

legal

The Snags of Site Plan Review

By MARK A. KABLACK

A recent decision by the Massachusetts Appeals Court, *Cumberland Farms Inc. v. Planning Board of Bourne* (2006), is



a good reminder of several of the nuances of site plan review. In particular, this appellate court case provides important guidance on the pitfalls of site plan review for projects otherwise considered an as-of-right use.

Although site plan review is a widely used planning tool, both in Massachusetts and in states throughout the country, the concept is an awkward one within the context of the Massachusetts Zoning Enabling Act, Massachusetts General Laws, chapter 40A (the Zoning Act). Site plan review is not mentioned in the Zoning Act, and as a result, there is no statutory reference to the procedures for site plan review, including appellate review. As one commentator has opined, site plan review is entirely the creation of municipalities and the courts. It is within this context that builders and developers need to carefully navigate the process of permitting a project when site plan review is involved.

Site plan review is often associ-

ated with the issuance of a special permit. Special permits are specifically defined within the Zoning Act, section 9. As such, the designation of a permit granting authority, and the powers and procedures associated with that authority, are carefully detailed by statute. There is by statutory definition a defined group of uses that are permissible by special permit; there are standards for application, conduct of a public hearing, decision making and judicial appeal. When a site plan is submitted within a special permit process, typically referred to as a "site plan/special permit," the site plan review is conducted in accordance with the standards of special permit review. In essence, the site plan process rides on the coattails of the special permit. Judicial review of a site plan/special permit occurs within the framework of the appeal procedures, set forth in accordance with the Zoning Act, section 9 (special permits) and section 17 (judicial review of actions taken by a special permit granting authority).

However, site plan review can also be required by a municipality for a project that is otherwise permitted as-of-right. For these projects, where no special permit is required, and given the lack of direction within the Zoning Act, the site plan review process can be complicated and confusing. It is within this context that builders and devel-

opers should look to the *Cumberland* case, and certain other appellate court cases, to make sure that they understand their rights and obligations.

One of the more often-cited appellate cases dealing with site plans and as-of-right uses is the case of *Prudential Insurance Co. of America v. Board of Appeals of Westwood* (Massachusetts Appeals Court, 1986). The *Prudential* case reaffirmed several rulings provided earlier for site plan review procedures and defined standards for how a site plan review board may approve, approve with conditions, or deny a site plan. Site plans by their very nature deal with the layout, scale, appearance and safety of a project. Site plan approval for an as-of-right use is inextricably linked to the issuance of a building permit. No written decision is required by a site plan review board and approval can occur by a simple majority vote (where site plan/special permits require a super majority vote). Often the final review occurs by a review board with a simple endorsement of a final plan. The permit that is issued is the building permit itself. This ends up being an important distinction for purposes of appeal rights, as noted below.

According to the *Prudential* case, a site plan review board may impose reasonable conditions on an as-of-right use prior to the issuance of a building permit. According to the appeals court, a

review board may: a) reject a site plan that fails to furnish adequate information required by the bylaw (incomplete application); b) impose reasonable conditions in connection with site plan approval; or c) reject a site plan where a project is so intrusive on the interests of the public that no reasonable conditions can be imposed which would satisfy the problem.

When a site plan is approved, approved with conditions or denied for as-of-right uses, the appellate procedure is different than for projects governed by site plan/special permit. Due to the fact that site plans for as-of-right uses are linked to the building permit process, the review and appeal procedures follow the same track as the review and appeal procedures for a building permit that is approved, approved with conditions, or denied. In other words, there is an interim series of steps that must be filed prior to bringing a judicial appeal under the Zoning Act, section 17. In such circumstances, a building inspector must take final action or exceed the maximum period of time to take final action. Only then, in accordance with section 8 of the Zoning Act, may an aggrieved party commence an administrative appeal to the permit granting authority (typically a Zoning Board of Appeals) designated within the municipality's bylaw. An aggrieved party then must exhaust efforts under the administrative appeal process prior to

commencing a judicial appeal under section 17. Filing for a building permit, appealing the building inspector's decision to the board of appeals and seeking judicial review of the board of appeals decision may be awkward and problematic, but these interim steps are crucial to preserving all appeal rights before a court. "[T]he right of an aggrieved person to appeal a local ... 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's Citizens Comm. Inc. v. Boston Redevelopment Authority*, 1999; see also, *Cumberland, Massachusetts Appeals Court*).

In *Cumberland*, the project proponent (Cumberland Farms) sought site plan approval for a project that it believed constituted an as-of-right use. In the town of Bourne, site plan review is conducted before the Planning Board, and in this case, the Planning Board disapproved of the site plan for a number of reasons, including a finding that the use was not as-of-right, and required a special permit. Cumberland Farms then sought an appeal to the Bourne Zoning Board of Appeals. The Zoning Board of Appeals voted to uphold the Planning Board's denial, and Cumberland Farms brought an appeal in Superior Court pursuant to the Zoning Act, section 17. On appeal of the Superior Court case, the appellate court ruled that

Cumberland Farms bypassed building inspector action, a "jurisdictional prerequisite" to action before the Zoning Board, and subsequent appeal to Superior Court. The appellate court reaffirmed positions taken in prior cases with respect to as-of-right uses and held that the Zoning Board had no power to entertain Cumberland Farm's appeal. It then vacated judgment and dismissed Cumberland Farms' complaint.

Cumberland is a good reminder of several important issues regarding site plan review. First and foremost, builders and developers must initially ascertain whether site plan review is required in conjunction with a special permit use or an as-of-right use. Second, if the use is as-of-right, the reviewing board's decision is limited in scope and linked to the building permit process. Third, an adverse decision by the reviewing board must be followed by final action of the building inspector with respect to a building permit request; administrative appeal to the permitting board (often the Zoning Board of Appeals); and then judicial appeal. Any short-circuiting of these intermittent steps can be a fatal flaw on appeal. ♦

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