

# THE NEW JERSEY PLANNER

THE NEW JERSEY PLANNING OFFICIALS

November / December 2015

VOL. 76, No. 6

ISSN: 2168-6416

## AFFORDABLE HOUSING UPDATE

By: Mike Cerra  
Assistant Executive Director, NJLM

Municipalities continue to struggle with how to comply with the State imposed affordable housing obligations. After the Council on Affordable Housing (COAH) failed to adopt regulations, over 300 municipalities were forced to seek declaratory judgments before the Court. The ink was barely dry on the NJ Supreme Court order that transferred oversight of the Fair Housing Act from COAH to the courts when the Fair Share Housing Center issued its own estimate of municipal obligations. In response, the League retained two consultants who each looked at the issue from a slightly different perspective. We are pleased to advise that both reports have been a positive resource for municipalities in their respective Court proceedings.

The first report: *Demographic and Economic Constraints on the Inclusionary Zoning Strategy Utilized for the Production of Low and Moderate Income Housing in New Jersey*, is authored by Dr. Robert S. Powell, Ph.D., and Gerald Doherty, M.A. of Nassau Capital Advisors, LLC. To summarize, this report intends, “to analyze the factors that determine how effective the inclusionary zoning strategy is likely to be in delivering privately-financed affordable housing units in New Jersey over the next ten years.” (See Section 5, pg. 18)

The analysis comes to the conclusion that the State economy is, “...likely to continue to struggle over the next ten years to achieve a level of growth needed to fuel a robust housing market.” (Section 5, pg. 18) The report also notes the economic effect of recent shift in “locational preferences” as residents

## NJPO Calendar of Events\*

### 2016 Winter Spring Mandatory & Experienced Classes

#### Mandatory

Date	County	Location
Jan. 30	Morris	Police Academy, Morris Plains
Feb. 6	Middlesex	Fire Academy, Sayreville
Feb. 20	Camden	To be determined
Feb. 27	Hunterdon	Voorhees High School, Glen Gardner
Mar. 2	Bergen	Community College, Paramus
Mar. 5	Burlington	Burlington Township Municipal Building
Mar. 11	Gloucester	Pleasant Valley School, Harrison
Mar. 19	Ocean	Fire Academy, Waretown
Apr. 2	Sussex	Sussex Community College, Newton
Apr. 9	Monmouth	Monmouth Co. Fire Academy, Howell
Apr. 16	Bergen	Paramus Life Safety Building, Paramus
Apr. 23	Cape May	Technical High School, Cape May Court House
Apr. 30	Somerset	Hillsborough Twp. Muni. Complex, Hillsborough
May 7	Essex	Kessler Institute, West Orange

#### Experienced

Date	County	Location
Mar. 5	Burlington	Burlington Township Municipal Building
Apr. 9	Monmouth	Monmouth Co. Fire Academy, Howell
May 7	Essex	Kessler Institute, West Orange

\* visit [www.NJPO.org](http://www.NJPO.org) for registration information.

shift increasingly away from suburban and rural areas back to the State’s urban centers (Section 5, pg. 18).

The report’s authors, “...find no credible evidence to support the conclusion that New Jersey’s economy will be able to increase its historic level of housing production to a level that will allow the inclusionary zoning strategy to come close to achieving the aspirational goals of affordable housing advocates.” (Section 5, point 4; pg. 19)

In conclusion, the report predicts that, “the inclusionary zoning strategy is capable of delivering a total of between 17,000 to 24,000 new units of low and moderate income housing during the next ten years.” (Section 5, pg. 21)

## USE OF SOCIAL MEDIA BY BOARD MEMBERS DURING THE HEARING PROCESS

By: Jonathan E. Drill, Esq.  
Associate Council, NJPO

I attended the recent New Jersey League of Municipalities conference in Atlantic City where one of the hot topics of conversation was board member use of electronic communications, social media<sup>1</sup>, and independent computerized research. This article contains my legal opinion on board members' use of electronic communications (including social media) and independent computerized research by board members during the hearing process. It is my opinion that during the hearing process on an application, board members should refrain from all electronic communications and independent computerized research to avoid allegations that they have been converted from unbiased judges of an application to advocates or witnesses, thereby tainting the proceedings and risking reversal of the Board's action.<sup>2</sup>

It is well settled in New Jersey that a board member is limited to considering evidence that was made part of the record during a hearing on an application. *Kramer v. Sea Girt Board of Adj.*, 45 N.J. 268, 284, 289 (1965); *Baghdikian v. Ramsey Board of Adjustment*, 247 N.J. Super. 45, 50-51 (App. Div. 1991). The Municipal Land Use Law N.J.S.A. 40:55D-10a requires that a board hold a formal hearing on an application for development as well as on an application for adoption, revision or amendment of the master plan. N.J.S.A. 40:55D-10d requires that the board take testimony under oath during the hearing and that all witnesses be subject to cross examination, which contemplates that the

evidence constituting the record that the Board may consider cannot be submitted ex parte nor be the result of independent research by board members.

While the technical rules of evidence do not apply to a board hearing (see N.J.S.A. 40:55D-10e), our courts have held that "evidentiary concepts are still pertinent." *Clifton Board of Education v. Clifton Board of Adjustment*, 409 N.J. Super. 389, 430 (App. Div. 2009). Thus, even though the technical rules of evidence do not apply in a board hearing, a board cannot rely upon documents without a witness to explain them and be cross examined on them. *Seibert v. Dover Twp. Board of Adj.*, 174 N.J. Super. 548, 552-53 (Law Div. 1980). "[A]n agency is never free to act on undisclosed evidence that parties have had no opportunity to rebut." *High Horizons Dev. Co. v. NJDOT*, 120 N.J. 40, 53 (1990).

For this reason, texts, emails and other forms of electronic communications (including through social media) that board members may receive from an applicant, objector or member of the public should not be considered. They should instead be rejected with a reply from the board member stating that it is inappropriate for the member to consider any input outside the hearing. Further, board members receiving such communications should reveal as part of the record that such communications were received, and paper copies of the communications should be placed in the application file maintained by the board secretary, with a notation that it was not viewed by the board members (this step is necessary for purposes of establishing a complete record in the event of a subsequent appeal to the courts).

The reason electronic communications should not be accepted or considered during the hearing process is that they can convert a board member - who by law is supposed to be an unbiased judge of the application - into an advocate for one side or the other of an application or, equally problematic, a perceived advocate for one side or the other. This creates potential ethical issues, potential violations of New Jersey's rules of evidence, and potential violations of due process rights.

<sup>1</sup> Social media is defined in Merriam-Webster's on-line dictionary as "forms of electronic communication ... through which users create online communities to share information, ideas, personal messages, and other content." See, <http://www.merriam-webster.com/dictionary/social%20media> (last visited December 2, 2015).

<sup>2</sup> There are other issues related to the use of electronic communications and social media outside the hearing process such as engaging in "cyber" meetings and revealing confidential and privileged information, both contrary to the Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21, but those issues are beyond the scope of this article.

The Local Government Ethics Law at N.J.S.A. 40A:9-22.5d provides that no local government officer or employee (and board members are local government officers) shall act in his or her official capacity in any matter where he or she has a direct or indirect “personal involvement that might reasonably be expected to impair his [or her] objectivity or independence of judgment.” The discovery by a reasonable member of the public that a board member received and considered ex parte electronic communications by an applicant, objector or other member of the public could lead the reasonable member of the public to believe that such communication constituted personal involvement by the board member that might reasonably be expected to impair the board member’s objectivity or independence of judgment.

Similarly, board members should not conduct any independent computerized research, whether through Google or other search engines, relating to the property that is the subject of the application or any witnesses involved in the application. By engaging in such activities, the board member steps out of his or her role as a judge of the application and steps into the role of a witness. The better practice is to ask one of the board’s witnesses - such as the board planning or engineering expert - to conduct the research instead, then explain on the record the results of that research and subject himself or herself to cross-examination.

New Jersey’s model jury charges are instructive. Because of problems the judiciary has had with jurors conducting their own on-line and other research, the Model Jury Charges include as Preliminary Charge 1.11C: “You must not conduct any research or make any investigations on your own about the case.” See, <http://www.judiciary.state.nj.us/civil/charges/1.11C.pdf> (last visited November 30, 2015). The charge continues:

You must not investigate, research, review or seek out information about the issues in the case, either specifically or generally, ... either in traditional formats such as newspapers, books, advertisements, ... through any research or inquiry

on the Internet, in any blog, or any other computer, phone, text device, smart phone, tablet or any other device. ... You must also not attempt to communicate with others about the case or even general subject matters raised during the case, either personally or through computers, cell phones, text messaging, instant messaging, blogs, Twitter, Facebook, MySpace, personal electronics and media devices or other forms of wireless communication. Id.

Preliminary Charge 1.11C explains why these restrictions have been imposed:

Why is this restriction imposed? You are here to decide the case based solely on the evidence - or lack of evidence - that is presented in this courtroom. You may be wrongly inclined to think that different or additional information from other sources would be helpful to you, or that this prohibition is somehow artificial ... . Our system of justice requires that you, as a juror, not be influenced by any information outside this courtroom. ... We must also make certain that each party has a fair opportunity to refute or explain evidence offered against it or that may be unfavorable to its case. Id. (emphasis added)

While the above jury charge addresses the relatively new phenomenon of instant computerized research and instant electronic communication, the concept on which it is based is quite old. It has long been the law that members of administrative agencies “cannot be silent witnesses as well as judges.” N.J. State Board of Optometrists v. Nemitz, 21 N.J. Super. 18, 28 (App. Div. 1952).

I am aware that the courts expect board members to bring their familiarity with their community’s characteristics and their peculiar knowledge of local conditions to the table, Kramer, 45 N.J. at 296, and that board members can rely on their personal knowledge of a site gleaned from that member’s drive-by or visit to the site, Baghdikian, 247 N.J.



Super. at 50. However, in order to rely on such personal knowledge, the facts so relied on must be placed on the record. *Id.* As the Baghdikian court explained: “If such facts are undisclosed the parties would be denied the essence of a hearing, they would be kept in ignorance of the things controlling the action of the board, and due process would be flouted.” *Id.* at 51 (emphasis added) (quoting *Giordano v. City Comm’n of Newark*, 2 N.J. 585, 589 (1949)).

Some will argue that if a board member is allowed to make a site visit to “eye ball” the site conditions, that board member should also be allowed to “eye ball” the site through the use of Google Maps or a computerized mapping program. The courts have not yet ruled on this proposition in the context of land use applications but, at a minimum, even if the courts were to agree that viewing a site on a computer is the equivalent of physically viewing the site, the board member would have to place his or her observations gleaned from the use of the viewing software on the record during the hearing so that the applicant and any objectors could refute or explain the information.

Fundamentally, however, there is a material evidentiary difference between physically viewing a site with one’s own eyes to get an understanding of the situation and viewing the site through computer software, a difference that in my opinion casts doubt on whether a court would in fact accept a computerized view as the equivalent to an in-person visit. Viewing the site through computer software is akin to viewing the site through a photograph or video, both of which are forms of evidence that can only be considered if they are first authenticated during the hearing and introduced into evidence.

It is well established law in New Jersey that photographic evidence – including still photographs, motion pictures and video images – can be admitted for the truth of the matters depicted in the images, but only if the party proffering the image established that the image is a substantially correct representation of the matter depicted. This requires sworn testimony that: (1) the image is an accurate reproduction of what

it purports to represent; and (2) the reproduction is of the scene at the time at issue or that the scene has not changed between the time at issue and the making of the reproduction. *State v. Wilson*, 135 N.J. 4, 14-16 (1994). This requirement in and of itself begins to highlight the inherent problems with a board member relying on computerized images discovered through his or her own independent research.

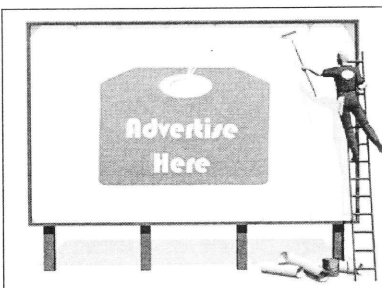
Beyond this, however, computer generated images create additional issues that our courts have addressed. In *Rodd v. Raritan Radiological Associates*, 373 N.J. Super. 154, 169 (App. Div. 2004), the court held that the use of computer generated images as evidence requires a more detailed foundation than required for photos due to “the reliability problems arising from computer generated exhibits and the processes by which they are created.” The court held that as such, “there must be testimony by a person with some degree of computer expertise, who has sufficient knowledge to be examined and cross examined about the functioning of the computer.” *Id.* Further, what is required is “testimony from a witness who possesses sufficient knowledge of the technology used to create the [computer images].” *Id.* at 169-170. My point here is that viewing the site through computer software should be done and considered only if the computer images are presented during the hearing and made part of the record by introduction into evidence during the hearing.

If a board member has reason to believe - based on his or her familiarity with their community’s characteristics and/or peculiar knowledge of local conditions – that the facts are other than has been presented by the applicant, or if a board member wants to verify a witness’s testimony regarding a property or structures at issue in the application or the depiction of the property or structures on a map or plan, the board member should ask one of the board expert witnesses (such as the board planning or engineering expert) to research the issue - which could include on the spot computerized research through Google Maps or similar computerized software program – so that the expert witness can

then explain on the record the results of the research and be subject to cross examination. The board member could also ask the applicant to provide the same information. In this way, the board member does not risk becoming or being perceived as biased, an advocate for one side or the other of the application and/or a witness rather than a judge of the application.

The danger from a board member engaging in electronic communications and/or independent computerized research during the hearing process is twofold: (1) it taints the individual board member's determinations, and (2) it also infects and taints the determinations of the board as a whole<sup>3</sup>. In *New Jersey Racing Commission v. Silverman*, 303 N.J. Super. 293 (App. Div. 1997), the court held that engaging in ex parte communications with board members and providing board members with material which the party in interest had no opportunity to contest is improper and so "taints" and "infects" the board's deliberations and decision that the decision must be invalidated as arbitrary and capricious.

Based on all of the above, it is my opinion that during the hearing process on an application board members should refrain from all electronic communication and independent computerized research, to avoid allegations that they have been converted from unbiased judges of an application to advocates or witnesses, thereby tainting the entire proceeding, and resulting in the possible reversal of the Board's action. §



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<sup>3</sup> This is so even if the board member is personally convinced that he or she remains unbiased despite the information that was obtained.

## NJPO Announces its Meeting Schedule for 2016

The New Jersey Planning Officials will hold five board meetings in the 2016 calendar year. Board meetings are open to all NJPO members.

Feb. 29, 2016	(5 <sup>th</sup> Monday) - Budget
April 25, 2016	(4 <sup>th</sup> Monday)
July 25, 2016	(4 <sup>th</sup> Monday)
Sep 26, 2016	(4 <sup>th</sup> Monday)
Nov 16, 2016	(League of Municipalities)

## 2016 Board of Directors Announced

The New Jersey Planning Officials proudly announces its 2016 Board of Directors with the following positions:

G. Winn Thompson	President	Pennington Borough
Gail Glashoff	Vice President	East Amwell
Shaun C. Van Doren	Treasurer	Tewksbury Twp.
Graeme Atkinson	Director	Long Branch
Brian Boffa	Director	Woodcliff Lake
Veronica Chainey	Director	Millville City
Nathan Foulds	Director	Franklin (Sussex)
Monty Holt	Director	Estell Manor
Kwan P. Hui	Director	Monroe Twp.
Kenneth Kauker	Director	Edgewater Park
Lee Klein	Director	West Orange
Eugene Kobryn	Director	Little Egg Harbor
Karen Kubulak	Director	Perth Amboy
Patricia Leaf	Director	Edgewater Park
Ann Marie Michael	Director	Pompton Lakes
Michelle Nocito	Director	Voorhees Twp.
Debra Mercantini	Director	Robbinsville Twp.
Rajeh Saadeh	Director	Springfield Twp.
Roger Steedle	Director	Linwood
Dave Szilagyi	Director	Perth Amboy
Rick Verdecchio	Director	Carneys Point
Jon Weston	Director	Chatham Twp.
Cleo Williams	Director	Ewing Twp.