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July 13, 2007

Wayne Feiden
Director of Planning and Development
City of Northampton
210 Main Street, Room 11
Northampton, MA 01060

RE: Hilton Garden Inn

Dear Mr. Feiden:

You have requested my opinion regarding the approval process for the above-referenced application (the Hilton).

As I understand the facts, the proposed Hilton is located in the Central Business (CB) District. At some earlier time, the Planning Board issued a special permit for the project and the applicable appeal period has expired. The Northampton Zoning Ordinance (NZO), at Section 350-11.3, states that “[n]o building permit, zoning permit, or special permit shall be issued for ... major projects prior to the review and approval of a site plan in accordance with this section.” The Hilton constitutes a major project. The Hilton did not have an approved site plan when the special permit was issued.

The Hilton is now before the Planning Board seeking site plan approval. The CB District has no required side yard setback and a 6 foot required rear yard setback. The proposed Hilton has a 14 foot setback at its closest point to a side or rear property line. The plan accompanying the application for a special permit depicted the same setback as that proposed in the application for site plan approval.

You have asked me two specific questions and I offer these opinions:

1. Is the special permit valid where an approved site plan was not provided to the Planning Board as part of the special permit application?

In my opinion, the special permit granted by the Planning Board is valid. Where the Board grants a special permit despite the failure of the applicant to meet the requirements of the NZO, any challenge to this defect is limited to the twenty day appeal period set forth in G.L. c. 40A, s. 17. Any later collateral attack on the issuance of the special permit (for example, by

declaratory judgment) is untimely and would be dismissed by a reviewing court. See, *Iodice v. City of Newton*, 397 Mass. 329, 34 (1986); *Balcam v. Town of Hingham*, 41 Mass. App. Ct. 260 (1996). This is true even where the special permit contained an unauthorized condition or was granted without compliance with local procedures, such as those set forth in Section 350-11.3. See, e.g., *Campanelli, Inc. v. Planning Bd. of Ipswich*, 358 Mass. 798 (1970); *Marino v. Board of Appeal of Beverly*, 2 Mass.App.Ct. 859 (1974); *Town of Stoneham v. Savelo*, 341 Mass. 456 (1960); *Young v. Planning Board of Chilmark*, 402 Mass. 841, 844-45 (1988).

2. Does the Planning Board have the authority under site plan review to increase the setbacks otherwise required in the CB District?

In my opinion, the Planning Board is without such authority. In *Castle Hill Apartments Limited Partnership v. Planning Board of Holyoke*, 65 Mass. App. Ct. 840 (2006), the Appeals Court reviewed the imposition of certain conditions as they applied to a proposed multifamily development. The conditions were contained in the site plan decision of the Planning Board. The Board required two entrances per dwelling unit instead of two entrances per building (as required by the zoning ordinance). The Appeals Court characterized the condition as an “issue of density” and ruled that

[i]ssues of density are not included in the site plan review criteria perhaps because issues as to density, like issues related to the use itself, were previously resolved “in a legislative sense” when the city enacted the ordinance permitting up to twenty units of multifamily residences per acre as of right in the RM-20 zoning district.

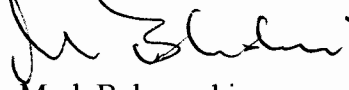
The Appeals Court held that the condition exceeded the board’s authority. This result was matched in the recent Land Court decision of *Muldoon v. Stern*, Misc. Case No.: 310986 (Land Ct. 2007). Chief Judge Scheier cited *Castle Hill* in rejecting the imposition of a 30 foot rear setback where the district required only eight feet. The condition was placed in a “special permit for site plan approval” decision by the Marblehead Planning Board. Judge Scheier ruled that “the dimensional requirements set forth in the Bylaw cannot now be altered by the Board where such matters were previously ‘resolved in a legislative sense’ when the [Town] enacted the [Bylaw].”

In Northampton, the setbacks in the CB District have been resolved “in the legislative sense” like the units per acre standard in Holyoke and the setback distance in Marblehead. The application for site plan approval complies with the rear and side setback requirements. The Planning Board is without authority to impose greater setbacks. In my opinion, and for the reasons cited by Judge Scheier in *Muldoon*, this is true even where the local ordinance or by-law contains a provision authorizing such increases. This would work a violation of the uniformity clause set forth in G.L. c. 40A, s. 4, which states that “any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.”

Of course, my opinion should not be construed to limit the power of the Board to impose such conditions where the applicant voluntarily accepts a greater setback and does not file an appeal.

Please let me know if you have any additional questions in this regard.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Bobrowski', written in a cursive style.

Mark Bobrowski