affordable housing where appropriate; overlays on properties that might redevelop; creating accessory apartments; money to create affordable housing on properties that are appropriate; just because the number was reduced doesn't mean the job is done; we have to remain vigilant for affordable housing in the future; use overlays where appropriate; municipalities have to take action instead of collecting money; what is appropriate is subjective and needs to be discussed in court; not as black and white as satisfying the RDP.

**Councilman Cadicina:** asked if we did this in round 2.

**Ms. McManus:** stated, yes; the Borough identified a number of sights; referred to page 3 of her handout; zoning put in place; affordable housing put in place; we get the credits; that was for the 109 RDP; we have COAH rules and case law that states the next time a municipality comes before them, you have to re-examine your RDP to identify other properties whose conditions have changed since 2001; RDP that are now vacation or developable; RDP may need to be adjusted; explained credits; all credits go to the RDP; 109 RDP are subject to change and have to be re-examined; there are also bonus credits which are not counted; as a component of RDP there are rental obligations; 25 of 109 must be for rent; bonus credits discussed further.

**Mr. Smith:** stated the difference between 358 and 109 is largely the golf course.

**Ms. McManus:** stated that was fair to say; at the next special meeting the golf course will be discussed and its treatment; how it may impact the RDP; believes we are going to keep the RDP below 358; automatically eligible for the vacant land adjustment which can be reevaluated.

**Mr. Madaio:** stated all is up in the air at this time; will not know the rules for a long time; we will show the judge that we have satisfied our obligation.

**Ms. McManus:** stated the rules will have to be battled in court; there is some thought on the part of the Fair Share Housing Center that parts of COAH's third round rules should also apply to municipalities; Ms. McManus disagrees; no reason for it in the Supreme Court decision or any other decision; the third round bonus credits should be applied after the obligation is met; not only do we have to battle the obligation, there are lots of other issues that we are not able to anticipate; we want to produce a legitimate plan and be able to defend it as well.

**Councilman Kahwaty:** asked if the 688 number was the outlier on their side.

**Ms. McManus:** stated it should be lower from EConsult; would be shocked if it were higher than that.

**Mayor Bivona:** stated we are never going to meet the number with our RDP; RDP standards discussed; almost indifferent to EConsult because we are dealing with a much lower RDP.

**Ms. McManus:** stated Franklin Lakes is in control of calculating the RDP; courts may not agree on how we did it, but we will be able to present a number; we have a number of 109 that needs to be reevaluated; identify unmet need mechanism; we have 205 unknown credits but additional bonus credits to satisfy 109 which is already done; will discuss further at the next special meeting; other documents to view; who will administer affordable housing units; spending plan; how to spend the fees that have been collected; resolution committing to fund programs; resolution to adopt housing element and endorse the fair share plan; expect to see Ms. McManus before the Planning Board in November asking for adoption, then shortly after, before the Mayor and Council for the endorsement.

**Mayor Bivona:** stated he wanted to emphasize that the confidentiality of this meeting is of the utmost importance.

**Mr. Hart:** stated he wanted to make all present that there is an affordable housing committee; has been meeting for a few months; reviewing potential sites for development to meet the RDP and unmet need; will have an assessment of those sites along with recommendations on how we might address both the RDP and the unmet need; will have this information for the October 7, 2015 meeting; looking to adopt the amendment to the housing and fair share plan in November; Mayor and Council has to approve the amendments and authorize submission to the court prior to the December 8, 2015 deadline; there doesn't have to be an in depth analysis for every site; our next meeting may not be sufficient to address all the questions members may have; we will set out the schedule moving forward and what we will need to work through.

**Motion to go back into Regular Session:** Councilman Kahwaty, Councilman Cadicina  
**All in Favor**

**Meeting went back into Regular Session at 9:00PM**

**Motion to Adjourn:** Councilman Cadicina, Councilman Lambrix  
**All in Favor**

**Meeting adjourned at 9:00PM.**

Respectfully submitted by:

JoAnn Carroll  
Recording Secretary  
September 27, 2015