

From: Jonathan Drill
Sent: Wednesday, January 31, 2018 9:19 PM
To: dfilardo@clintontwpnj.com
Cc: Marcelli, Cathleen; Tom Behrens; Brian Bosenberg
Subject: Fw: Legal Advice regarding CTEC comments regarding the Willows at Annandale Final Site Plan Application

Denise,

This email contains my legal advice to the Board with respect to the attached CTEC review of the Willow at Annandale's EIS.

I ask you to please forward the within email to all Board member, forward it to the applicant's attorneys, forward it to the CTEC, and place a copy of it in the Willows at Annandale file. This is email NOT an attorney-client privileged communication.

The following is my legal advice:

First, the EIS that was submitted with the Willow at Annandale's preliminary site plan application was APPROVED by the Board in Resolution No. 2016-08 adopted on June 6, 2016.

Specifically, Resolution No. 2016-08 (a copy of which is attached) provides as follows (starting on page 18 and continuing on page 19), and I have highlighted in yellow and bolded the applicable language:

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD, BY MOTION DULY MADE AND SECONDED ON JUNE 6, 2016 AS FOLLOWS:

C. RELIEF GRANTED

1. **"C(1)" Steep Slope Variances.** Subject to the conditions set forth below, "c(1)" variances are granted from ordinance section 165-117 to allow: (a) a disturbance of 5.6% in areas with slopes in excess of 25%; and (b) a disturbance of 37.3% in areas with slopes between 15% and 25%, where the ordinance does not permit development in areas with slopes that exceed 25% and permits development in a maximum of 15% of areas with slopes between 15% and 25%.

2. **"C(2)" Setback Variances.** Subject to the conditions set forth below, "c(2)" variances are granted from the zoning ordinance setback regulations applicable to development in the AH-4 zone as contained in Table 2 of the Redevelopment Plan (found on page 20 of the Redevelopment Plan) to allow: (a) a trash enclosure to be setback 44.4 feet from Beaver Avenue (CR 626) where the minimum front yard setback requirement is 65 feet from Beaver Avenue; and (b) a retaining wall in the northeast corner of the property to be setback 10 feet from the easterly side property line where the minimum side yard setback is 25 feet.

3. **Exception from Redevelopment Plan Requirement of Foundation Plantings.** Subject to the conditions set forth below, an exception is granted from the Redevelopment Plan requirement established in section 5.12.13 (found on page 24 of the Redevelopment Plan) to allow no foundation planting.

4. **Exception from RSIS Requirement for the Number of Parking Spaces.** Subject to the conditions set forth below, an exception is granted from the RSIS requirement established in Table 4.4 which is incorporated by reference into and by N.J.A.C. 5:21-4.14(b) of 1.8 spaces per each one-bedroom unit and 2.0 spaces for each two-bedroom unit, which equates to a requirement to provide a total of 131 parking spaces for “Mid-Rise Apartment”/ “Garden Apartment,” to allow 116 off-street parking spaces on the site.

5. **Preliminary Site Plan Approval. Subject to the conditions set forth below, preliminary site plan approval is granted to the** Preliminary Site Plans, Preliminary Architectural Plans, Traffic Report, **EIS**, Geotech Report, and Stormwater Management Report as referenced above.

The only conditions requiring revisions to the EIS that I can find in Resolution No. 2016-08 (in condition #1) are as follows:

g. Following comments emanating in the letter to the Board from Jeffrey K, Keller, Ph.D. of Habitat by Design (Board environmental expert) dated May 31, 2016:

(1) Revise the EIS to: identify the acreages of the four vegetative communities referenced on page 13 of the EIS (maintained lawn, upland woodlands, palustrine forested wetlands, and palustrine scrub / shrub wetlands); discuss the development proposed within each of the four types; and assess the environmental impacts (page 25 of the EIS). (To be clear, as set forth in the factual findings above, the Board recognizes that there will be adverse environmental impacts which cannot be avoided resulting from the development of the property as the Affordable Housing Project. That said, the Board is satisfied that the public benefits resulting from the provision of the Affordable Housing Project substantially outweigh the environmental detriments. See, ordinance sections 165-72.C(5) and -72.C(6). As also set forth in the factual findings above, the Board specifically found that development of the property for the Affordable Housing Project will not result in appreciable harm to the environment or to public health or safety. And, the Board found that the Affordable Housing Project has been designed with a view toward the protection of natural resources. As such, the Board approved the EIS in accordance with the standards set forth in ordinance section 165-72.E(1).)

(2)-(8) (Intentionally omitted these comments were not accepted by the Board so do not require plan revisions to the EIS.)

Thus, in my opinion, except if a comment in the CTEC letter addresses any of the revisions that were required by the preliminary approval, the Board cannot lawfully consider the CTEC's comments at the time of final site plan review because they cannot legally be applied after-the-fact to a previously approved EIS.

Second, with specific reference to the issue of traffic, traffic information was submitted at the time of preliminary site plan review and the application was granted preliminary approval based on that traffic information. Unless the Board retained jurisdiction over a specific traffic issue(s), this is another issue that the Board cannot, in my opinion, lawfully consider as it would be imposing new terms or conditions after-the-fact to a previously approved EIS. Further, the site is located on County Route 626 (Beaver Avenue), taking jurisdiction over traffic on that road out of the Planning Board's jurisdiction. Moreover, the use is a permitted use and case law provides that a Board cannot consider off site traffic conditions for a permitted use.

If anyone has any questions about my advice or anything in this email, please feel to call me to discuss.

Thanks,

Jon

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