

SITE PLAN REVIEW/SPECIAL PERMITS

By

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I. WHAT IS SITE PLAN REVIEW AND WHY SHOULD WE CARE?

Site plan review is a creation of local by-laws and ordinances; there is no mention of site plan review in the Zoning Act, General Laws chapter 40A. As a result, the scope of site plan review, as well as the procedures and criteria, are dependent to a large extent on the contents of the individual by-law or ordinance adopted by the municipality. Site plan review generally is a process set forth in the zoning by-law or ordinance to allow for review of developments that exceed a certain size on issues related to how the proposed development will fit into the site and the surrounding area. Drainage, lighting, vehicular and pedestrian site circulation, egress and ingress to the site, landscaping, and the like are often reviewed under the site plan umbrella. As will be emphasized in this seminar, the importance of having a well-drafted by-law or ordinance cannot be overstated. This article will discuss a number of court cases adjudicating site plan review challenges, which have created substantive law to guide municipalities in shaping their local regulations.

A. Site Plan Review versus Special Permit

Site plan review is often linked to the special permit process, although the two are quite different. Special permits in the usual sense regulate the use of a particular site, and apply criteria in the zoning by-law or ordinance to determine if the proposed special permit use, which is generally considered acceptable for that zoning district, is appropriate for the particular site. Site plan review, however, does not regulate the use, but the physical structures that will be constructed on the property. Site plan review can be imposed for uses that are allowed by right or by special permit. Moreover, special permits require a super-majority vote, and are subject to procedures for applications, notice, public hearings, and decision making set forth in the Zoning Act. Site plan review, as provided in the by-law or ordinance, may be imposed as a special permit requirement or as an administrative review.

Site plan review is tied to either the special permit process or the building permit process. Depending upon the provisions of the particular by-law or ordinance, site plan review may require a special permit or a more modest review, generally referred to as “administrative” site plan review. Some by-laws and ordinances have both forms of site plan review, with the special permit review reserved for the more intense uses. In most cities and towns, site plan review is performed by a local board, generally the planning board or board of appeals. Nonetheless, some cities and towns still provide for administrative site plan review by a municipal official, such as the building commissioner, city or town engineer, and/or planner. In whatever form it takes, site plan administrative review is generally linked to the issuance of a building permit. That is, the by-law or ordinance usually states that no building permit may be issued for certain uses unless the applicant has first secured site plan approval. Whether site plan review requires a special permit, or simply an administrative review, effects a number of procedural issues, as explained below.

B. Function of Site Plan Review

A board that is performing a site plan review does not have the same degree of discretion as it would in reviewing an application for a special permit. “Site plan approval procedures, unlike special permits and variances, involve no special permission or dispensation. Those procedures are a means of collecting the comments of various municipal authorities- e.g., highway, fire, police, health, building, conservation – as to a specifically identified category of construction permit applications...[S]ite plan review has to do with regulation of permitted uses, not their prohibition, as would be the case with a special permit or a variance.” Bowen v. Board of Appeals of Franklin, 36 Mass. App. Ct. 954, 954-955 (1994). Thus, the purpose of site plan review, whether it is imposed by special permit or by administrative review, is not to prohibit a particular use. Site plan review “is justifiable as an informational tool which discloses the specifics of the project, including the proposed location of buildings, parking areas, and other installations on the land, and their relation to existing conditions such as roads, neighboring land uses, public features, and ingress and egress roads.” Prudential Insurance Co. of America v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278, 282 n. 6 (1986).

Where the site plan review is made of a use allowed as of right, the question before the site plan review board is whether the public interest can be protected consistent with the reasonable use of the site for the permitted use. Id. A zoning by-law or ordinance may require a site plan special permit for a use that is allowed by right. While this may sound like an anomaly, the courts have interpreted these provisions as subjecting the site plan review to the procedural requirements of a special permit, including a public hearing and the right to appeal under G.L. c. 40A §17, as explained below. Because the use is allowed by right, however, the substantive criteria to be applied is not that of a special permit, but only limited review in accordance with Prudential and other site plan review cases, as noted above. Quincy v. Planning Board of Tewksbury, 39 Mass. App. Ct. 17, 21 (1995). Thus, where a use is allowed by right, the site plan review board is generally limited to imposing conditions.

II. DRAFTING AND IMPLEMENTING YOUR BY-LAW OR ORDINANCE

A. What Should be in Your By-law or Ordinance

Detailed discussion of the most advantageous terms to include in your site plan review by-law or ordinance will be provided elsewhere. Briefly, however, the by-law or ordinance should have these essential elements:

- Thresholds – What developments will be subject to site plan review?
- Special permit vs. administrative – Which uses will require special permit/site plan review and which will require only administrative review.
- Which local board will be the site plan review board. For uses that already require a special permit from a city or town board, it is generally the better practice to have the same board act as the site plan review board.
- What information needs to be included with the application, and what additional information may the board request. If using both special permit and administrative site plan review, the application requirements for administrative site plan are generally less stringent.
- Authority for the board to enact appropriate regulations to implement the site plan review ordinance or by-law. The regulations should cover nuts and bolts such as how many copies of the plans must be submitted; fees, and other details that would clutter up the by-law or ordinance. The regulations should also include authority for the board to require the use of outside consultants under G.L. c. 44 §53G where appropriate.
- Procedures (see below).
- Categories subject to review. What specific site features will the board examine? (E.g., pedestrian and vehicular access and egress, landscaping, lighting, etc.)
- Criteria for decisions. What types of conditions can be imposed, and what concerns are the conditions intended to address?
- Denial – Generally, the board cannot deny site plan for an allowed by right use. The ordinance or by-law should delineate under what circumstances the board is authorized to deny a site plan application for insufficient information, and may include language allowing denials for “intractable problems” as set forth in the applicable case law set forth below.
- Appeals procedures.

B. Procedures

A quick word on procedures. If site plan review is by special permit, the special permit procedures of G.L. c. 40A should be followed. If a special permit is also required for the use, generally the most efficient procedure is to have the same board that is the special permit granting authority also perform the site plan review. The site plan review can then proceed concurrently with the special permit use review.

For administrative site plan review, the procedures must be established by the ordinance or by-law. Administrative site plan review, whether performed by an official or a board, does not require a public hearing, although the ordinance or by-law may provide for one. The quantum of vote for administrative site plan review is a simple majority unless the by-law or ordinance provides otherwise. Osberg v. Planning Board of Sturbridge, 44 Mass.App.Ct. 56 (1997).

The administrative site plan review by-law should be sure to include minimum due process procedures, in any event. This means that the applicant would be given reasonable written notice of the time and place when the site plan will be reviewed, and will be given the opportunity to be heard. The board should allow the applicant access to all facts and materials which the board is considering in its decision making process, and allow the applicant to respond with additional materials and evidence. The board should also keep a complete record of its proceedings, including minutes.

C. Drafting Decisions and Conditions.

Due to the nature of site plan review, in which the board is regulating the use, not prohibiting it, the courts have stated that “the local board need not be held to as demanding a standard of reporting of the factual and legal underpinnings for their approval of a site plan.” Bowen, supra at 955. Nevertheless, to the extent possible, the board should be clear in drafting its decision to support its findings.

As with the drafting of all zoning decisions, the starting point for drafting decisions on site plan review is the provisions of your local by-law or ordinance. Thus, the board should review the various criteria in the site plan review by-law or ordinance, and review the various items that are within its jurisdiction. Conditions should be crafted that follow the criteria of the by-law or ordinance. Conditions imposed by the board must be reasonable and “appropriate...to protect the neighborhood and public from unreasonable harm.” Y.D. Dugout, Inc. v. Board of Appeals of Canton, 357 Mass. 25, 31 (1970).

Although denials will be rare, there are circumstances where a board may deny a site plan application. For example, a by-law or ordinance could provide that the site plan application could be denied if the use is not allowed, or, for special permit uses, if the special permit for the particular use is denied. See Balzotti Corp. v. Zoning Board of Appeals of Pembroke, 10 LCR 30 (2002) (board denial of site plan for use that was not allowed by right or by special permit in the zoning district was upheld).

In other instances, the Appeals Court has outlined the narrow circumstances under which a site plan application may be disapproved:

Our conclusion does not mean that a board authorized to approve site plans is devoid of regulatory power over such plans. A board may lawfully reject a site plan that fails to furnish adequate information on the various considerations imposed by the by-law as conditions of the approval of the plan....A board also

possesses discretion to impose reasonable conditions under a by-law's requirements in connection with approval of a site plan, even if the conditions are objected to by the owner...In some cases, the site plan, although proper in form, may be so intrusive on the needs of the public in one regulated aspect or another that rejection by the board would be tenable. This 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 and the judge conducting de novo review concurs in that conclusion.

Prudential Insurance Co. of America v. Board of Appeals of Canton, 23 Mass. App. Ct. 278, 283-284, n. 9 (1986). Thus, even for a use allowed as of right, where the plans submitted by the applicant were "wholly lacking in adequate information pertaining to loading spaces and surface and subsurface runoff", showed fewer parking spaces than required by the by-law, and were inadequate with respect to screening, sign requirements, and safe vehicular and pedestrian movements, the court upheld the denial of the site plan. Auburn v. Planning Board of Dover, 12 Mass. App. Ct. 998, 999 (1981). (In the Auburn case, the site plan review was by special permit, although the use was allowed by right.) In order to deny site plan approval for lack of adequate information, the by-law or ordinance should specifically provide for such denials and outline the circumstances under which a denial may be imposed.

III. SITE PLAN REVIEW AND EXEMPT USES

General Laws chapter 40A §3 provides that a number of uses are exempt from some or all of the provisions of a local zoning by-law or ordinance. The extent to which such exempt uses may be subject to site plan review is the subject of some debate. Some cities and towns have enacted site plan administrative review provisions specifically for exempt uses. In general, site plan review cannot be used to deny an exempt use, nor can an exempt use be required to obtain a site plan special permit. In addition, there are a number of areas which site plan review cannot regulate when exempt uses are at issue.

The Dover Amendment, as codified in G.L. c. 40A §3, provides in pertinent part as follows:

No zoning ordinance or by-law . . . shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

While a municipality may reasonably regulate educational and religious uses, it may not, through the guise of regulating bulk and dimensional requirements, "proceed to 'nullify' the use exemption permitted to an educational [or religious] use." The Bible Speaks v.

Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 31 (1979). Dimensional regulations that are to be applied to an educational or religious use are presumptively valid. Id. If, however, the building inspector determines, after an appropriate showing by the agency proposing an educational or religious use, that even the “facially reasonable zoning requirements concerning bulk and dimension cannot be applied to an educational use occupying a particular site because application of the requirements would improperly nullify the protection granted to the use, or because compliance with the requirements would significantly impede an educational use, in either instance without appreciably advancing municipal goals embodied in the local zoning by-law”, then the town or city may not enforce such regulations against the educational use. Campbell v. City Council of Lynn, 415 Mass. 772, 778 (1993).

Whether a municipality may require a limited form of site plan review for exempt uses has not been definitively ruled on by the courts, but should be approached cautiously. While the Supreme Judicial Court has not ruled on the issue, the Appeals Court has stated “there is nothing in G.L. c. 40A §3 which contemplates the requirement of site plans and informational statements as monitoring devices for educational uses.” The Bible Speaks, *supra* at 32. The by-law at issue in The Bible Speaks case, however, included a provision making educational uses subject to the discretionary grant of a special permit. A limited, administrative site plan review that is specifically tailored to exempt uses, in particular by limiting the scope of review to those items that a municipality is allowed to regulate under G.L. c. 40A §3, would seem to be a reasonable exercise of a municipality’s authority under the Zoning Act.

The scope of site plan review for exempt uses should be carefully and specifically set forth in the by-law or ordinance. In addition to the items listed in chapter 40A §3 as within the scope of a municipality’s right to regulate, the courts have also indicated that traffic issues are possible legitimate concerns that could support the enforcement of local regulations. See Trustees of Tufts College v. Medford, 33 Mass. App. Ct. 580 (1992). On the other hand, the Appeals Court stated that “the probable effects of the use on (such factors as) . . . changes in the number of legal residents, . . . increases in municipal service costs, . . . changes in tax revenue, . . . land erosion or loss of tree cover, . . . character of surrounding neighborhood, . . . master plan of the town, . . . (or) any pertinent regional plans” are inappropriate considerations under Section 3. The Bible Speaks, 8 Mass. App. Ct. at 32.

IV. LEGAL ISSUES

A. Appeal of Site Plan Review Decisions

Both the courts and aggrieved parties have struggled to make sense of the appropriate appeal procedure for site plan review by-laws and ordinances that differ widely from municipality to municipality and are not specifically governed by chapter 40A. The Appeals Court has noted “the elusive procedure for review of site plan approval decisions under our developing law.” Cumberland Farms, Inc. v. Planning Board of Bourne, 56 Mass. App. Ct. 605, 608 (2002). For those who want a detailed look

at some of the twists, turns and missteps associated with attempting to appeal a site plan decision, the two Cumberland Farms cases are an object lesson. In the first case, Cumberland Farms' petition in the nature of certiorari was rejected. Id. Its further appeal attempts were likewise unsuccessful, as will be explained below.

Case law has differentiated between site plan special permit review, and site plan review that is attached to the issuance of a building permit for uses allowed by right. Dufault v. Millennium Power Partners, L.P., 49 Mass. App. Ct. 137, 139 (2000). Where the use requires a special permit, or where site plan review follows the special permit procedures, it appears that appeal of the site plan decision is to be taken under G.L. c. 40A §17 in the same manner as a special permit appeal. Quincy v. Planning Board of Tewksbury, 39 Mass. App. Ct. 17, 22 (1995).

Under administrative site plan, where the site plan is tied to the issuance of a building permit, it is not as clear. As always, it is helpful if the by-law or ordinance addresses this issue to the extent possible. For example, one recurring question is whether an administrative site plan decision which is made by the planning board may be appealed to the board of appeals under G.L. c. 40A §8. If for some reason your city or town wishes to allow such an appeal, the by-law or ordinance should explicitly say so. If not, the by-law or ordinance should state that the site plan review decision is not appealable to the board of appeals. The courts will look first to the provisions of the by-law or ordinance when determining the route of appeal. See Osberg v. Planning Board of Sturbridge, 44 Mass. App. Ct. 56, 60 n. 8 (1997). In the absence of a specific right of appeal in the by-law or ordinance from the planning board to the board of appeals, the Appeals Court has ruled that the planning board's decision is not action by "an administrative officer" under G.L. c. 40A §8, and therefore not appealable to the board of appeals. Cumberland Farms, Inc. v. Planning Board of Bourne, 67 Mass. App. Ct. 67, 69 (2006).

With respect to administrative site plan review, the courts have held that, in the absence of a zoning by-law or ordinance provision otherwise, "the right of an aggrieved party to appeal the 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." Dufault, supra. Thus, when a site plan application is approved, the right of aggrieved parties to appeal does not ripen until the building inspector issues the building permit. As stated by the Supreme Judicial Court:

An approval after site plan review, 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 permit. The Appeals Court has said, we think correctly, 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.

St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority, 429 Mass. 1, 9 (1999). Once the building inspector has issued or denied the building permit, an

aggrieved party may appeal the decision on the building permit to the board of appeals under G.L. c. 40A §8. See McDonald's Corp. v. Seekonk, 12 Mass. App. Ct. 351, 353 (1981). The board of appeals decision may then be appealed pursuant to G.L. c. 40A §17.

The application to the building inspector is a necessary step in the process. Cumberland Farms, Inc. v. Planning Board of Bourne, 67 Mass. App. Ct. 67 (2006). This is due to the well-established principle in zoning that requires exhaustion of administrative remedies prior to resort to the courts. Quincy v. Planning Board of Tewksbury, 39 Mass. App. Ct. at 20. Thus, to properly exhaust available administrative remedies, a party aggrieved by the decision of the building inspector on a building permit application must appeal to the board of appeals prior to filing with the court. See McDonald's Corp. v. Seekonk, 12 Mass. App. Ct. at 353.

B. Judicial Review Standard

Courts do not apply the same level of deference to administrative site plan decisions as they do to other zoning decisions. In Prudential, where the use was allowed by right, the board denied the site plan application due to traffic concerns. When the developer appealed, the board argued that the court should apply the highly deferential standard applied by courts in reviewing special permit decisions. The court, however, determined that the by-law made it clear that the proposed use was allowed by right and was not subject to the issuance of a special permit. The court delineated the proper standard of review as requiring the court to review the traffic problem and determine if it “was so intractable that it could admit of no reasonable solution. Short of independently finding that, [the court] was not obliged to give deference to the board’s decision.” Prudential at 283. The trial court in Prudential concluded that the board’s resolution of the traffic problem was unjustified because it, in effect, improperly prohibited a use which could be conducted with reasonable conditions.

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