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To: Arlington Redevelopment Board;
Jennifer Raitt, Director of Planning and Community Development

From: Douglas W. Heim, Town Counsel

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Re: Special Permit Process for EDR Applications

Members of the Arlington Redevelopment Board ("ARB" or "Board"), you inquired as to the appropriate process and standards for hearing special permit applications subject to Environmental Design Review ("EDR") under your purview; specifically, whether or not the Board should evaluate EDR standards under §3.4.4 if and when the Board (or some of its members) believes that a permit application should be denied for failure to satisfy the more general special permit criteria of §3.3.3. Articulated another way, should the Board essentially bifurcate its "regular" special permit criteria from its EDR standards to implement a rounded or "phased" permitting process where it anticipates a denial? As set forth fully below, this Office does not recommend adopting a phased special permit process for EDR-qualified applications at this time. If the Board were inclined to consider such an approach, it is recommended that your regulations and application materials be updated to more clearly reflect the purpose, parameters, and timing of phased or rounded special permit hearings.

Background and Context

To this Office's understanding, the specific context of the Board's inquiry is a pending special permit application before it subject to EDR which may or may not present an undesirable or excessive use under special permit criteria 3.3.3(B) and (G). Board members inquired whether an initial determination that the proposed use was undesirable and/or excessive might foreclose further review at hearing of EDR standards and form the sufficient basis for a denial. The Director of Planning and Community Development responded that the Board's current practice under the Zoning Bylaw and ARB is not to bifurcate your consideration and decision making, and that a denial should incorporate the Board's full consideration of EDR standards as well as baseline special permit criteria of § 3.3.3. The Board, through its Chair sought further review of the issue and the opinion of this Office.

The Bylaw, Rules & Regulations, & EDR

As noted in prior memos to the Board, you are a body of limited, but special jurisdiction, functioning as a Redevelopment Authority, Planning Board, and Special Permit Granting Authority (SPGA) through the lens of Environmental Design Review ("EDR") as codified in the Zoning Bylaw. Accordingly, approximately 10 percent of the Town's special permit applications are submitted to you, each involving commercial, industrial, larger scale residential, or mixed uses "which have a substantial impact on the character of the town and on traffic, utilities, and property values, thereby affecting the public health, safety and general welfare."

In order to accomplish your goals and realize the ARB's purpose as set forth in the Bylaw, the Board utilizes the more rigorous, but also more flexible and subjective toolkit of the EDR process, which adds to special permitting standards and processes established for predominantly (though not exclusively) residential uses currently governed by the Zoning Board Appeals ("ZBA"). Indeed, §3.4.3 of the Zoning Bylaw outlines a specific procedure for EDR projects which does not apply to "regular" special permits as follows:

> Procedures
>
> A. Application. Applicants shall submit an application for Environmental Design Review in accordance with the Arlington Redevelopment Board's ("Board") rules and regulations.
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> B. The Board shall hold a public hearing in *accordance with Section 3.3 of this Bylaw* and G.L. c. 40A, §§ 9 and 11.
>
> C. The Board shall refer the application to the Department of Planning and Community Development ("Department"), which shall prepare and submit written reports with recommendations to the Board before or at the public hearing. The Board shall not take final action on the special permit application until it has received the Department's report or until 35 days have elapsed after submittal of the proposal to the Department. Failure of the Department to submit

written reports or to give an oral report at the public hearing shall not invalidate action by the Board.

D. A favorable decision by the Board shall require the votes of at least four members.

E. *The Board shall not deny a special permit under this Section 3.4 unless it finds that the proposed use does not comply with the Environmental Design Review* Standards listed below to such a degree that such use would result in a substantial adverse impact upon the character of the neighborhood or the town, and upon traffic, utilities, and public or private investments, thereby conflicting with the purposes of this Bylaw.

(emphasis added).

Reading §§ 3.4.3 (B) and (E) harmoniously suggests that EDR special permitting reflects a holistic approach whereby the ARB requires information fully responsive to both the Special Permit Criteria set forth in §3.3.3 and the twelve (12) EDR criteria set forth in §3.4.4. These requirements are echoed in Rule 14 of your Rules and Regulations, and further clarified by Rule 15, which states:

RULE 15 : BOARD DECISIONS

The ARB shall review the plans and may grant a special permit subject to the conditions and safeguards listed in the Arlington Zoning Bylaw *Section 3.3 and 3.3.4.* For stated reasons the ARB may deny approval of a special permit or may approve a special permit without a finding of hardship. As required by M.G.L. c. 40A, §9, a positive vote of at least four members of the Redevelopment Board is needed to issue a special permit. Upon the Board's approval, the Secretary Ex-Officio may sign decisions following a vote of the Board and file decisions per requirements of M.G.L. c. 40A. The final decision shall be emailed and may receive administrative corrections following the Board's votes.

(emphasis added).

Based on the Bylaw, ARB Rules and Regulations, your application requirements, as well as a review of a collection of past decisions of the Board (and c. 40A), it is clear that in any application for an EDR permit, the applicant must address all the Special Permit Criteria set forth in §3.3.3 *and* the twelve (12) EDR criteria set forth in §3.4.4; and further, any approval decision by the ARB must at least assess and address same.[1] The only question therefore is whether or not a denial (or anticipated denial) would be excused from the same process and standard if

[1] It may well be, and indeed several of your decisions reflect, that one or even several specific EDR standards are not central to the ARB's thinking on any given application, and/or that conditions on a permit focus on some EDR standards more than others.

rooted in a failure to satisfy §3.3.3. For the reasons discussed below, this Office concurs with the Director of Planning and Community Development's assessment that your best practice is to utilize the same process in any instance where denial is possible, but not objectively certain on the face of the application.

Analysis

As an initial matter, the nuance of denials under c. 40A should be noted. On one hand, c. 40A §9 provides that a Special Permit Granting Authority "shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions..." Further, a decision granting a special permit must include any findings required by the municipal ordinance or bylaw, as well as the findings required by the applicable provisions of the Zoning Act. *Sheehan v. Zoning Bd. of Appeals of Plymouth*, 65 Mass. App. Ct. 52, 56 (2005).

On the other, favorable actions require more vigorous support articulating the basis for the grant of a special permit than a denial of same. *Gamache v. Town of Acushnet*, 14 Mass. App. Ct. 215 (1982) (denial of variance based on town's policy against trailer parks is sufficient absent a clear record to the contrary); *Board of Aldermen of Newton v. Maniace*, 429 Mass. 726 (1999) (even failure to obtain requisite affirmative votes for a draft decision constitutes a sufficient basis for denial). Nonetheless, as a general rule of practice it should be rare that a process is determined by a potential (or even likely) outcome absent a very clear roadmap for fast-tracking a decision or failure to meet entirely objective threshold criteria. In other words, the difficulty in making a decision solely on the basis of §3.3.3 criteria is standardizing the Board's level of certainty that a vote on a subject criteria – the desirability or concentration of a particular use – preempts all further development of the record.

There are examples where boards and bodies adopt a "phased" or "rounded" process" whereby only some facets of an application are considered in different stages. Under such processes, applications essentially pass or fail (typically on a more narrow set of criteria) before proceeding on to the next stage of analysis with the specific goals identified and served by evaluating only portions of an application. In most of those cases however, there is no prejudicial impact of a denial akin to the two (2) year prohibition on repeat applications found in c. 40A §16. The ARB theoretically could implement such a process. However, at present the ARB's Rules and Regulations and application materials do not provide a clear roadmap for the goals, timing, or tools necessary of bifurcating EDR special permit applications into §3.3.3 analysis and *then* §3.4.4 analysis at some later phase.

For example, it is not clear when and how the Board would assess an application and take a vote to make a threshold determination on the baseline Special Permit criteria under §3.3 of the Zoning Bylaw. Would an unsuccessful motion to deny based solely on §3.3.3 criteria preclude later denial on the same grounds after application of EDR standards? If a member of the Board

has further bases for denial that have not yet been addressed on the record under EDR, may those concerns be articulated in the decision as well? Are they sufficiently supported in the record?

It is similarly unclear when and to what extent an applicant's response to EDR standards under §3.4.4 can help or hinder the Board's assessment of §3.3 criteria under a bifurcated review. Both your Bylaw and your Rules and Regulations imply interplay between these criteria. There may be circumstances where after the more robust application of EDR, a member of the ARB is persuaded or dissuaded that a given project is more or less responsive to being "essential or desirable to the public convenience or welfare" – one of the baseline §3.3.4 criteria. Similarly, the Board might be deterred by or impressed with an applicants' proposal with regard to EDR criteria "J" ("[w]ith respect to Arlington's heritage, removal or disruption of historic, traditional or significant uses, structures, or architectural elements shall be minimized insofar as practicable, whether these exist on the site or on adjacent properties") in such a manner as to inform the desirability of the use under §3.3.3(B).

Moreover, while the standards for denials of special permit applications are more modest than approvals, in order to best defend its decisions and convey the basis for denials to future applicants, the Board may articulate any and all reasons for denial in the most comprehensive manner practicable. Alternately stated, if the Board is denying a permit for *both* causing an excess of use detrimental to the character of a neighborhood (3.3.3(G)) *and* negative findings with respect to relation of buildings to the environment (3.4.4(B)), such denial is all the better supported. Without engaging in EDR, it begs the question of why EDR supporting materials were required in the first instance and could undermine an otherwise valid denial with respect to any basis from the desirability of use (3.3.3(B)) to unduly impairing pedestrian safety (3.3.3(C)).

The foregoing should not be read to imply that the Board may not deny a special permit under EDR for one of the reasons set forth in §3.3.3 such as an excessive use, or that only EDR standards ought to form the basis for approval or denial to the exclusion of §3.3.3. Such a determination however typically involves some subjective, qualitative judgment, which may be informed positively or negatively by application of full EDR standards and process. There may also be rare instances where an application cannot reasonably proceed because the use requested is not permitted in a district and an applicant has submitted despite efforts to persuade them otherwise. This Office is sensitive to the demands upon the ARB's time and attention. It remains however in the Board's interest to fully examine EDR applications under a full EDR process unless objective or procedural denials are merited, and/or Rules and Regulations harmonious to the Zoning Bylaw are developed to support a bifurcated or staged application review.

Conclusion

For the reasons set forth herein, this Office agrees with the Director of Planning and Community Development's recommendation to assess Special Permit Applications before you with both "Special Permit" Criteria under §3.3.3 and EDR Standards under §3.4.4 before voting upon your decisions unless and until the Board commits to a more detailed bifurcated or phased process in your Rules and Regulations.