

SITE PLAN REVIEW

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I. DEFINITION

Site plan review establishes criteria for the layout, scale, appearance, safety, and environmental impacts of commercial or industrial development, in an attempt to "fit" larger projects into the community. Site plan review usually focuses on parking, traffic, drainage, roadway construction, signage, utilities, screening, lighting, and other aspects of the proposal to arrive at the best possible design for the location. In the usual situation, site plan approval must be obtained before the building or special permit is issued.

Mass. Gen. L. ch. 40A, the Zoning Act, contains no reference to site plan review. Site plan review is entirely the creature of the cities and towns that use it, and the courts that have endorsed it.

II. COMPARISON TO SPECIAL PERMIT

In the special permit process, the full range of discretion is available to the special permit granting authority.

Neither the Zoning Enabling Act nor the town zoning by-law gives . . . an absolute right to the special permit . . . The board is not compelled to grant the permit. It has discretionary power in acting thereon. *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638-639

(1970).

On the other hand, the Supreme Judicial Court has defined site plan review as "regulation of a use rather than its prohibition . . . contemplating primarily the imposition for the public protection of reasonable terms and conditions." *Y.D. Dugout v. Board of Appeals of Canton*, 357 Mass. 25, 31 (1970). The Supreme Judicial Court has repeatedly distinguished site plan review from the special permit process in this manner.¹ In sum, site plan review can only be used to shape a project; it cannot be used to deny a project, except in rare circumstances.

III. SITE PLAN REVIEW BOARD

Site plan review is not defined in the Zoning Act. As a result, various boards or officials may exercise this authority. These include:

- * Planning Board: Probably the most common site plan review board, the planning board brings its experience with design issues from the subdivision arena.
- * Board of Selectmen/City Council: In some towns, notably Sudbury, the executive board sits as site plan review board.
- * Zoning Board of Appeals: Probably rare, but the Board of Appeals may sit in this capacity.
- * Building Inspector: Older site plan review models had the building official serving in this capacity, usually in a ministerial manner.
- * Hybrid board: Some towns, particularly on Cape Cod, have hybrid boards composed of members of the community, designees of other boards, or technical experts.

IV. FUNCTION OF SITE PLAN REVIEW

The Zoning Act establishes a system of permits to authorize uses or structures: variances, special permits and building permits. Site plan review, unmentioned in the Zoning Act, cannot operate alone to authorize a use or structure. Accordingly, site plan review usually operates in conjunction with one of these other devices.² The only exception to this rule is site plan review to

¹ See *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986); *Auburn v. Planning Bd. of Dover*, 12 Mass. App. Ct. 998 (1981).

² Site plan review is rarely attached to the variance mechanism, although there is good reason to do so. Uses authorized by a variance need to fit into their neighborhoods; dimensional variances may necessitate an even greater need for screening and landscaping, always issues in site plan review.

alter a site in a manner that does not require another permit: parking lot expansion or site clearing are good examples.

Where site plan review is connected to another permitting process, it is important to identify the link because it will determine the procedure for appeal of adverse decisions.

1. Use or Structure also Requires Special Permit

Site plan review in conjunction with a special permit application is the earliest version of the device and remains quite common.³ There are two possible variations:

*** Same Special Permit Granting Authority (SPGA)**

Generally, this system operates by requiring both a special permit and site plan review for the same proposal before the same board serving as SPGA and site plan review board. In this case, the site plan ostensibly serves to provide detailed information to the SPGA on aspects of the proposed development. The leading case of *Y.D. Dugout v. Board of Appeals of Canton*, 357 Mass. 25, 31 (1970, found the process "in substance, . . . equivalent to permitting any commercial building construction . . . only upon special permit." In *Auburn v. Planning Board of Dover*, 12 Mass. App. Ct. 998 (1981), a by-law provision required site plan approval for all buildings to be erected in a business district through issuance of a special permit. The court held that the "requirement that a site plan be approved before the issuance of a special permit does not impose impermissible restrictions on the allowed use."

*** Different Special Permit Granting Authority**

Where, hypothetically, the board of appeals serves as SPGA and the planning board sits in review of site plans, there is a potential for conflict.⁴ Conditions imposed in the approval of the project by one board may run counter to those attached by the other. No appellate level decision reviews such a circumstance. Since site plan review powers have been clearly delineated to include the imposition of conditions, it is unlikely that the special permit decision would supersede its counterpart. Given the usual tension between these two boards, the prospects for eventual judicial review of this quagmire are quite promising. In the meantime, the model site plan by-law

³ See *Woods v. City of Newton*, 351 Mass. 98 (1966); *Coolidge v. Planning Bd. of North Andover*, 337 Mass. 648 (1958).

⁴ This occurs fairly often. The reason may stem from the fact that planning boards were excluded from special permit granting authority until at least 1975, when amendments to Mass. Gen. L. ch. 40A first opened this door.

[ordinance], Appendix A, attempts to coordinate review under this circumstance.

2. Use or Structure Requires Only Building Permit

Site plan review may also be attached to as-of-right uses. The process is used to impose reasonable conditions before the issuance of the building permit. In *Prudential Insurance Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 282 (1986), the court examined such a case.⁵ Even though the plaintiff's proposed office buildings were a permitted use, the board of appeals denied site plan approval, primarily because of traffic concerns raised by the project. The appeals court held that this result was contrary to *Y.D. Dugout*, which limited site plan review to "regulation of a use rather than its prohibition." Thus, site plan review attached to a use available as of right cannot be used to deny the use. This limitation is described in Section V, below, in detail.

V. POWERS OF THE SITE PLAN REVIEW BOARD

In *Prudential Insurance Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 283-284 n.9 (1986), the Appeals Court defined the powers of site plan review boards. The court held that such boards may:

- * Reject a site plan that fails to furnish adequate information required by the by-law;
- * Impose reasonable conditions in connection with site plan approval, even at the expense of the applicant; and
- * Reject site plans where "although proper in form, (the site plan) may be so intrusive on the needs of the public in one regulated aspect or another that rejection by the board would be tenable."

As to the last clause, the Appeals Court commented that "[t]his would typically be a case in which, despite best efforts, no form of reasonable conditions could be devised to satisfy the problem with the plan" There has never been a case under this clause of Prudential at the appellate level, and none are known in the lower courts. Boards are strongly advised to resist the temptation to deny site plans under this prong of the test unless the proposed use dwarfs the community's capacity to handle it.

VI. PROCEDURES FOR SITE PLAN REVIEW

⁵ See also *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513 (1971); *Richardson v. Zoning Bd. of Appeals of Framingham*, 351 Mass. 372 (1966); *Salah v. Board of Appeals of Canton*, 2 Mass. App. Ct. 488 (1974).

The procedures for variances, special permits, and administrative appeals are set forth in the Zoning Act. Site plan review is unmentioned in the statute, so boards have had to guess at procedural minima. This has not been helped by the fact that no decision at the appellate (or trial) level details minimum procedural safeguards for site plan review.

Section 9 requires special permit determinations to be made after a public hearing, duly advertised for two weeks prior to the hearing, with notice to abutters; the statute also requires a formal decision within 90 days of the hearing, with written findings. Many communities incorporate these procedures by reference for site plan review.

However, there is no need, statutory or constitutional, to use this level of formality. Some communities rely on an informal process roughly equivalent to preliminary plan review under the Subdivision Control Act. The review board conducts plan evaluation at a regular business meeting; notice is limited to observance of the Open Meeting Law. Interested parties make their views clear to the board through informal comments, written or oral, delivered at the meeting. The applicant interprets the site plan with the board, and notes the board's criticism and suggested modifications. The applicant and board may negotiate terms or conditions that might be imposed on the plan.

This practice is consistent with the expectations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Site plan review has always been characterized as functionally less than a special permit decision. Simply put, a site plan cannot be denied. Thus, Due Process expectations are lower - absolute denial of a property interest is unlikely. For example, in *Y.D. Dugout*, 357 Mass. at 31, the court stated that "[t]he board's authority to enforce compliance with (site plan review) is only to 'assure' protection of the public interest 'to a degree consistent with a reasonable use of the site for the purposes permitted or permissible by the regulations of the district.'"

Site plan review does not threaten deprivation of the property interest, except to the extent that conditions cost the applicant money to conform.

Thus, the Appeals Court's ruling in *Fairbairn v. Planning Board of Barnstable*, 5 Mass. App. Ct. 171, 181-182 (1977)(regarding board of health review of definitive subdivision plans), probably describes minimal procedural safeguards:

- * An applicant filing a site plan may also request, in writing, a hearing;
- * If, after studying the plan, the board is disposed to disapprove the plan or subject it to conditions which have not been approved by the developer, the board must honor the request for a hearing.
- * The board must give the developer reasonable notice of the time and place of the hearing.

- * The developer must be advised of all of the facts and other material in the possession of the board on which it intends to rely, and she must be given the opportunity to produce all relevant evidence, to cross examine witnesses, and to present argument.
- * A board "runs a serious risk of having its [decision] annulled by a court if the board fails to maintain a complete record of the proceedings complained of, including a record of the evidence adduced before the board."

Note that *Fairbairn* did not require notice to abutters or newspaper notice. To the extent this, and other formalities, are required, the city or town has stated a political, rather than a legal, requirement. Every town will have to make its own decision as to the scope of procedures accompanying site plan review.

VII. REVIEW OF THE SITE PLAN

Certain local boards, including the planning board and board of appeals, have been authorized by Mass. Gen. L. ch. 44, s. 53G to adopt technical review fees. Use of this device enables the board to establish an escrow account to review a particular project and to use the services of technical consultants, including, but not limited to, acoustical engineers, architects, attorneys, civil engineers, hydrogeologists, landscape architects, planners, preservationists, soil scientists, traffic engineers, and wetland botanists.

Site plan review boards are strongly encouraged to use the provisions of the statute to review site plans and to promote more informed decision-making. The system works especially well in small towns without staff: Sterling, Berkley, Dighton, and Clinton, for example, have used the statute to good advantage. Large towns with overworked staff can free up time for planning studies by "farming out" technical reviews to outside consultants. Franklin and Framingham have taken this approach.

The following aspects of the site plan should be closely scrutinized by the board and its agents. These features are depicted on Appendix D (Existing Conditions Plan) and Appendix E (Proposed Landscape Plan), as numbered below:

- * pedestrian and vehicular access to and egress from the site (1);
- * parking (2) and loading (3);
- * landscaping, screening, and buffers (4);
- * lighting (5);

- * signage (6);
- * stormwater management (7);
- * architectural style and scale (8);
- * water and wastewater systems (9);
- * refuse disposal (10).

Obviously, many of these issues are highly technical. Unless the board has a special expertise (i.e., a member is a civil engineer willing to take on review), a 53G account should be implemented for the project. A sample 53G rule for a planning board is set forth as Appendix C.

VIII. DECISION

The decision of the site plan review board must comport with the standards established by the court in *Prudential Insurance Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 283-284 n.9 (1986). The court held that such boards may:

- * Reject a site plan that fails to furnish adequate information required by the by-law;
- * Impose reasonable conditions in connection with site plan approval, even at the expense of the applicant; and
- * Reject site plans where "although proper in form, (the site plan) may be so intrusive on the needs of the public in one regulated aspect or another that rejection by the board would be tenable."

Consequently, most, if not all, site plan decisions should end up approving the proposed use subject to conditions. These conditions may include:

- * private disposal of solid waste;
- * deadline to commence construction;
- * possession or use of hazardous substances;
- * limitations on signage;

- * alarm system;
- * limits on vehicles;
- * limit as to number of students or residents;
- * noise limits;
- * maintenance guarantees;
- * landscaping requirements;
- * parking spaces;
- * dust control;
- * sewer connection;
- * bond or other performance guarantee;
- * hours of operation;
- * police details during periods of heavy traffic.

All of these conditions are supported by case law regarding special permits and variances.

Unless otherwise provided in the local ordinance or by-law, site plan approval requires only a majority vote of those present at the meeting. *Osberg v. Planning Board of Sturbridge*, 44 Mass. App. Ct. 56, 59 (1997). It is advisable to observe the rule of *Mullin v. Planning Board of Brewster*, 17 Mass. App. Ct. 139 (1983), which holds that where the proceedings before the board are continued to various sessions, only those members who had attended all the public hearing sessions could vote.

The court has ruled that a board is not required to make detailed findings, in writing, to approve a site plan. *Bowen v. Board of Appeals of Franklin*, 36 Mass. App. Ct. 954 (1994). Nonetheless, it is good practice to provide the same level of detail as in special permit decisions. A sample decision is set forth as Appendix B.

IX. CONSTRUCTIVE APPROVAL OF SITE PLAN

There are no decisions to provide guidance as to the constructive approval of a site plan. Nor does any opinion indicate whether a constructively approved site plan may be amended, modified, or

rescinded upon a motion of the board. It is good practice to state in an ordinance or by-law that plans not acted upon within a fixed period are constructively approved so that applicants are not faced with delay. Ordinances and by-law should also state that the time period for a decision may be extended upon agreement of the parties.

X. SITE PLAN REVIEW AND VESTED RIGHTS

In *Towermarc Canton Limited Partnership v. Town of Canton*, Misc. Case No. 131947 (Land Ct. 1989), a zoning amendment set a height limitation that seriously impacted plaintiff's project, shown on an approved site plan. The land court held that the freeze provision of Mass. Gen. L. ch. 40A, §6 does not apply to site plan approval. The absence of any reference to site plan approval in the freeze paragraphs of the statute was fatal to plaintiff's claim that the site plan approval protected the property from subsequent zoning changes. Note, however, that this result is from a lower court.

XI. APPEAL OF SITE PLAN DECISIONS

There has been considerable confusion regarding the appeal of site plan decisions, no doubt fueled by the absence of any statutory directives.

Where the site plan is connected to a special permit issued by the same board, the Appeals Court has ruled that the site plan decision should be appealed directly to court in accordance with Mass. Gen. L. ch. 40A, §17. *Quincy v. Planning Board of Tewksbury*, 39 Mass. App. Ct. 17, 21-22 (1995).

Where site plan review is required in connection with the issuance of a building permit, the Appeals Court ruled in *Osberg v. Planning Board of Sturbridge*, 44 Mass. App. Ct. 56 (1997), that unless the procedural framework of the local ordinance or by-law permits direct appeal pursuant to Mass. Gen. L. ch. 40A, s. 17, the requirement to exhaust administrative remedies may dictate that action by a planning board be appealed to the board of appeals. In *St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority*, 429 Mass. 1 (1999), the Massachusetts Supreme Court noted that an approval of a site plan, when required in connection with the issuance of a building permit, is not a final action, but only a prerequisite to the grant of the building permit. The Court concluded that the right of an aggrieved person to appeal a local planning board's site plan review decision arises only when the building permit for the proposed project is issued or denied by the building inspector. *

In *Dufault v. Millennium Power Partners*, 49 Mass. App. Ct. 137 (2000), the Appeals Court reviewed the site plan approval provisions of the Charlton zoning by-law. Site plan approval for uses permitted as of right was linked to the building permit process. The bylaw required submission of a site plan to the planning board in order for the board to assure compliance with the

by-law. The zoning by-law also directed the planning board to inform the zoning enforcement officer and the inspector of buildings of the approval of the site plan. The Charlton zoning bylaw did not specify an appeal process from the approval or denial of a site plan. The Appeals Court concluded that where no provision in either Mass. Gen. L. ch. 40A, or the Charlton zoning bylaws specifically refer to appeals from the approval or denial of a site plan, the right of an aggrieved person to appeal the planning board's site plan review decision arises when the building permit for the proposed project is issued or denied by the building inspector. *

The *Botolph* and *Dufault* decisions have created a problem at the local level. Without guidance in the local zoning by-law, it is unclear whether an applicant aggrieved by a site plan decision must go through the exercise of applying for a building permit in order to commence the appeal period. Since abutters and parties in interest are not entitled to notice when a building permit is issued, how will they know when the 30-day appeal period commences? Ordinances and by-laws should address the appeal process for site plan approval. It is probably not good practice to pit one local board against another by authorizing appeals to the board of appeals. Communities may want to consider that site plan approval appeals be taken directly to court pursuant to Mass. Gen L. ch. 40A, s.17. *

XII. JUDICIAL REVIEW OF SITE PLAN DECISIONS

In *Prudential Insurance Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 283 (1986), the Appeals court announced the scope of judicial review for site plan decisions for uses available as of right. Where the site plan is approved with conditions, the usual deference is granted. However, where site plan approval is denied, "[t]he judge . . . examine[s] the proposal to see if the . . . problem was so intractable that it could admit of no reasonable solution. Short of independently finding that, he was not obliged to give deference to the board's decision."⁶

XIII. CONCLUSION

Too many cities and towns confuse site plan review and special permits. The award of a special permit is completely discretionary. In a special permit

[n]either the Zoning Enabling Act nor the town zoning by-law gives . . . an absolute right to the special permit The board is not compelled to grant the permit. It has discretionary power in acting thereon.

MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638-639 (1970). On the other hand, in site plan review a board is engaged in "regulation of a use rather than its prohibition . . . contemplating primarily the imposition for the public protection of reasonable terms and conditions." *Y.D. Dugout*

* Inserted by DHCD (9/14/00)

v. Board of Appeals of Canton, 357 Mass. 25, 31 (1970). The difference is not subtle. A site plan review board lacks the power to deny a project, absent extraordinary circumstances, the likes of which have not yet been seen by an appellate court.

Therefore, it is crucial to review ordinances and by-laws with this limitation in mind. Uses available as of right, subject only to site plan review, cannot be stopped. For a classic example, see *Osberg v. Planning Board of Sturbridge*, 44 Mass. App. Ct. 56 (1997), regarding the development of a Walmart. If the use allowed as of right might take a form unacceptable to the community, the voters at Town Meeting or on the City Council are well-advised to place the use on special permit status.