



DESAUTEL LAW

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VIA ELECTRONIC AND USPS MAIL

Chairman Paul A. Croce
And Members of the Town of Middletown Planning Board
350 East Main Rd
Middletown, RI 02893

**RE: Application of Horan Building Company; 208 Howland Avenue,
TAP 129, Lot 53**

Dear Chairman Croce and Members of the Planning Board:

This office is endeavoring to act in an advisory capacity to the Planning Board to evaluate those legal arguments made by interested parties to this Board, and to advise in regards to the procedure to be followed upon the remand of this matter from the Zoning Board appeal.

After appeal, the Zoning Board remanded this matter to the Planning Board's attention, and specifically highlighted areas that would need to be addressed in more detail in the Planning Board's decision. Among these areas was the question of the amount of lots to be allowed in the proposed subdivision. Specifically, the Zoning Board was concerned that the Planning Board was aware and able to exercise their powers of discretion should they deem it necessary to reduce the number of lots. As cited in the Zoning Board decision "Section 407(B)(4)... provides that the Planning Board may approve of the Master Plan as submitted, approve with changes and or conditions, or deny the application." (Decision, pg 3-4).

In addition, the Zoning Board in its Decision discussed the considerations required of both the conventional and conservation subdivisions when it came to the evaluation of the number of lots permissible. The Zoning Board indicated that "[a]t the Master Plan stage of review, the applicant must provide not just a calculation of allowable lots based on the overall area of the parcel, but also a separate plan showing the number of lots the property would yield as a traditional conventional subdivision." (Decision, pg. 6) The standard, as cited in the Zoning Board decision, is that "[t]he Applicant must demonstrate to the Planning Board that the lots as depicted on the conventional plan are capable of supporting the proposed development given any land development constraints." (Decision, pg. 6, citing Art. 3 §302(E)) The Zoning Board specifically

stated that the Conventional Plan submitted to the Planning Board “must depict the relevant constraints. These constraints could be such things as (i) the need for septic and wells properly spaced apart from each other and from wetland features (ii) how dramatic changes in grade will be handled; iii) that setbacks, frontage and other dimensional requirements are met; etc.” (Id.) The error cited by the Zoning Board in its remand was the lack of this detail in the conventional plan previously submitted.

Recently, Attorney Leys wrote to this board in regards to this element of the remand. In his letter, he suggested that the Planning Board must “choose” between a conservation and conventional plan at a Master Plan stage. This is not the case. Middletown Ordinance §301 (C) provides:

“Where a conservation subdivision/land development project [“CSD”] plan is submitted, the Planning Board shall have the discretion to consider for approval either the CSD or the conventional plan of development provided that such determination is made at the Master Plan stage of review for all major subdivisions/developments, and prior to Preliminary Plan approval for minor subdivisions.”

§301 then goes on to describe considerations which the Board “**must find**” prior to the consideration of the conventional plan rather than the conservation plan. See id. (emphasis added). The natural conclusion of a plain language reading of the ordinance is that while both plans must be submitted, and, as the Zoning Board noted, with sufficient detail to show that they are both viable, a conventional plan should only be considered if those elements of §301(D) (cited accurately in Attorney Leys letter) are found. It is not a matter of the Planning Board choosing the “better” plan. See eg. Roberts v. Russolino, K.M. 06-415 (R.I. Superior, April 29, 2008) (“If the proposal meets the Comprehensive Plan and all the state and local regulations, then the application should obviously be approved, regardless of whether Plaintiffs believe their proposed plan is better.”)

Further, Attorney Leys suggested that “we believe the Regulations and General Laws require a thorough engineering review of [sic] before a decision on Master Plan is made (and at each stage thereafter).” However, a reading of the statutory description of a Master Plan refutes this explicitly. A Master Plan is defined as “[a]n overall plan for a proposed project site outlining general, rather than detailed, development intentions. It describes the basic parameters of a major development proposal, **rather than giving full engineering details.**” R.I.G.L. §45-23-32(23) (emphasis added). A Preliminary Plan is “[t]he required stage of land development and subdivision review which requires detailed engineered drawings and all required state and federal permits.” R.I.G.L. §45-23-32(35). A Final Plan consists of “[t]he final stage of land development and subdivision review.” R.I.G.L. §45-23-32(13). See also Green Development, LLC v. Town of Exeter Zoning Board of Review, C. A. WC-2018-0519 (April 20, 2020, fn. 6) (only “conceptual” plans are required, and more detailed plans come later).

Further, the Board noted with approval: “The conservation plan shows possible location of wells, septic facilities, residences, and some wetland features.” (Decision, pg. 6). The Zoning Board, finding no fault with the conservation plans previously submitted, noted on remand that the

conventional plans should provide the “same” level of detail. (Id.) Attorney Leys’ request for additional engineering review on the conservation plan, as described in his letter, far exceeds the scope of the direction of the Zoning Board in its remand to this Board.

Finally, in an effort to give guidance to this Board in the manner to address this remand, additional hearing is not necessary “if the current board members can glean the findings of facts and conclusions of law from the transcript of testimony and any other evidence presented to the Planning Board.” Veronneau v. Cumberland Planning Bd. of Appeals, C.A. 02-1150 (R.I. Super. Dec. 22, 2004). The Planning Board may hold such additional hearing in their discretion if needed to “issue findings of facts in support of its conclusions of law.” Id. The goal upon remand is a decision that includes findings of fact which addresses those issues remanded to the Planning Board and supports the conclusions that the Planning Board reaches in their review.

If you have any questions, please do not hesitate to reach out. Thank you for your attention to this correspondence.

Sincerely,



Marisa Desautel, Esq.