

**Town of Westwood Planning Board
Meeting Minutes
50 Carby Street
November 19, 2007
7:00 PM**

Board Members Present: Chairman Robert Malster, Robert Moore, Steve Olanoff, Bruce Montgomery and Henry Gale.

Staff Members Present: Diane Beecham, Town Planner; John Bertorelli, Town Engineer; Peter Alpert, Esq., Ropes & Gray.

Chairman Malster opened the meeting at approximately 7:40 pm.

Request for Withdrawal of Certain Consolidated Special Permits

Attorney Alpert stated that the Applicant has requested to withdraw, without prejudice, their requests for the following consolidated special permits: (1) Animal Clinic or Hospital, under Section 4.1.5.3 of the Town of Westwood Zoning Bylaw; and (2) Commercial Kennel, under Section 4.1.5.15 of the Town of Westwood Zoning Bylaw; in connection with the Application for MUOD Area Master Plan Special Permit for Westwood Station, filed December 13, 2006, as supplemented and amended (as so supplemented and amended, the "MUOD Special Permit Application").

On a motion by Robert Moore and seconded by Bruce Montgomery, on a vote of four in favor and one abstention, the Board voted to grant the Applicant's request to withdraw without prejudice the above special permit applications.

Continuation of Deliberations on the Westwood Station Special Permit Decision

Attorney Alpert stated the next topic of the meeting would cover the General Conditions as part of the Westwood Station deliberative process.

General Conditions.

1. Conformity to Approved Plans. The Project shall be implemented in substantial conformity with the Application, the Approved Plans, and the findings and conditions set forth in this Decision. Any material modifications to the Project shall require a formal amendment to this Decision pursuant to the procedures set forth in Section VIII below. The Board shall, in its reasonable discretion, determine whether an action constitutes a material modification. Notwithstanding the preceding sentence, provided no other conditions of this Decision or the Bylaw are violated, the types of physical variations from the Approved Plans described in Special Condition 2(b) shall not be deemed to constitute a material modification requiring an amendment to this Decision. Nothing in this General Condition 1 shall limit the Board's ability to authorize the transfer of development authorizations and obligations pursuant to Bylaw § 9.6.13.3.

[In response to a question, Peter Alpert stated that the "material modification" vote will require a super majority.

2. Amendments to Consolidated Special Permits. The Planning Board shall retain jurisdiction over any future amendments that might be sought in connection with the uses and activities permitted pursuant to the Consolidated Special Permits granted in this Decision.

3. Environmental Impact and Design Review. Consistent with Section 9.6.13.1 of the Bylaw, no individual components of the Area Master Plan for which Environmental Impact and Design Review ("EIDR") is otherwise required pursuant to Bylaw Section 7.3 may receive Building Permits or be constructed without prior approval of an EIDR Application. This General Condition A.3 sets

forth the procedural requirements for the EIDR review of components of the Approved Area Master Plan. These requirements are intended to complement but not contradict the EIDR-related provisions of the Bylaw and the Rules & Regulations.

As required pursuant to Section 1.3 of the Rules & Regulations, and except as provided in General Condition A.5 below, no EIDR Application shall be deemed complete unless accompanied by a Compliance Monitoring Report that “demonstrates compliance with the provisions and conditions identified in the Area Master Plan Special Permit as material or central to the Board’s decision to issue the Area Master Plan Special Permit.” All “material or central” provisions and conditions, to the extent related to matters that are amenable to monitoring and reporting in a CMR, are enumerated in Exhibit to this Decision.¹ Other provisions and conditions of this Decision that by their terms apply to the EIDR process, but which may not be amenable to ongoing monitoring and reporting, also must be satisfied in order for the EIDR process to be completed.

(a) It is the intent of the Planning Board and of this Decision that open space, Open Public Amenity Areas, Site Drives, Driveways, Project Infrastructure, and other elements of the Approved Master Plan that are not included within the Definitive Subdivision Plan and that are non-structural in nature not evade EIDR on the theory that they do not require a building permit. To this end, such non-structural elements shall either be included within the scope of the EIDR Application for the Building (or Buildings) to which such elements are most closely related spatially or functionally. Alternatively, such non-structural elements can be made the subject of their own, stand-alone EIDR Applications, provided that in no event shall this approach result in a situation where the overall proportion of constructed Buildings to constructed Open Public Amenity Areas is materially different from what is shown on the Approved Plans. EIDR review is not required for: (i) Project Roadways and Project Infrastructure for which detailed design specifications are established in the Project’s approved Definitive Subdivision Plan (and for which performance guarantees have been provided as required pursuant to M.G.L. c. 41, § 81U); or (ii) preliminary grading work and subsurface utility installations necessary in connection with the development of Phase I (and for which performance guarantees have been provided to the extent required pursuant to General Condition A.10 below). [The Board wants to include a provision that this work has to be subject to the O&M Plan.]

(b) If the Planning Board’s decision on the Definitive Subdivision Plan is appealed by the Applicant or any person affiliated with the Applicant pursuant to M.G.L. c. 41, § 81BB, then the Planning Board may suspend its processing of any pending EIDR Applications until such appeal has been finally adjudicated in favor of the Applicant or the person affiliated with the Applicant. Applicant agrees not to make any claim of “constructive grant” respecting the period of time during which the processing of any EIDR Application is suspended pursuant to this condition.

(c) If this Decision is appealed by the Applicant or any person affiliated with the Applicant, then the Planning Board may suspend its processing of any pending EIDR Application until the final disposition of such appeal, and (if applicable) the conclusion of any process in which the Planning Board must engage in accordance with the remand instructions accompanying such final disposition. Applicant agrees not to make any claim of “constructive grant” respecting the period of time during which the processing of any EIDR Application is suspended pursuant to this condition.

Mr. Olanoff asked that this subsection be added to the Development Agreement. There was some discussion about what “suspend” means in this subsection. It was stated that if the EIDR gets appealed, the Planning Board could re-open the hearing and keep it open and re-notice the hearing.

(d) If multiple EIDR Applications are filed or pending at a single time, or if any EIDR Applications are filed prior to the Board’s approval of the Definitive Subdivision Plan, the Board may, as reasonably necessary in view of available resources and to facilitate orderly and complete reviews, process the applications either in series or in parallel. The Applicant may suggest the

1

sequence in which the Board should process separate EIDR Applications that are pending at the same time.

(e) Each EIDR Application shall contain a representation by the Applicant to the effect that the EIDR Application in question is, to the best of the Applicant's knowledge, consistent in all material respects with the Approved Area Master Plan and this Decision. To the extent this representation cannot be made, the EIDR Application shall disclose and describe all known discrepancies between the EIDR Application and the Approved Area Master Plan.

4. Development Agreement. Bylaw Section 9.6.13.5 provides that "development under an Approved Area Master Plan . . . will involve memoranda of understanding or non-regulatory agreements reached among [the Applicant], the Town, and possibly other entities Such non-regulatory agreements shall be incorporated by reference and made part of [the] Area Master Plan special permit." The Applicant and the Board of Selectmen have negotiated and submitted to the Board a draft document entitled "Development Agreement," a full and accurate copy of which is attached as Exhibit ___ to this Decision (the "Draft Development Agreement"). The Planning Board has not participated in the negotiation of the Draft Development Agreement and is deferring to the Board of Selectmen's judgment as to the desirability of the Town's entering into such an agreement. As required pursuant to Bylaw Section 9.6.13.5, the Draft Development Agreement is incorporated by reference into, and made a part of, this Decision. No EIDR approvals for any portion(s) of the Project shall be granted by the Planning Board unless the application for such EIDR approval contains evidence, reasonably satisfactory to the Planning Board, that (i) the Applicant and Town have fully executed an enforceable Development Agreement that does not substantially deviate, in its operative terms, from the Draft Development Agreement (such fully executed document, the "Final Development Agreement"); and (ii) there does not then exist any material, uncured default on the part of the Applicant under the Final Development Agreement. The addition to the Final Development Agreement of certain provisions contained in this Decision shall not constitute a "substantial deviation" as the term is used in clause (i) of the preceding sentence.

Attorney Alpert stated after reviewing Condition#4, specifically Section 8E, more review by the Board of Selectmen is necessary. Suggested wording regarding the timing of mitigation payments is needed. This issue of financing/tax payments/mitigation payments has to be finalized in the Development Agreement before the special permit (of which the Development Agreement becomes part of) is finalized. Dan Bailey, Special Counsel to the Selectmen, stated that the Selectmen's interests are aligned with the interests of the Planning Board and if the Development Agreement fails, then the TIF fails, and therefore he is confident that there will be resolution of this matter.

5. Compliance Monitoring Reports.

(a) A Compliance Monitoring Report ("CMR") shall be filed by the Applicant at least once a year with each of the Board of Selectmen of Westwood, the Planning Board of Westwood, the Town Planner of Westwood, the Town Engineer of Westwood, and the Town Clerk of Westwood. On or before October 15 of each year, the Applicant shall submit to the Town a CMR covering the reporting period ("Monitoring Year") that commences on September 1 of the prior year and ends on August 31 of the year in which the CMR is to be submitted. The requirement to submit annual Compliance Monitoring Reports shall terminate on the five-year anniversary of the issuance of the permanent Certificate of Use and Occupancy for the final Building constructed pursuant to this Decision. In addition to annual Compliance Monitoring Reports, an updated Compliance Monitoring Report must also be submitted with each EIDR Application, unless a complete report was submitted separately (either pursuant to the annual filing requirement set forth above, or in connection with another EIDR Application) during the ninety (90) day period preceding the filing of the EIDR Application in question.

(b) Pursuant to its authority to grant waivers from the Rules & Regulations, the Planning Board waives the requirement for the submission of a CMR to accompany the First EIDR Application. The First EIDR Application must, however, be accompanied by evidence, reasonably satisfactory to

the Planning Board, that any construction activities that have occurred to date at the Project Site have been performed in substantial conformance with all applicable provisions of the Special Conditions Related to the Project Construction Period (see Section VI.10 below). This waiver is without prejudice to the Board's ability to enforce all of this Decision's provisions relating to events that must occur or actions that must be taken prior to the filing of the First EIDR Application (e.g., the funding of the Traffic Calming Account pursuant to Special Condition B.3(f)).

(c) The contents of the CMRs accompanying all EIDR Applications that are submitted to the Board subsequent to the First EIDR Application and prior to the issuance of the First Certificate of Occupancy shall be determined through consultation between the Applicant and the Town Planner.

(d) All CMRs filed after the issuance of the First Certificate of Occupancy shall address all of the content requirements identified in this Decision. As appropriate and convenient, monitoring and compliance deliverables that the Applicant is required to prepare pursuant to other permits and approvals may be used to satisfy the CMR content requirements.

6. Certificates of Use and Occupancy.

(a) No Certificate of Use and Occupancy shall issue until all Subdivision Roads and all off-Site improvements listed in Special Condition B.3 (a) of this Decision are substantially completed and operational.

(b) No Certificate of Use and Occupancy shall issue until Site Drives, Driveways, and Project Infrastructure necessary for the proper and safe operation of the relevant portion of the Project have been constructed, installed, and operational, apart from punch-list items that, in the reasonable judgment of the Town Planner and Town Engineer, are not material to the proper and safe operation of such portion of the Project. As used in the preceding sentence, "relevant portion of the Project" means the portion of the Project covered by the EIDR Approval pursuant to which the Building seeking the Certificate of Use and Occupancy in question is built. All Site Drives, Driveways, and Project Infrastructure shall be constructed, installed and operational prior to the Phase I Completion Date, apart from (i) punch-list items that, in the reasonable judgment of the Town Planner and Town Engineer, are not material to the proper and safe operation of the Project, and (ii) Driveways needed exclusively for the construction and operation of Phase II Buildings. With the approval of the Planning Board in consultation with the Town Engineer, this General Condition A.6(a) can be satisfied through the use of functionally equivalent access or utility service that is provided through temporary alternative measures.

Mr. Olanoff asked that the description of the connection from Cabot Place to the MBTA platform be more specific.

(c) The First Certificate of Use and Occupancy shall not issue until the pedestrian connection to the MBTA is constructed in a manner substantially similar to the "T Connection Concept Sketch" shown in the Application, subject to the MBTA's timely authorization to proceed with such construction and to Applicant having obtained all other governmental approvals needed for such construction (provided that Applicant has used diligent efforts to obtain such governmental approvals).

(d) No Certificate of Use and Occupancy shall issue for a given Building until the Parking Facility serving such Building has received its Certificate of Use and Occupancy.

7. Effect of Lease Provisions. No provision of a lease, ground lease or other instrument conferring usage or occupancy rights to Buildings or facilities within the Project Site shall be invoked as a defense to the enforcement of this Decision.

8. Project Buildout. The Project is to be built-out in accordance with the phasing descriptions and scheduling information provided in the Findings section of this Decision (i.e., construction will

begin initially on components of Phase I, and subsequent build-out of the Project will occur as market conditions allow). The Applicant may submit EIDR applications in a sequence and at times other than as projected in the Application. In connection with any EIDR Application that is filed for a component of Phase II prior to the Phase I Completion Date, the Planning Board may require that the Applicant provide additional information related to such Phase II component (beyond the information and analyses otherwise required by the Bylaw and this Decision) as may be necessary to confirm, to the reasonable satisfaction of the Planning Board, that the construction and operation of the Phase II component in question in advance of the Phase I Completion Date will not result in adverse impacts to the Town in excess of those impacts projected for the Project, at any relevant stage of its build-out, in the Application.

9. Consent to "Off-Site" Conditions. Certain conditions set forth in this Decision require the Applicant to perform work at locations outside the Project Site or on land that the Applicant does not own or control. All such conditions are based on information presented and proposals made in the Application, and, therefore, Applicant is deemed to have consented to the imposition of such conditions and to have waived any argument or contest with respect to the Board's authority to impose such conditions. Except as may otherwise be noted in this Decision, Applicant's failure to obtain the required consent of another governmental or private entity shall not relieve Applicant of its obligation to comply with the conditions regarding off-Site work. Notwithstanding the foregoing, Applicant at all times retains its right to request the Board to amend this Decision in order to alleviate or eliminate conflict between the requirements of this Decision and constraints imposed on the Applicant by other governmental entities or by "force majeure" type events or conditions (i.e., events or conditions that are beyond the Applicant's reasonable ability to control).

Mr. Olanoff asked that the MBTA connection condition and the bike lane designation over the Canton Street bridge be exported to the Development Agreement.

10. Performance Guarantees. Prior to the commencement of construction of Site Drives and Project Infrastructure, the Town Engineer may determine the components of such work that, in the reasonable judgment of the Town Engineer, must be completed for the benefit of the environment or public health and safety (such work, the "Secured Work"). Based on this determination, the Town Engineer may require a performance guarantee securing the proper construction and completion of the Secured Work. Such performance guarantee, if and to the extent required, may take the same form as the performance guarantee that is provided pursuant to G.L. c. 41, § 81U in connection with the construction of the Subdivision Roads. If the Town Engineer and the Applicant are unable to agree on the need for, form or amount of such performance guarantee, then the Town Engineer shall refer the matter to the Planning Board, which shall make the final determination as to the matters in dispute. This condition shall not apply to any construction work covered by the performance guarantee that is provided pursuant to G.L. c. 41, § 81U in connection with the construction of the Subdivision Roads. Until such time as the Secured Work is substantially complete, the Applicant shall demonstrate in connection with each EIDR Application that the performance guarantees required pursuant to this condition have been provided and remain in effect.

John Bertorell, Town Engineer, indicated that he thought it is important that there be some form of performance guarantee to ensure that the if the project construction is halted, there is a way to shore up the site so as not to have environmental and public safety issues.

Nancy Hyde, Chairman of the Board of Selectmen was in attendance to provide a status report on the Development Agreement in terms of mitigation and financial protections. As outlined in March 2007, Mrs. Hyde reported \$3,000,000 is earmarked for school capital costs; \$1,000,000 is for any school related purpose; \$2,000,000 if the number of children residing at Westwood Station reaches 100 and if the ratio of children residing at Westwood Station reaches .22/unit, no additional residential buildings can be constructed until additional satisfactory mitigation is provided. \$3,600,000 is for construction of a public safety building within Westwood Station site; and \$1,800,000 earmarked for public safety equipment and construction management services will be

provided by the developer. Mrs. Hyde informed the Board that the minimum Guaranteed New Revenue is as follows: \$2.75 MM for Year 1, \$3.25 MM Year 2, \$4.00 MM Year 3 and Years 4-20 will increase by 5%. In addition, \$1,000,000 will be earmarked for Town to support the project.

Ms. Hyde also indicated the following:

- There will be funding of Canton/Everett/Forbes neighborhood traffic calming consulting, design and implementation.
- An additional \$1,000,000 will be provided for the completion of high school playing fields.
- As requested by Planning Board, there will be a placeholder in the Development Agreement for importation of certain conditions from the Master Plan Special Permit. These conditions will include an express prohibition on at-risk work in the event of any appeal by the developer and are expected to also include certain conditions related to traffic performance at key intersections.
- There will be a requirement that (i) the Board of Selectmen pursue the redesign and implementation of the intersection of Canton Street and Westwood Station Boulevard, in the final configuration approved by VHB and (ii) that the developer agree to pay for all costs associated with the redesign and construction of this intersection.
- The Board of Selectmen is finalizing the details of the timing of payments and the security for the various financial and non-financial obligations of the developer. Timing and security aside, all obligations are consistent with those previously reported to the Planning Board.
- Most of the material provisions of the Development Agreement do not become effective until the Master Plan Special Permit and Environmental Impact and Design Review for Phase I have been approved and all appeals have been resolved. The Development Agreement does not become fully effective if the developer decides to proceed with construction at their risk, while litigation of any appeals remains pending.
- The Board of Selectmen anticipates that the developers may seek an increase in the maximum number of leased units when actual impacts of the initial condominium sales and leasing activity can be measured and if market conditions dictate.

The meeting adjourned at approximately 10:30 PM.