

# October 29, 2008

## Special Meeting

7:00 p.m. Land Use Meeting Room

**MEMBERS PRESENT:** Mr. Bedini, Mrs. Hill, Mr. LaMuniere, Mr. Picton, Mr. Thomson

**ALTERNATES PRESENT:** Mr. Bohan, Mr. Wadelton

**STAFF PRESENT:** Mr. Ajello, Mrs. Hill

**ALSO PRESENT:** Mrs. Wildman, Atty. Fisher, Mr. Klauer, Mr. Carey, Mr./Mrs. Federer, Mrs. Solomon, Mr. Szymanski, Mr. Charles, Mr. Rogness, Ms. Giampietro, Mrs. Rickart, Residents, Press

## Wykeham Rise, LLC./101 Wykeham Road/#IW-08-31/Site Development for Inn

Mr. Picton called the Special Meeting to order at 7:10 p.m. and seated Members Bedini, Hill, LaMuniere, Picton, and Thomson. Mr. Picton acknowledged Atty. Fisher's third letter calling for his recusal, but he said he had consulted with the Commission's attorney and would not step down. He briefly referred to Atty. Zizka's letter dated 10/29/08.

It was noted that two documents to approve with conditions and one to deny the application had been circulated, but not discussed, prior to the meeting.

Mr. Thomson suggested that his motion of approval be made and seconded and used as the basis for discussion. He thought the vote would be a simple matter as he had weighed the consultants' assessments. He read his motion of approval, which included the following conditions: 1) posting of a \$30,000 performance bond prior to the start of work, 2) inspection of the ongoing work by a qualified engineering firm at least once a week and the weekly submission of the inspection report to the WEO, 3) giving the WEO the authority to determine whether additional erosion controls or corrective measures are required by the Commission in response to the engineer's report, 4) installation of a rain gauge to be checked daily by the contractor on site and if it is found there has been half an inch of rain in the last 24 hours, the contractor shall call the monitoring engineer to inspect the site to ensure that all of the erosion control measures are functioning properly, and 5) implementation of both temporary and long term erosion and sedimentation control measures and maintenance of the drainage structures as documented in exhibit A to be submitted later.

Mr. LaMuniere seconded the motion.

Mr. Picton noted that several of these conditions were included in the plans submitted, so he questioned whether it was necessary to make them conditions of approval.

Mr. Bedini asked for clarification of the proposed monitoring process. Mr. Thomson said it would be modeled after the Kessler approval; the monitoring engineer would have the authority to order corrections if he deemed them necessary. Mr. Bedini asked if the engineer would have the authority to stop work. Mr. Thomson said the engineer would make ad hoc recommendations and send his report to the WEO, who would decide whether they were matters that had to come before the Commission. Discussion of the process continued. Mr. Picton wanted all significant changes to come to the Commission for review. Mr. LaMuniere thought minor changes and corrections could be ordered by the EO, but that serious problems should go to the Commission.

Mr. LaMuniere recommended a condition of approval that reporting continue for two years after the completion of work and he noted the applicant had agreed to a water quality monitoring system. Mrs.

D. Hill noted he had agreed, but said since this was not included in the plans submitted, it should be made a condition of approval. Mr. LaMuniere agreed, saying it must be coordinated with long term, broad ranged monitoring.

Mr. Picton thought there should also be long term conformance evaluation.

Mr. LaMuniere recommended the stormwater management system be monitored for three years after the project is completed to make sure it functions properly. Mrs. Hill agreed, noting that Land Tech had recommended that a third party monitor the system for three years.

Mr. LaMuniere complained that the construction sequences submitted were too general and that more precise sequences should be required for the seven buildings to be constructed 50 feet from the wetlands. Mr. Picton was not sure how this could be crafted and evaluated after the close of the public hearing. Mr. LaMuniere said it could be a condition of approval. Mr. Ajello suggested the specific construction sequence be drafted at the time the construction manager is hired. Mr. Picton objected, saying sufficient detail was needed now; it could not be drafted on the fly.

Mr. Thomson noted that in the application process, when reasonable best management practices had been recommended to this applicant, he had agreed to implement them. Therefore, he thought approval could be contingent upon the condition that the monitoring engineer would have the authority to request improvements on an ad hoc basis, and the applicant would be required to implement them. Mr. Bedini said the Commission could not change the plans once it had approved them. He also stressed that there must be a specific mechanism in place to resolve problems on site without costly delays for the applicant.

Mr. Picton did not think it was likely that, as designed, the project could be successfully implemented and completed. He noted that Mr. LaMuniere did not think the plan as submitted had enough details for the Commission's monitoring engineer. He said it would take time to craft a detailed motion of approval. Mr. LaMuniere agreed that since there would be 5 acres of disturbance at any one time, the construction sequence had to be more detailed in the areas of high risk so that there would be a more precise implementation protocol than the one submitted. Mr. Picton and Mr. LaMuniere thought the Commission's consultant could draft the more detailed provisions.

Mr. Bedini objected because the Commission would then be engineering the project, which it had never done in the past. He said the Commission had to act on what the applicant had submitted.

Mr. Thomson proposed an additional conference at which the monitoring engineer and applicant would meet to further refine the construction sequences. It was noted the plans already included a preconstruction conference. Mr. Thomson said this was different because the preconstruction conference assumed a pre agreed set of conditions.

After further discussion, Mr. Picton asked if the plans as submitted were sufficient in all ways to carry out the project without adverse impacts. If yes, the Commission should approve the application, if not, Mr. LaMuniere and others could write conditions to bring the specifications up to sufficient standards, or if there was concern that the plans were not sufficient for the success of the project, the application could be denied.

Mr. Bedini pointed out that if a motion of approval has so many conditions that it becomes unwieldy, the Commission would be better off to deny it without prejudice and let the applicant address all concerns when he resubmits the application. He thought conditions to cover bonding and monitoring made sense, but he did not think it was appropriate, nor was the Commission qualified, to craft specific engineering details. Mr. LaMuniere agreed this was not for the Commission to do, and recommended the Commission's consultant do it. Mr. Bedini again stated the Commission could not vote to approve the application and then work to make substantial changes. Mr. Picton agreed with Mr. Bedini.

Mr. Thomson noted that everyone had had the opportunity for input during the application process and that the Commission's consultant had signed off on the application. Therefore, he thought with his proposed additional conference the project could proceed with relative certainty of success. He again explained this mechanism in detail.

Bonding was discussed. It was noted the performance bond would be separate from the consultant's bond. Mr. Thomson suggested a \$30,000 bond.

Mrs. Hill said a condition of approval should be that the Commission would hire a consultant for monitoring and the applicant would pay for his services. Mr. Picton said the Commission would have to define his schedule of work, addressing issues such as how the engineer would carry out his work on behalf of the Commission and what the procedure would be when deficiencies were found and improvements required. There was disagreement among the commissioners about whether these details had to be specified in the motion or could be worked out later. Mr. Bedini thought that if the details were not included in the motion, then there should be no ad hoc work on site; that only what was approved should be carried out.

Mr. Picton said he did not object to the scope of the project, he objected to its design. Mr. Thomson stated that he had addressed Mr. Picton's concerns by adding safeguards in his motion of approval, read it again, and explained it again

There was a lengthy discussion concerning the ad hoc work that could or could not be ordered by the monitoring engineer and the commissioners were in disagreement. Mr. Picton noted there was a motion on the table and said the Commission should either vote or take the time to craft more complete language concerning protective measures to make the approval more viable.

Mr. Thomson followed with a lengthy statement regarding the approval process, Land Tech's 9/25/08 review of the application, and his assessment that based on the judgments of all consultants involved, the application could be approved now. He said that the consultants found the project would cause no significant impacts to the wetlands and noted that the plans called for a reduction in impervious surfaces.

Ms. Chase's report, her assumption that the water quality of Kirby Brook was the highest quality, and the difficulty of testing for impacts to the brook based on that assumption were discussed. Mr. Thomson stated that Ms. Chase had found the project would have no significant impacts on Kirby Brook. Mr. Bedini read from Land Tech's 9/25 report, which stated it was up to the Commission to decide whether there would be significant impacts and whether there were feasible and prudent alternatives.

Mr. Picton noted that feasible and prudent alternatives had not yet been discussed. He said it had already been noted that he and Mr. LaMunier had concerns about the risk to wetlands and that if risks exist, then a thorough analysis of feasible and prudent alternatives was required. He said this had not been done according to the standards in the Regulations.

Mr. Thomson disagreed, saying the applicant had provided a list.

Mr. Picton did not think the list was suitable. He noted that when the applicant had deleted the section of driveway (in the northeast section of the property) it was then possible to move buildings to that location. He said it was the applicant's job to consider whether this was a feasible and prudent alternative for the buildings proposed on the steep slopes elsewhere on site.

Mr. Thomson objected, saying the Regulations talk about the need for balance between the need to protect wetlands and the need for economic development. He said the applicant had the right to spread out his resort and the layout proposed by Mr. Picton would be counter intuitive to the purposes of the

spa.

Mr. Bedini stated that the consideration of feasible and prudent alternatives was the biggest problem with the application and was an important aspect the Commission had to consider. He asked the Commission to compare how it had considered feasible and prudent alternatives in previous applications. He said he would have liked to have seen other configurations that were better for the wetlands; and asked what the impact to the plans would have been if all of the buildings had been placed at least 100 feet from the wetlands. He said the possible siting of those buildings away from the steep slopes had not been discussed as required by the Regulations.

Mr. Thomson disagreed. He said the applicant had responded to the Commission's pleas for consideration of feasible and prudent alternatives throughout the process and a list had been provided. He did not think it was fair to "blindsided" the applicant with a cluster development proposal at the eleventh hour.

Mrs. Hill said it is the Commission's responsibility to suggest possible feasible and prudent alternatives to the applicant.

Mr. Picton read sections 9.2 and 9.4 of the Regulations and Mr. Bedini cited section 8. Mr. Picton said when he suggested the location of the buildings in the former driveway area, he was attempting to address the requirement that Mrs. Hill referred to. He cited section 8.1.3, which states that when a public hearing is held, the Commission may not approve the application unless a feasible and prudent alternative does not exist. He said he had suggested a different location away from steep slopes, a decrease in density, a change in layout, or clustering as alternatives to comply with this section of the Regulations.

Mr. Thomson said again, that all of Mr. Picton's concerns had been addressed in his proposed motion and that the Commission could approve it. He added, though, that if the commissioners wanted more time to review all of the consultants' advice, he would withdraw his motion.

Ms. Chase's report and its findings were again debated.

Mrs. Hill noted that this site had long been used commercially and that any purchaser would want to develop it to meet the needs of his business. She said that in the process, this developer was restoring all of the impacted wetlands and allowing the site to regrow naturally. She noted that much of the proposed work was on steep slopes and in the upland review area, but agreed with Mr. Thomson that Land Tech had said it was OK. She said she had no engineering expertise and so would rely on Land Tech. She liked the proposed vegetated buffers, thought the proposal was an improvement over what now existed on site, and was generally in favor of the application.

Mr. LaMunier thought the project was "doable" if the plan was followed and sufficient contingency measures were implemented below the buildings where he and Mr. Picton had identified areas of risk. He stated that the applicant proposed significant improvements to the site, which included installing the drainage system, planting vegetative cover, and reducing impervious surfaces. He did not think these proposed improvements were exactly a consideration of feasible and prudent alternatives as would apply to the relocation of buildings to assess whether doing so would result in less potential impact. He said it was not clear whether the relocation of the more intrusive buildings to the eastern part of the property would be significant in terms of wetland protection. While he thought it would have been better to remove those buildings close to the wetlands setback, he did not think their construction would pose either a long term or short term impact if the work was done properly and better erosion controls were installed.

Mr. Bedini asked Mrs. Hill if she thought that feasible and prudent alternatives had been considered according to the Regulations. Mrs. Hill said that was a matter of judgment and that the applicants had

submitted a list of alternatives that they had or would change. She said this was a different way of looking at it. She said the Commission had to give the applicant leeway to do what he wants and that she did not think there would be adverse impacts because the Commission's consultant had said there would be none if the work was done carefully.

Mr. Picton noted it appeared a motion to deny would fail, but suggested more work was needed on a motion to approve. He recommended that if the Commission had determined 1) there would be no adverse impacts, 2) there would be no short term or long term impacts, 3) there were realistic mechanisms for monitoring and verifying the work, 4) there was a likelihood the project would be satisfactorily completed, 5) the proposed mitigation was adequate, and 6) the applicant's analysis of feasible and prudent alternatives was sufficient to meet the requirements of the Regulations, then these findings should be included in the motion to approve. He suggested that once crafted, it be sent to Atty. Zizka for review, and that a Special Meeting be scheduled to act on the motion at a later date.

Mr. LaMuniere agreed the motion should be rewritten.

Mrs. Hill, Mr. Picton, and Mr. Bedini thought Atty. Zizka should review the motion to make sure it addresses the Regulations and would hold up in court. Mrs. Hill thought if the motion would be sent out for a legal review, it should be written tonight. It was the consensus to send the motion to Atty. Zizka prior to taking action.

Mr. LaMuniere recommended several conditions of approval. 1) The applicant should return to the Commission for review and approval if development on the septic site is proposed. 2) A pre construction meeting to be attended by the Commission's representative should be held to define more clearly the work to be done around and down gradient of the buildings in the high risk area. 3) The Commission should define more precisely what its monitoring engineer will be hired to do and what the role of the WEO should be. 4) The kind of monitoring reports to be required should be specified. Mr. LaMuniere and Mr. Ajello thought the Kessler monitoring requirements, the settlement document by Atty. Zizka and Atty. Kelly, and the reporting system used by Mr. Neff would be helpful to review. Mr. LaMuniere said he was not prepared at this time to draft specific conditions.

Mr. Thomson suggested his original motion of approval be amended to include these conditions of approval and he read the changes he had included to address the concerns raised. Mr. LaMuniere and Mr. Picton thought a more thorough draft should be done. Mr. Ajello suggested that the commissioners decide now what conditions they would want included in a motion of approval, and that he would then draft it and send it to Atty. Zizka for review.

The following conditions were recommended: 1) a \$30,000 bond be posted, 2) if there was any change from the approved plans, the applicant is required to return to the Commission for review and approval, 3) monitoring of the applicant's plan would be required as agreed to at a pre construction meeting, and 4) water quality testing as outlined in the report by Hydro Technologies be required.

Mr. Ajello stated that at the pre construction meeting the construction sequence would be expanded to include details regarding the work to be done around the wetlands.

The Commission's choice for monitoring engineer was discussed. Mr. LaMuniere recommended Mr. Neff, who had worked with the Commission previously on the Kessler project. Mr. Ajello recommended Mr. Szymanski, the applicant's engineer. Mr. Picton and Mrs. Hill stressed that the consultant should be an independent third party and it was the consensus to hire Land Tech. It was noted the work of the monitoring engineer would be independent of the erosion control specialist, and that the work of the monitoring engineer, erosion control specialist, and water quality tester would have to be coordinated.

Mr. Thomson withdrew his motion for reconsideration in a revised form at the next meeting.

A Special Meeting was scheduled for Monday, 11/3/08 at 4:00 p.m.

MOTION: To adjourn the Meeting. By Mrs. Hill.

Mr. Picton adjourned the Meeting at 9:40 p.m.

FILED SUBJECT TO APPROVAL

Respectfully submitted,

Janet M. Hill

Land Use Coordinator