

**Town of Westwood Planning Board
Meeting Minutes
50 Carby Street
Monday, November 13, 2006
7:00 PM**

Board Members Present: Steven Olanoff, Bob Moore, Rob Malster, George Nedder, Bruce Montgomery

Board Members Absent: none

Staff Members Present: Diane Beecham, Town Planner

The meeting was convened at 7:05 pm.

Discussion of Mixed Use Overlay District Rules and Regulations

In Attendance: Peter Alpert, Esq., Ropes and Gray

[The Planning Board has spent approximately 15 months developing Rules and Regulations to implement Section 9.6, Mixed Use Overlay District, in anticipation of the pending Westwood Station special permit application. The process was stalled with respect to the EIDR process, which occurs after the special permit is issued. More specifically, the Board is concerned that once the special permit is issued, they essentially lose their discretionary powers because the subsequent EIDR process is not discretionary. Thus, it is imperative to make sure that the project is in compliance with all provisions of the special permit before EIDR approval is given. In other words, the Board does not want to make subsequent EIDR approvals include conditions that essentially state that the project must meet the conditions of the special permit if the project is not in compliance at that time of the site plan review process. There is not enough enforcement "teeth" in this condition. The Board retained the services of Ropes and Gray to address this particular issue.]

Mr. Malster asked Mr. Alpert about the Planning Board's ability to phase the special permit process so that the project is required to be split between two distinct special permits. Mr. Alpert responded that after his review of the MUOD zoning bylaw, it is his interpretation that the Planning Board does not have the authority to require it. The developer could request that it be split, but it can not be a requirement of the Planning Board; it is essentially the developer's call.

Mr. Alpert stated that for this particular project, the Planning Board will need a lot of information to make the required statutory findings that the benefits of the project outweigh the detriments. It would certainly be a thoroughly conditioned special permit; however, the conditions would have to be reasonable.

Can the rules and regulations governing the subsequent EIDR/site plan review process require that there be compliance with the conditions placed on the special permit? Mr. Alpert responded that the Planning Board has the authority to enact rules and regulations in two places: as part of the site plan review section of the Bylaw and the MUOD section of the Bylaw. As part of their organic rulemaking authority, it would be rational for the Planning Board to enact a rule that would require consistency/compliance with the special permit. There should be a showing

of compliance before the site plan review application is to be processed.

[Dan Bailey, Esq. of Rackemann, Sawyer & Brewster and Special Counsel to the Selectmen drafted a Memorandum of Understanding to address this issue of compliance because it was indicated to them by the developer that the developer wanted this requirement to be in a separate, recorded document. Mr. Alpert responded that he though this would be fine but also needed to be in the rules and regulations; in fact the document should first be "beefed up" and the final exact language of the MOU then included in the Rules and Regulations.]

The Compliance Monitoring Reports are to be prepared by the applicant; they will have to be substantial and be peer reviewed by the Planning Board's consultant. If the Compliance Report indicated that there were some issues that were not in compliance, then the site plan review application was not complete and the Board did not have to process the site plan review application.

Mr. Olanoff indicated that he did not think that what is in the Rules and Regulations is as important as what is in the actual special permit decision and development agreement. He felt that having language in the Rules and Regulations that is not as strong as what the Board would otherwise like did not prohibit the Planning Board from having much stronger language in the final decision.

Mr. Alpert responded that the Rules and Regulations is a significant document and the Board should have as complete and detailed language in this document as possible.

Mr. Montgomery asked if the Board had discretion to tell the developer what the Board wanted in the monitoring report? He does not want it to include information that is not relevant. Can the Board require a pre-application meeting to determine what specific items will have to be covered in the monitoring report? Mr. Alpert responded that the information that must be included as part of the monitoring report will have to be cited in the special permit decision.

How will the Board determine if there is a "major" or "minor" discrepancy/non-compliance issue? Which minor discrepancies should be allowed to be addressed as part of a site plan review (i.e. the applicant can go forward with the site plan review, but a condition of the site plan review decision will be that they have to correct the minor discrepancy)? Mr. Alpert responded that the Board can not really determine "major" versus "minor" discrepancies as part of the Rules and Regulations; it will have to be done as part of the special permit decision.

It was indicated that the Planning Board must hold to reasonable standard no matter what the language says in the Rules and Regulations or the decision. The Board cannot be arbitrary or capricious. Mr. Alpert stressed that if the developer was found to be in compliance with the special permit conditions, then the Board will be duty bound to process the site plan review application.

Mr. Moore indicated that if the project started to get "out of whack" with the special

permit, there has to be a process to get it back into compliance. Once the project is back in compliance, the site plan review process can then start.

Ms. Beecham indicated that if there is a determination not to process the site plan review application because of non-compliance issues, is there an appeal process? Can the developer appeal this finding from the compliance report to the Board of Appeals? Mr. Alpert stated that it probably would not go to the Board of Appeals; instead it would go to the Land Court for declaratory judgment which is a pretty quick process for the developer.

Mr. Nedder asked what if there is a scenario in there is a clear violation of the special permit, but it is now out of the control of the developer and it is clear that there is no way for the developer to get the project back into compliance? Could the developer take the Planning Board to court? Mr. Alpert responded that the option for the developer would be to amend the special permit to alleviate the burden/problem. However, he can not think of a project-related impact that could not be fixed. If it is just money related, then the developer would just have to get the required funds. However, it must be made clear that the Planning Board can not sanction the project for impacts that are not project related.

Mr. Alpert also stressed that "compliance" does not mean "consistency" and these two terms should not be tied together. In other words, the site plan application would not be processed until a compliance report was provided that showed that the project is in compliance with the terms of the special permit decision; this is not the same as making a finding that the particulars of the site plan review application are consistent with the approved area master plan.

Why exactly does compliance mean? The answer is that there should be a definition that provides for some flexibility; it should not necessarily mean exactly 100 percent compliance, because that could be an appeal issue.

Mr. Nedder indicated that he wanted very specific parameters to determine what was to be defined as "substantial compliance or "total compliance". Mr. Alpert responded that requiring total compliance has two disadvantages: 1) it opens up the project to wide ranging appeals by the neighbors; and 2) this may be regarded as arbitrary and not a reasonable rule by the court. There has to be some flexibility to determine material versus immaterial non-compliance issues. This determination will not be done as part of the rulemaking but as part of the special permit decision.

Mr. Alpert believes that the appropriate standard should be "substantial or material compliance". The required compliance finding would be by a majority vote of the Planning Board.

The meeting was adjourned at 9:15 pm.