

Adopted October 30, 2015

MOA POLICY ADVISORY COMMITTEE MEETING

Richard J. Sullivan Center
Terrence D. Moore Room
15 C Springfield Road
New Lisbon, New Jersey

June 26, 2015

Immediately following the 9:30 a.m. Policy & Implementation Committee meeting

MINUTES

MEMBERS IN ATTENDANCE: Chairperson Candace Ashmun, Commissioners Ed Lloyd and Ed McGlinchey, Mr. Fred Akers, Mr. Chuck Chiarello, Mr. Ernest Kuhlwein and Commissioner Alan Avery (Alternate).

MEMBER ABSENT: Commissioner Paul E. Galletta

OTHER COMMISSIONERS PRESENT: Richard Prickett and Mark Lohbauer

STAFF PRESENT: Executive Director Nancy Wittenberg, Susan R. Grogan, Charles Horner, Paul D. Leakan, and Betsy Piner. Also present was Amy Herbold with the Governor's Authorities Unit.

Chairperson Ashmun called the meeting of the Memoranda of Agreement (MOA) Policy Advisory Committee to order at 10:56 a.m.

1. Adoption of minutes from the April 24, 2015 MOA Policy Advisory Committee meeting

Commissioner Lloyd moved the adoption of the minutes from the April 24, 2015 Committee meeting. Mr. Kuhlwein seconded the motion and all voted in the affirmative except Commissioner McGlinchey, who abstained as he had not read the minutes.

2. Continued discussion of intergovernmental agreements

Chairperson Ashmun said her intent was to review the list of items included in the meeting packet (*Memoranda of Agreement June 18, 2015*). Commissioner Ashmun reminded all present that there are deviation MOAs and streamlining MOAs. This Committee's focus is on the deviation MOAs.

Ms. Grogan began a review of the June 18, 2015 list, noting that she had broken it into two categories, one related to the MOA process, and the other to MOA standards. She said the

current process, *The Process for Considering an Intergovernmental Agreement –June 23, 2008* is posted on the Commission’s web site at:

[http://www.state.nj.us/pinelands/images/pdf%20files/Intergovernmental%20Agreement%20Process%20\(June%202023,%202008\).pdf](http://www.state.nj.us/pinelands/images/pdf%20files/Intergovernmental%20Agreement%20Process%20(June%202023,%202008).pdf) She said this is the long-time process to which staff directs applicants to guide them when pursuing an MOA.

Mr. Leakan presented the 2008 process document on the Smart Board.

Ms. Grogan said the packet list is not a set of recommendations, but rather a list of issues raised during Plan Review and on various occasions by staff, the public and the Commission itself. Some items contradict one another, which is understandable given the variety of sources of the comments. Referring to the 2008 Process, she said there are minor housekeeping issues that can be addressed readily, e.g., Item 1 indicates that the Public & Governmental Programs Committee no longer exists and should be replaced with the Policy & Implementation Committee to reflect the current committee structure.

Commissioner Ashmun said the important question is the role of the Commission in starting the MOA process. As it stands now, the Committee authorizes the *pursuit* of an MOA and directs the staff to start the work.

Ms. Grogan directed the Committee to Step 6 of the 2008 process, which calls for the Committee to make such a decision.

Ms. Grogan said the staff tries to provide applicants with guidance regarding the consistency of their proposed development with the CMP. This usually involves meetings with applicants and the review of a fairly comprehensive package of information provided by the applicants, so that staff will have a full understanding of what is being requested and why. If the proposed development cannot meet CMP standards, the applicant may request to come before the P&I Committee and explain why a deviation MOA may be warranted. The P&I Committee then decides if it is interested in pursuing such an agreement, as described in Step 6 of the 2008 Process.

Commissioner Lloyd said last year when a proposed MOA came before the P&I Committee, the Committee was told by staff that the decision would be that of the whole Commission, not the Committee.

Ms. Grogan said that a suggestion was made at the last MOA Committee meeting to add a step in the MOA process. As described in Item #3 of the packet list, after the P&I Committee has heard the applicant’s presentation about the need for an MOA, the full Commission would then determine whether it is interested in pursuing the agreement or not.

Commissioner Lloyd said the MOA process is very time consuming. The Commission needs to determine where it wants to allocate its resources.

In response to Commissioner Ashmun’s question regarding the point at which the applicant is told that a proposal will not meet CMP standards, Mr. Horner said when a public agency first

meets with staff and makes its proposal, typically staff can advise that a project may not work and offer suggestions, e.g., move a proposed municipal building to a site other than wetlands. If an agency proposes a public development project that does not meet CMP standards but is intended to address a public safety issue, staff will discuss the potential for an MOA. He noted that this is a rare occurrence.

Chairperson Ashmun said she would like the Commission to see a report that explains what is being proposed by the applicant and be given the opportunity to make the decision if an MOA is appropriate.

In response to Mr. Akers' question if an inconsistent Certificate of Filing (CF) could serve as a threshold for bringing a request for an MOA before the Committee, Ms. Wittenberg reminded him that there is no CF issued for a public development application. Also, she said that staff needs a significant amount of information before a project can proceed.

Ms. Grogan added that the Commission would not want a public agency to go through a lot of work before being advised that a project would not work.

Commissioner Lohbauer asked if there were some trigger point at which the applicant is told that a proposed project is inconsistent with the CMP.

Commissioner McGlinchey asked if there is any standard in the CMP identifying what qualifies as a compelling public need, e.g. as for the sewer line at Ancora Hospital. He said he found it disturbing that staff is accused of "helping" public agencies obtain MOAs when they are merely trying to gather the significant amount of information needed to provide appropriate guidance to an applicant.

Mr. Horner said the Committee might think of the process as a filtering process. If a proposed development does not meet CMP standards, then the next filter is that staff helps the applicant modify their application. If the application cannot be modified, the next filter is determining whether a compelling public need exists and looking for feasible alternatives. The CMP is clear that if there is a feasible alternative, a compelling public need waiver cannot be approved. For those applications that cannot be modified, staff typically issues a letter advising the applicant that a project does not meet CMP standards and that alternatives should be sought. The letter would also request that the applicant advise the staff whether the agency wishes to pursue a waiver based on compelling public need. Mr. Horner said, in practice, the application is usually modified to meet CMP standards, but if not, the MOA is the last step. He said it is the staff letter that is typically the trigger point for consideration of an MOA. Mr. Horner provided an example where several years ago Woodland Township wanted to use a sand pit in the Preservation Area District as a temporary Off Road Vehicle (ORV) park in exchange for revegetation of the site. It was clear to the staff that the proposal would not qualify for a compelling public need waiver. However, staff found some merit to the proposal and ultimately it was approved through an MOA.

Mr. Kuhlwein asked what would happen if the applicant were told that an MOA would not work yet the applicant insisted on pursuing it.

Mr. Horner said the Executive Director would put the issue on the P&I Committee meeting agenda. He added that it is difficult for staff to deny a public agency an opportunity to meet with the Commission.

In response to Chairperson Ashmun's question if requiring the Executive Director to bring a potential MOA application before the Committee requires a rule change, Ms. Grogan said she did not believe so as that was the current process under the 2008 guidelines. She reminded the Committee that the CMP does not recognize committees of the Commission. The public hearing process is basically all that is addressed in the CMP regarding MOAs.

In response to Mayor Chiarello's question as to why this was such a critical issue, Chairperson Ashmun said during the latest Plan Review, it was evident that there was uncertainty about the MOA process and it was felt that perhaps the Commission needed to have a more active role early on in the development of an MOA.

Commissioner Lohbauer said this MOA Committee will decide if changes are needed to the guidance document or if a rule change is required. He suggested that a "trigger" letter, not currently described in the process, should be included.

Chairperson Ashmun said she felt the issue is that the Commission has to get the process straight and publicly acknowledged.

Mayor Chiarello said he didn't like to see things get more complicated from the county and municipal viewpoint.

Chairperson Ashmun said that the Commission was trying to straighten out its own internal process.

Commissioner Avery said he had pursued both MOAs and compelling public need waivers on behalf of Ocean County. He said that no one wants to go through the MOA process. He said he was concerned with having the P&I Committee as the end point of an MOA discussion. He said the composition of the P&I Committee may not represent the balance of the Commission. He said that MOAs are generally related to large issues and all Commission members are aware of them. It is rare that an issue would develop into an MOA as most applicants want to go through the normal regulatory process because it is consistent. But when an MOA is developed, there is a benefit of going before the P&I Committee as a means of hashing out the details.

Commissioner Lohbauer said he concurred. He said he didn't believe the P&I Committee should have the power to circumvent the full Commission. He said the review by the P&I Committee should be procedural, not substantive, and address if an MOA is an appropriate approach.

Commissioner Avery said that he would not want to do anything to jeopardize the applicant.

Chairperson Ashmun said if the staff and the Commission start the MOA process, it is a huge commitment.

Commissioner Lloyd said he didn't want a situation in which the applicant dictates how the Commission uses its resources. He said he was comfortable with the P&I Committee making the decision to proceed and said, for example, he thought the Ocean Acres basin project had gone through a good process as it had been brought to the Committee early.

Ms. Wittenberg reminded the Committee that the P&I Committee had not been able to come to a consensus on the Stafford basin matter and ultimately made no recommendation as to how the applicant should proceed. These discussions need to end with a recommendation.

Commissioner Avery said only 14 applications have risen to the MOA level in the past 20 years. Mr. Horner added that it is only once a year when discussion of an MOA with an applicant even starts.

Commissioner Lohbauer asked what if the P&I Committee's review of an applicant's request for an MOA culminated in a recommendation to the full Commission.

Commissioner Lloyd said he agreed that the P&I Committee should be the first level of vetting.

Ms. Grogan said that Item #3 on the list of MOA procedural issues would have the P&I Committee review an applicant's request for an MOA and make a recommendation to the full Commission. It would then be the full Commission's responsibility to determine whether to authorize the staff to proceed with development of the MOA.

Ms. Grogan said whether or not rulemaking will be required will depend upon the final package of recommendations developed by this Committee.

Commissioner Prickett said when the P&I Committee reviews an MOA, it is performing due diligence on behalf of the full Commission.

Chairperson Ashmun said the Commission needed to provide guidance to staff early on in the process.

Commissioner Prickett asked if there were situations where an equivalent level of protection could not be identified.

Commissioner Lohbauer responded that this is a substantive issue and that the P&I Committee needed to determine procedural requirements.

Mayor Chiarello asked if that wasn't like having a veto power over something for which one does not have all the facts.

Commissioner Lloyd said with an MOA, the threshold is that a project is inconsistent with the CMP, but the Commission may want to proceed with one.

Chairperson Ashmun said that MOAs are extremely rare. If one cannot meet the CMP standards, there are big hoops through which one must jump. An applicant must demonstrate how it will deal with alternatives. She said she supported Mr. Horner in that many times there are alternatives.

Commissioner Avery said, from the applicant's point of view, much of the work on the process may have been done already by the time it gets to the Committee.

Commissioner Ashmun asked who should qualify for an MOA.

Mr. Akers said he thought a flow chart would be helpful and maybe staff needs to determine the process.

Commissioner McGlinchey said when discussing who should be eligible to apply for an MOA, he believed that public utilities are the lifeblood of a community and it would be wrong to exclude them.

Commissioner Lloyd said he did not feel that private utilities should be raised to the level of a public agency.

Commissioner Lohbauer said he believed utilities were not public agencies and should not be permitted to apply for MOAs. His understanding was that only a unit of government can apply for an MOA.

Commissioner Avery said he believed different entities should be allowed to enter into an MOA.

Commissioner Lloyd said an MOA, by definition, is for a public project that is not in compliance with the CMP. He said he did not believe that utilities could come under the guise of public agencies.

Ms. Grogan said that over the years the Commission had entered into agreements with a variety of agencies, such as for the Woodland Township ORV park and the Southern Ocean County landfill, that involved both public and private entities.

Ms. Wittenberg cautioned against ruling out certain types of agencies.

Commissioner Avery said the Southern Ocean County landfill was a project for which the Commission tried to bring a landfill in compliance but an MOA was required as the cover material was brought in from outside the Pinelands.

Mr. Kuhlwein said the parent company, a private company, was bankrupt and couldn't afford to cap the landfill.

Mr. Horner said the Woodland Township MOA had involved the NJ Department of Environmental Protection, the NJ Conservation Foundation and the Commission. He said the

Southern Ocean County landfill project was an example of a project for which there were significant obstacles in demonstrating a compelling public need.

Chairperson Ashmun called for public comment.

3. Public Comment

Mr. Lee Rosenson, with the Pinelands Preservation Alliance and New Jersey Audubon Society, referencing the discussion of compelling public need, said that through some “voodoo” regulations, private companies have been transmogrified into public agencies. He said he believed an applicant must demonstrate the protection of Pinelands resources.

Ms. Ann Kelly, a resident of Mount Laurel, said that compelling public need should apply only for the protection of the Pinelands.

Ms. Marianne Clemente, a resident of Barnegat Township, said that the P&I Committee makes recommendations to the full Commission so the Committee has no veto power over the full Commission.

Chairperson Ashmun said the next meeting of the MOA Policy Advisory Committee will be following the August 28, 2015 CMP P&I Committee meeting. Commissioner McGlinchey added that the Agriculture Committee would meet following the July 31, 2015 CMP P&I Committee meeting.

The meeting adjourned at 12:15 p.m. (Moved by Commissioner Lohbauer and seconded by Mayor Chiarello)

Certified as true and correct:



Betsy Piner,
Principal Planning Assistant

Date: July 8, 2015