

Ghost Haunting Land Use Law: Site Plan Review and Local Zoning Regulations

~ Practical Skills Session ~



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the cannabis industry. Prior to joining Davis Malm, Shawn served as a law clerk to the Hon. Gordon H. Piper, Chief Justice of the Land Court.

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years, starting practice in Oregon before moving to Massachusetts. She has represented a variety of clients, including individuals, small businesses, large-scale corporations, and federally recognized Indian tribes.

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What is a Site Plan?

- A site plan or a plot plan is a comprehensive blueprint used by architects, landscape architects, urban planners, and engineers which shows existing and proposed conditions for a given area, typically a parcel of land which is to be modified.
- The site plan will often show features such as:
 - property lines.
 - outline of existing and proposed buildings and structures.
 - distance between buildings and property lines (setbacks).
 - parking lots, indicating parking spaces.
 - driveways.
 - surrounding streets.
 - landscaped areas.

The Function and Purpose of Site Plan Review

- Site plan review is “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, supra* at 281 n. 6.
- Site Plan Review is meant to establish design standards for a development project.
- Site plan review also is a means of collecting the comments of various municipal authorities, such as highway, fire, police, and health departments.

Who conducts the Review?

- The review generally is conducted by a zoning board of appeals or a planning board.
- Site plan provisions may also require an assessment of off-site impacts on “traffic, municipal and public services and utilities, environmental quality, community economics, and community values.”

Important considerations

- Although not specifically authorized by G.L. c. 40A, site plan review is a common practice used by municipalities to review and condition certain uses or activities where the underlying use is permitted by right or allowed subject to a special permit.
- First recognized by the Supreme Judicial Court in *Y.D. Dugout, Inc. v. Bd. of Appeals of Canton*, 357 Mass. 25 (1970).
- Absent the lack of standardization under the Zoning Act municipalities have adopted a range of procedures from “administrative site plan review” to those treated as special permits.
- For uses allowed as-of-right, administrative site plan review amounts to something akin to as-of-right plus permitting.
- Through administrative site plan review, “if the specific area and use criteria stated in the by-law [are] satisfied, the board [does] not have discretionary power to deny . . . [approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use.” *Prudential Ins. Co. of America v. Board of Appeals of Westwood* (“*Prudential*”), 23 Mass. App. Ct. 278, 281 (1986). This is because “the concepts of a use as of right and a use dependent on discretion are mutually exclusive.” *Prudential, supra*.
- Accordingly, a reviewing court is “to examine the proposal to see if the . . . problem [upon which site plan review was denied i]s so intractable that it could admit of no reasonable solution. Short of independently finding that, [the judge i]s not obliged to give deference to the board’s decision.” *Prudential, supra* at 283. See *Castle Hill Apartments L. P. v. Planning Bd. of Holyoke*, 65 Mass. App. Ct. 840, 845-846 (2006), quoting *Quincy v. Planning Bd. of Tewksbury*, 39 Mass. App. Ct. 17, 21 (1995) (“[w]here the site plan involves a permitted use, ‘the judge’s proper role . . . [is] to inquire whether the public interest [may] be protected to a degree consistent with the reasonable use of the locus’ for [that permitted use]”).
- Over the years, the Courts have grappled with a number of site plan-related issues, summarized nicely by Judge Speicher in *Corner et al., v. Forest Delahunt Development, LLC et al.*, 18 MISC 000316.
 - If a site plan is treated by a municipality as a special permit, does it require a supermajority vote? (per G.L. c. 40A, § 9)
 - How detailed must the findings be in an approval? See *Bowen v. Bd. of Appeals of Franklin*, 36 Mass. App. Ct. 954, 955 (1994) (because “site 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 . . . the local board need not be held to as demanding a standard of reporting of the factual and legal underpinnings of their approval of a site plan.”).
 - Is there a different standard for a denial?
 - Can a site plan approval be denied for an as-of-right use?
 - Can a planning board impose stricter dimensional regulations as a condition of site plan approval? Yes, see *Muldoon v. Planning Bd. of Marblehead*, 72 Mass. App. Ct. 372 (2008).
 - Ripeness of appeal of a site plan approval (the very issue grappled with in *Corner*).

Important considerations (cont'd)

- What is significant when a municipality designates site plan review as a “special permit”? See *Epstein v. Plan. Bd. of Marblehead*, 100 Mass. App. Ct. 1128 (2022) (Rule 23.0) (“Notwithstanding the fact that the bylaw incorporates the procedures under § 9 by reference, and thus may appear to apply to all special permit applications, § 9 does not, as a matter of law, apply to a special permit application for a use as of right.”). Is this correct?
- What standard does a court apply when reviewing a site plan denial?
 - What standard when reviewing an approval with conditions in an appeal brought by the applicant?
 - What standard when reviewing an abutter appeal of an approval?
 - One framework for review:
 - (1) Is the underlying use permitted as of right (this is not always undisputed),
 - (2) Did the local board apply the proper criteria in approving the site plan (how do you prove this if the board renders only a cursory written decision? How does this play out on de novo review?),
 - (3) Was the board’s approval legally tenable and not arbitrary or capricious (for an as-right use, how does an abutter show the board was arbitrary and capricious? Must an abutter propose specific conditions the board failed to impose? Can an abutter hope for a better result than a remand?)?
- In an abutter appeal, are the requirements to demonstrate status as a “person aggrieved” the same as a discretionary special permit or variance?

Considerations when Applying for Site Plan Approval on behalf of Project Proponent

- The Zoning Bylaw/Ordinance – the by-the-book bible (make sure you have the most up-to-date version – ask the Town Clerk for a certified copy). Absent codification under the Zoning Act, there is a lack of uniformity in procedures between Towns or municipalities. The submission requirements, Board authority, hearing procedures, notice requirements, timing expectations/limitations, and (hopefully) appeal process are laid out in the bylaw or ordinance and form the starting point for submitting your project for review and approval.
- Know the Planning/Zoning staff. Know your Board.
 - Whichever board or group is your authority for Site Plan Review, know who the staff person is and what the expectations are. Some Town Halls only operate on half days on Friday. Some require that the Staff member stamp your Site Plan submission as “received” in order to start your review period. Some staff members will want additional information from you before your application is deemed complete.
 - Some Towns allow you to meet with the staff member or department staff prior to submitting your Site Plan, this can be a good way to understand what is being reviewed more critically in your submission and what the expectations are. Even if there is no process for this, it is a good idea to meet informally with the staff member if you can.

Considerations when Applying for Site Plan Approval on behalf of Project Proponent (cont'd)

- The Board members are next: Who are they? Do they have any subject matter expertise? When were they elected? Were they elected on a particular platform?
 - Want to be extra thorough? Watch a previous Board meeting (or two) online. While there are many aspects of SPR that *are* consistent across the State, many jurisdictions have idiosyncratic rules that have developed through years of Town meetings, specific precedents (Projects that have been previously loved or hated and worked their way into the process – either officially or unofficially).
 - Local politics plays a big role in many development projects – whether you have NIMBY/YIMBY/Other Board is important to know going in.

What to Submit?

- Whatever the Bylaw lists. Generally, this will include:
 - Application
 - Application Fee
 - X number of Plan Sets (often a combination of full-sized 24x36 inch plan sets and reduced 11x17 inch plan sets)
 - Bylaw usually stating what items must be displayed on the Plans
 - Parking/Traffic Analysis
 - Stormwater/Drainage Compliance or Analysis
 - Information on what (if any) other permits or approvals are required (e.g. Conservation Commission proceedings, special permit, septic system approval, etc.)
 - Site walk
- Whatever the Planning/Zoning Staff tell you (even if it isn't listed in the ordinance or bylaw)
- Gold star? Memorandum in Support
 - Good practice to walk your Board through why your project is compliant with all of the Site Plan approval criteria and appropriate for the character of your neighborhood. Also provides a good frame of reference for the Board.

Important Permitting-Specific Considerations

- Neighbors – Some bylaws require notice to abutters and some do not, but the court of public opinion can affect how long/how many hearings you have and what conditions may be included in your approval.
- Who else is reviewing your Site Plan?
 - Many Towns require that their Board solicit comments from relevant departments (Police, Fire, Engineering, Health/Sanitation, Conservation Commission, etc.); comments from these departments are typically incorporated into conditions of approval.