

**MORRIS COUNTY CONSTRUCTION BOARD OF APPEALS**

**MINUTES**

**DATE:** Regular Meeting Thursday November 18, 2010 – 7:30 p.m.  
FREEHOLDER PUBLIC MEETING ROOM

Vice Chairman Ted Maglione called the meeting to order and read the Open Public Meeting Statement.

Vice Chairman Ted Maglione requested a roll call.

**PRESENT:** Vice Chairman Ted Maglione, Jeffrey Betz, Edward Bucceri, Harold Endean, (8)  
Kimberly Hurley, Raymond Stromberg, Michael Spillane, Craig Villa

**ABSENT:** Chairman Bruce Alatary (1)

**ALSO PRESENT:**

Martin Barbato, Esq., Board Attorney  
Evelyn Tierney, Board Secretary

The secretary reported that a quorum was present.

**APPROVAL OF MINUTES:**

Minutes of the meeting held October 28, 2010 were previously distributed. Craig Villa moved the approval of the minutes as submitted. Edward Bucceri seconded the motion. The Board approved the minutes as submitted by the following roll call vote:

**YES:** Edward Bucceri, Vice Chairman Ted Maglione, Craig Villa (3)

**NO:** None (0)

**NOT VOTING:** Jeffrey Betz, Harold Endean, Kimberly Hurley, Michael Spillane (5)  
Raymond Stromberg

**CASES TO BE HEARD**

Fox Hills at Rockaway Condominium Association, Inc. (Block 11302, Lot 48 MC#2010-4  
1 JFK Circle) v. Township of Rockaway/Fire Prevention Bureau

The parties to the above mentioned appeal were advised that due to the lengthiness of the appeal to be heard prior (Post v. Chester, see below) they may have to wait a long time. The parties waited an hour and were given the option to return at the next hearing date of December 16, 2010, at which time the appeal would be considered first as requested by the Board members. The parties were advised by the Board secretary that a reminder notice will be sent to all parties for the December 16, 2010 hearing date.

Vice Chairman Ted Maglione called the parties to appeal:

Vice Chairman Ted Maglione stated that this hearing of the appeal is a continuance from the August 26, 2010 hearing date and that the five members voting would be the three special members: Ted Maglione, Craig Villa, Michael Spillane and the two regular members: Edward Bucceri and Raymond Stromberg. The other members in attendance are invited to participate in the hearing.

Appearances:

Deborah Post, pro se, Owner in Fee  
John Suminski, Esq., Counsel representing the Township of Chester

Witnesses were advised by Counsel Barbato that they were still sworn in from the previous hearing held on August 26, 2010:

Deborah Post, pro se, representing herself  
Peter Turek, P.E., Township Engineer  
George Ritter, P.P., Township Planner  
Carol Isemann, Municipal Clerk/Administrator  
Sarah Jane Noll, Planning & Zoning Administrator and Zoning Official  
Gary DosSantos, P.P., Associate with Mr. Ritter's firm  
Willard Bergman, Esq., Chester Township Planning Board Attorney

Vice Chairman Ted Maglione explained that the various issues established at the last hearing would be addressed and decided on first. There are three code sections that are of importance in this case.

**Reference: 40:55D-53.2.13(a)** applicable language addresses the services provided and are they chargeable – review of applications and review in preparation of documents. Those provisions apply to the following points:

- Point 4- Charges not statutorily allowed
- Point 5- Engineer billing for travel time
- Point 6- Professional review for other professional work product
- Point 7- Professional Planner and Engineer billing for attendance at Board meetings

**Reference: 40:55D-53.2.13(c)** applicable language addresses the services provided and their timeframe and preparation requirement. Those provisions apply to the following points:

- Point 1- Documents not provided in a timeframe that are statute allowed
- Point 2- Invoices not properly prepared (quarterly hours)
- Point 3- Invoices/Vouchers not reviewed by the CFO

**Reference: 40:55D-53.2.13(e)**

- Point 8 - On an application presently pending are attorney bills for services provided prior (assuming they were) would those charges be recoverable.
- Point 9 - Transcripts charges – point closed and will not be addressed by Board.

Mr. Barbato stated that there was a disagreement at the last meeting on what the scope of the language was.

Vice Chairman Ted Maglione stated that the municipality will present their case first as to the scope of the services provided, and if they are chargeable.

Municipal attorney Mr. Suminski in his opening statement stated that the purpose of the Board is to review the charges of professionals and determine if those charges were necessary and reasonable.

- Regarding the charges of fees, testimony will be provided that the fee schedule is established by ordinance and resolution authorizing the appointment and contracts to be entered into with three (3) professionals. The township is in compliance with the statute.
- In case *Wynfield Corp. v. Killam Associates/Hamburg Borough/Sussex County CBA* it was indicated that travel fees are permitted including out of pocket expenses and travel time. The Appellate Court also found that time associated with travel are part of professional fees. The townships position is that travel time (travel time and out of pocket expenses) are allowable.
- The Township believes that Professional review for other professional work product is part of the review process.
- The Township believes the statute allows for professionals to charge for reviews. The attendance of Professional Planner and Engineer at Planning Board hearings is part of that review process, in hearing testimony and providing guidance to the Planning Board to approve or disapprove an application.

Ms. Post in her opening statement stated that regarding Reference: 40:55D-53.2.13(a), her interpretation of the legislature provides guidelines what charges are allowed. Ms. Post indicated that the professionals attendance at Planning Board meetings and discussions and review of other professionals work product and those costs associated should not be chargeable against her escrow account.

Regarding travel, Ms. Post indicated that she believed that travel time is only billable if it is an allowed charge in the fees and charges established by resolution. She believes that neither the resolution nor the contract provided for travel expenses, therefore, travel expenses should not be allowed. The travel time was not documented properly, and therefore in this case is not reasonable.

Mr. Barbato provided his opinion for the Board in regard to the scope of the applicably statutory language, the cases cited, and as applied to the particular matters that are in issue. With regard to **40:55D-53.2.13(a), the statute provides that** charges shall be limited only to professional charges for review of applications, review and preparation of documents and inspection of developments under construction, and review by outside consultants when an application by its nature is beyond the scope of the expertise of the professional normally used by the municipality. What may be added to any such charges shall be “actual out of pocket expenses” of any such professionals or consultants including normal and typical expense occurred in processing applications and inspecting improvements.

With regard to the specific issue of travel, if the arrangement reached with the municipality allows for travel charges, then those charges would be payable. If the particular retainer agreement did not provide

for travel or recovery of out-of-pocket expenses, then there would be no basis to have those fees charged against the escrow account.

With regard to professional review for other professional work product and attendance at Board meetings, Mr. Barbato observed that neither party presented anything substantial on the point. Mr. Barbato further noted that he does not concur that the Bloomingdale case stands for the proposition that Professional Planners and Engineer billing to attend Board meetings is strictly prohibited.

As the Board is to review bills for necessity and reasonableness, it is to make its own determination in reliance upon the statutory language.

The Vice Chairman stated for the record that the following are the issues outstanding: Charges not statutorily allowed, Engineer billing for travel time, Professional review for other professional work product, and Professional Planner and Engineer billing for attendance at Board meetings.

Counsel Suminski introduced the first witness of the night. Carol Isemann testified next. She has been the Municipal Clerk and Township Administrator since 2005, employed since 1989.

The following documents were offered into evidence by Counsel Suminski and marked:

**Exhibit 1** (two items side by side) 1. Letter dated February 5, 2009 addressed to Ms. Isemann on letterhead from Hatch, Mott MacDonald and 2. Agreement entered into on January 20, 2009 for Professional Engineering Services (Peter Turek) for 2009 to the Township (multiple pages).

**Exhibit 2** – (two items side by side) 1. Letter dated January 12, 2009 addressed to Ms. Isemann on letterhead of Ritter & Plante Associates, LLC indicates the acknowledgment of the Professional Service agreements which has the fee schedule indicated. 2. Agreement entered into for Professional Planning Staff Services (George Ritter) for 2009 to the Township.

**Exhibit 3** - Letter dated November 18, 2009 addressed to Ms. Isemann on letterhead from Siegel & Bergman, LLC signed by Willard Bergman, Planning Board attorney indicating the hourly rate for 2009 and 2010.

**Exhibit 4** - Resolution dated January 27, 2009 by the Chester Township Planning Board appointing Mr. Turek, Mr. Ritter and Mr. Bergman as the Professionals to the Planning Board.

**Exhibit 5 (one document with two side by side resolutions)**

Resolution R2009-19 dated January 20, 2009 - appointing municipal planner George Ritter and municipal engineer Peter Turek.

Resolution R2009-1 dated January 6, 2009 - appointing numerous professionals by the Township counsel for the year of 2009. This is submitted to show consistency of how the professionals are appointed at the Township.

By authorization of the resolution, the township council approved their hourly fees as indicted in their Agreements/Contracts. Ms. Isemann testified that the resolution format and process in accepting and

approving those said resolutions has been the same way for the past five years while she has been the Township Clerk.

Ms. Post cross examined Ms. Isemann regarding the documents that were offered into evidence. Counsel Suminski indicated his objection to the conclusion made by Ms. Post.

Mr. Barbato advised the Board that the documents placed into evidence, which have been authenticated by the Clerk of the municipality, would be sufficient in meeting the requirement of 40:55-53.2 with regard to fees or charges based on a schedule established by resolution and/or established annually by ordinance. Moreover, the letter by the attorney would constitute a contract. However, the content or interpretations or Ms. Post's contention as to the insufficiency of the documents is a separate matter for the Board.

Mr. Barbato advised that concerning compliance with **40:55D-53.2.13(c)**, the following allegations by Ms. Post were to be addressed:

Point 1- Documents not provided properly and in a timeframe that is statutorily allowed

Point 2- Invoices not properly prepared (quarterly hours)

Point 3- Invoices/ Vouchers not reviewed by the CFO

Counsel Suminski stated that point 1 and 2 addressed the timeliness and were properly prepared invoices. Amended and corrected invoices were provided to Ms. Post. The township is in an interlocal agreement with the Township of Washington for CFO services.

Ms. Post indicated that in her opinion the invoices were not properly prepared in quarterly hours, the invoices were not provided to her simultaneously and she only received the Planners invoices after making a request to the Township. The review of the billing by the CFO to assure accuracy and accountability, in her opinion, did not take place.

Questions were raised by Ms. Post regarding the CFO procedure. Ms. Isemann testified. Cross examination by Ms. Post followed. Objection made by Counsel Suminski to the questioning of his witness. Questions by the Board followed.

Mr. Barbato advised the Board that the allegation of no CFO review was not supported, and the issue of timeliness here would not be sufficient for the Board to simply throw out the bills wholly, nor does the Board have the right to do so. The Board is to decide on the reasonableness of the charges, if the charges are proper and the quantity of hours if anything should have been charged at all.

Mr. Barbato separately noted for the record, that regarding the municipality had withdrawn the charges for attorney services provided prior to a pending application, and the parties had resolved the issue of transcript charges.

Mr. Barbato recommended that the Board first determine those invoices that it would review and those that it would not review.

For the invoices to be reviewed, Mr. Barbato advised that the statutory section left to be addressed would be **40:55D-53.2.13(a)**, which addresses the services provided and whether those services were

reasonable and necessary for review of applications and preparation of documents. Those provisions apply to the following points:

Point 4- Charges not statutorily allowed

Point 5- Engineer billing for travel time

Point 6- Professional review for other professional work product

Point 7- Professional Planner and Engineer billing for attendance at Board meetings

- Vice Chairman Ted Maglione made a motion concerning item 4 – charging for preparation or correspondence and review of billing invoices should be allowed, concerning item 5- Engineer billing for travel time should be allowed, concerning item 6 - Professional review for other professional work product should be allowed, concerning item 7 - Professional Planner and Engineer billing for attendance at Board meetings should be allowed, concerning item 1- Documents not provided properly and in a timeframe that is statutorily allowed, those charges should be allowed, concerning item 2- Invoices not properly prepared (quarterly hours increments, we heard that they were corrected and provided to the applicant) should be allowed, and concerning item 3- Invoices/Vouchers not reviewed by the CFO should be allowed. Craig Villa seconded the motion. The motion to accept the Invoices as a concept framework, which will still be reviewed for necessity and reasonableness. The motion was approved by the following roll call vote:

**YES:** Edward Bucceri, Vice Chairman Ted Maglione, Raymond Stromberg, (5)  
Michael Spillane, Craig Villa

**NO:** None (0)

**NOT VOTING:** Harold Endean, Jeffrey Betz, Kimberly Hurley (3)

Vice Chairman Ted Maglione indicated that by reviewing Ms. Post submission front page “Morris County Construction Board of Appeals, July 29, 2010” Submission Contents: starting at Tab D, Escrow charges were not reasonable, not necessary and not allowed. There appear to be three Invoices which are #9-33, 9-49 and 9-73. Ms. Post objects to all of them under section NJSA 40:55D-53.2(c). The bases for the objection is that the Invoices are not properly prepared in quarterly hour, also they are not reasonable, necessary and are not allowed.

Invoice #9-33 dated was May 5, 2009 for services rendered April 2009 with two charges listed as 5 hours by George Ritter and 35 hours by George DosSantos for a total of \$2,761.00. Vice Chairman Ted Maglione stated that the issue is that Ms. Post, the applicant, has no expert witness to argue the reasonableness to refute the charges. An expert witness could be an Engineer that has been through the process. This testimony would be most helpful to the Board.

Counsel Suminksi provided a letter dated November 18, 2010 indicating the process followed in the “Bloomingdale case”.

Vice Chairman Ted Maglione stated that in this case tonight Ms. Post does not have an expert witness.

As requested by Counsel Suminski. Mr. Ritter provided his qualifications as an expert witness in his field which is a BS in Landscape Architecture, Masters in Regional Planning from Penn State University and has practiced in the field of Land Use Planning in the State of New Jersey for the past 30 years. He is licensed as a Planner and Landscape Architect in the State of New Jersey. He is also accepted in Superior Court as an expert in Land Planning, testified regarding Invoice 9-33 and his believe as to why the hourly time and charges are necessary and reasonable.

Cross examination by Ms. Post followed. Objections were made by Counsel Suminski as to the questioning of Mr. Ritter. The Board stopped the cross examination process and Ms. Post objected to not being allowed to complete her cross examination. Questions by the Board of the witness followed.

Counsel Suminski introduced his third witness of the evening Mr. DosSantos whose qualifications are a Bachelor of Science degree in Landscape Architecture and over 30 years in site planning and development testified regarding his hours spent in reviewing the application and his believe as to why the hours spend are necessary and reasonable.

Cross examination by Ms. Post followed of the witness. An objection was made by Counsel Suminski on the questioning of the witness. The Board concurred. Questions by the Board followed of both Mr. Ritter and Mr. DosSantos regarding Invoice #9-33.

Counsel Suminski summarized that two licensed professionals testified on what the charges were for and that they were reasonable and necessary. There was no information solicited under cross examination to the contrary.

The following invoice was offered by Ms. Post and marked as Exhibit 6: Post Farm Agriculture Subdivision, Apr-09 - Planner Invoice on Ritter & Plante Associates LLC letterhead.

Ms. Post summarized that there is nothing complex about her application. Therefore, she believes that the time spent on this application was not necessary and is not reasonable.

Discussion by the Board followed.

Raymond Stromberg made a motion that due to lack of refuting evidence, Invoice #9-33 is being accepted as having been properly issued. Edward Bucceri seconded the motion. Discussion followed. The Board voted to accept the Invoice #9-33 as issued by the following roll call vote:

**YES:** Vice Chairman Ted Maglione, Edward Bucceri, Raymond Stromberg, Michael Spillane (5)  
Craig Villa

**NO:** None (0)

**NOT VOTING:** Harold Endean, Jeffrey Betz, Kimberly Hurley (3)

The parties were advised that the Board will continue the hearing on Thursday December 16, 2010.

The parties were excused.

**CASES STAYED/POSTPONED (“Postponement requests/consent and case correspondences were made part of the file”)**

Mr. Bove, Jr. (Block 40.08, Lot 23) v. Twp. of East Hanover MC#2005-37 (pending Court Decision)

Ron Clark & Robyn Valle (Block 40501, Lot 13) v. Twp. of Rockaway MC#2006-9 (stayed pending litigation)

William Schaefer (Block 4401 Lot 42 – Denial of Permit 2/25/2010, Block 2604, Lot 19 Notice of Unsafe Structure 2/17/2010 = worksite: 441 Turnpike) v. Township of Pequannock MC#2010-7 (stayed open ended with monthly status update – update received dated 7/6/2010, 8/6/2010, /14/2010, 10/15/2010, 11/12/2010 - and made part of the file)

Weber Homes at Mountain Lakes LLC v. Town of Boonton **ESCROW APPEAL** MC#2010-10 (stayed open ended @4/22/2010 meeting, pending litigation)

Scheller Properties LLC (Block 20, Lot 50) v. Township of Washington MC#2010-21 (stayed open ended @6/23/2010 pending litigation)

**CASES POSTPONED TO 12/16/2010**

Tucker Kelley (Block 30503, Lot 12) v. Twp. of Rockaway MC#2006-34/1 (12/16/2010)

Berley Associates LTD. (Block 5801, Lot 24) v. Town of Morristown MC#2010-33HD (12/16/2010 3<sup>RD</sup> Mtg. Date)

Telco Communications v. Town of Morristown MC#2010-31HD (12/16/2010 3<sup>RD</sup> Mtg. Date)

**CASES WITHDRAWN (“Withdrawal Confirmation” letters faxed & mailed to all parties and made part of the case files)**

Galaxy Diner (Location: 1277 Route 23 South) v. Borough of Butler MC#2010-26  
Fire Prevention Bureau

**CORRESPONDENCE** --- NONE---

Treasurer Balance as of 10/31/2010 = \$3,947.82

**OPEN ACTION ITEM** --- NONE--- **OLD BUSINESS** --- NONE--- **NEW BUSINESS** --- NONE --

**2010/2011 MEETINGS:**

Thursday December 16, 2010 (3<sup>rd</sup> Thursday)  
Thursday January 27, 2011 (4<sup>th</sup> Thursday, Re-Org Mtg.)

**ADJOURN:** On motion duly made and seconded, the meeting was adjourned at 12:05 a.m.

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Evelyn Tierney, Board Secretary