

The background is a detailed site plan map. It features several buildings of varying sizes and shapes, some with internal room layouts. There are numerous trees represented by circular and irregular shapes, some with internal patterns. Contour lines are drawn across the map, with numerical labels such as 2.500, 3.000, 3.750, 4.000, 4.250, 5.000, and 6.000. A prominent thick grey line outlines a specific area or boundary. Arrows and dashed lines indicate directions or paths. The overall style is technical and architectural.

The Ghost Haunting Land Use: Site Plan Review & Local Zoning Regulations

Presented by:

Shawn M. McCormack, Davis Malm
Michel L. Wigney, Moriarty Troyer & Malloy LLC

Site Plan Review

“ Site plan review is the unacknowledged ghost haunting land use law. It is a planning process present in nearly every municipality's zoning bylaw or ordinance, but is nowhere mentioned in the Zoning Act, G.L. c. 40A. ”

Willis v. Nelson

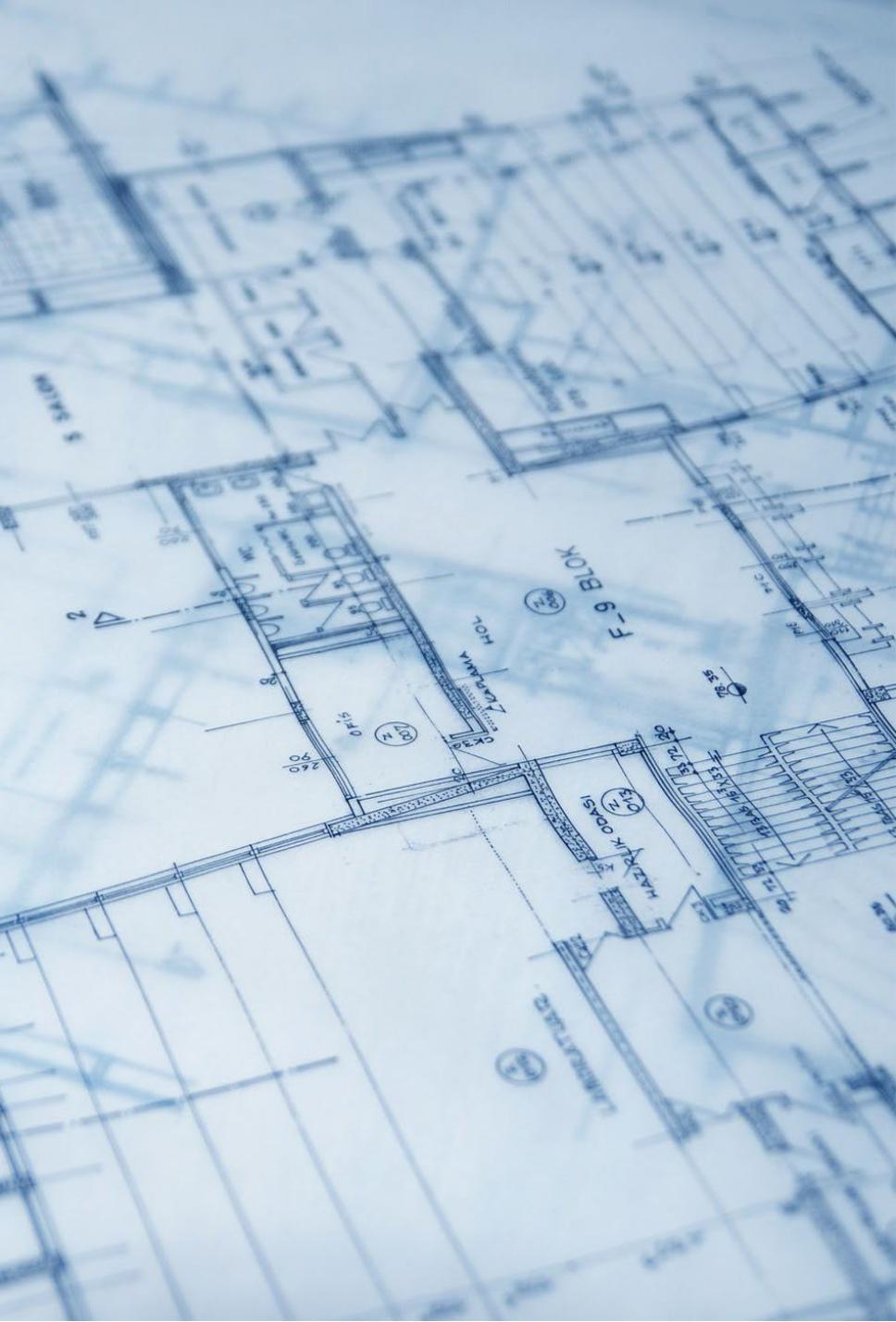


DAVIS MALM
ATTORNEYS



MORIARTY
TROYER &
MALLOY LLC

ATTORNEYS AT LAW



What is a Site Plan?

- A site plan or a plot plan is a comprehensive blueprint used by architects, landscape architects, urban planners, and engineers which shows existing and proposed conditions for a given area, typically a parcel of land which is to be modified.
- The site plan will often show features such as:
 - property lines
 - outline of existing and proposed buildings and structures
 - distance between buildings and property lines (setbacks)
 - parking lots, indicating parking spaces
 - driveways
 - surrounding streets
 - landscaped areas



DAVIS MALM
ATTORNEYS

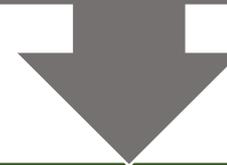


Function and Purpose of Site Plan Review

Site Plan Review is a tool by which a municipality confirms that a proposed development conforms to local guidelines.



Site Plan Review establishes design standards for development projects and ensures that they account for surrounding factors such as neighboring uses, traffic, drainage, and public features.



Site Plan Review also is a means of collecting comments from various municipal authorities, such as the highway, fire, police, and health departments.



DAVIS MALM
ATTORNEYS



MORIARTY
TROYER &
MALLOY LLC

ATTORNEYS AT LAW

The Concept of “as-of-right plus”

- Site Plan Review is applied to a use that is allowed as of right under local zoning.
- If all specific area and use criteria in the bylaw are met, a Board conducting administrative site plan review does not have the power to deny approval. It may only impose reasonable terms and conditions on the proposed use.
- This is because “the concepts of a use as of right and a use dependent on discretion are mutually exclusive.”



DAVIS MALM
ATTORNEYS



MORIARTY
TROYER &
MALLOY LLC

ATTORNEYS AT LAW

Site Plan Approvals Are **NOT** Special Permits

Special Permits are discretionary.

Even when a project satisfies the criteria for approval, a Special Permit Granting Authority may still deny the application.

Site Plan Approvals are non-discretionary.

If the underlying criteria are met, the Site Plan Review Board has no discretion to withhold an approval.

Even if a municipality calls its Site Plan Review permit a “special permit”, the substantive law of § 9 of the Zoning Act does not apply to uses as of right. *Epstein* (Rule 23.0).



The Differences between Site Plan Review and Special Permits

Site Plan Review

- Determined by local authority
- Ministerial review
- Can only be “denied” for an incomplete application or for non-conformance with zoning requirements
- Simple majority vote is default
- Appellate rights dependent upon bylaw

Special Permit

- Set forth in the Zoning Act
- Discretionary review
- Denial can be based upon the Project itself, regardless of procedural and substantive compliance
- Super majority vote required
- Clear appellate procedures

Seeking Site Plan Approval

The Zoning Bylaw

Make sure you have the current version
(a certified copy of the Zoning Bylaw can be requested from the Town Clerk)

Absent codification under the Zoning Act, there is a lack of uniformity in procedures between Towns or municipalities.

The submission requirements, Board authority, hearing procedures, notice requirements, timing expectations/limitations, and (hopefully) appeal process are laid out in the bylaw and form the starting point for submitting your project for review and approval.

Zoning Bylaws - Examples

- Norwood: <http://cms5.revize.com/revize/norwoodma/Final%20%20Zoning%20Bylaws%20approved%20through%20May%202022.pdf> (§10.5)
- Salisbury: <https://ecode360.com/10445611> (§300-109 et seq.)
- Williamstown: <https://ecode360.com/10633875> (§70-8.2)
- Nantucket: <https://ecode360.com/11472335> (§139-23)
- Mount Washington: <https://mountwashington-ma.gov/download/409/zoning-bylaws/10516/adopted-zoning-bylaw-4-6-21.pdf?preview=1> (§215-13(E)(3))



Know the Planning/Zoning Staff

Whichever board or group is your authority for Site Plan Review, know who the staff person is and what the expectations are.

Seeking Site Plan Approval

Some Town Halls only operate on half days on Friday.

Some require that the Staff member stamp your Site Plan submission as “received” in order to start your review period.

Some staff members will want additional information from you before your application is deemed complete.

Some Towns allow you to meet with the staff member or department staff prior to submitting your Site Plan.

This can be a good way to understand what is being reviewed more critically in your submission and what the expectations are. Even if there is no process for this, it is a good idea to meet informally with the staff member if you can.



DAVIS MALM
ATTORNEYS



MORIARTY
TROYER &
MALLOY LLC
ATTORNEYS AT LAW

Board politics plays a big role in many development projects

NIMBY? YIMBY? Other?

Seeking
Site Plan
Approval



The Board members:

- Who are they?
- Do they have any subject-matter expertise?
- When were they elected?
- Were they elected on a particular platform?



Want to be extra thorough?

- Watch a previous Board meeting (or two) online. While there are aspects of Site Plan Review that are consistent across the State, many jurisdictions have idiosyncratic rules that have developed over years.

The Town

- Do not underestimate the court of public opinion
- Many Site Plan Review procedures include notice to abutters within 300 feet of the proposed project
 - Facebook
 - Neighborhood Associations
- Local News
- Public comments

What to submit? Whatever the Bylaw lists.

Seeking Site Plan Approval

Generally, this will
include:

- Application
- Application Fee
- X number of Plan Sets (often a combination of full-sized 24x36 inch plan sets and reduced 11x17 inch plan sets)
- Bylaw usually states what items must be displayed on the Plans
- Parking/Traffic Analysis
- Stormwater/Drainage Compliance or Analysis
- Information on what (if any) other permits or approvals are required (e.g. Conservation Commission proceedings, special permit, septic system approval, etc.)
- Whatever the Planning/Zoning Staff tell you (even if it isn't listed in the bylaw)
- Gold star? Memorandum in Support

Seeking Site Plan Approval



Good practice to walk your Board through why your Project is compliant with all of the Site Plan approval criteria and appropriate for the character of your neighborhood.

Also provides a good frame of reference for the Board.



Important Permitting-Specific Considerations

- Neighbors: Reaching out to the Project's neighbors in advance and hearing their concerns can go a long way. Be sure to include this information, and any mitigation or concessions from your Project, in your presentation to the Board



Who else is reviewing your Site Plan

- Many Towns require that their Board solicit comments from relevant departments (Police, Fire, Engineering, Health/Sanitation, Conservation Commission, etc.); comments from these departments are typically incorporated into conditions of approval

Typical Conditions (This list is non- exhaustive)

- Incorporation of all plans and submitted documents into approval
- Submission of an “As Built” plan
- Receipt of all applicable local, state, and federal approvals
 - Conservation Commission, Bd. of Health, MassDOT, MHC, EPA, etc.
- Landscaping maintenance
- Designated hours for construction and/or operation
- Containment and shielding of dumpsters or recycling
- Snow removal/storage requirement

Constructive Denial



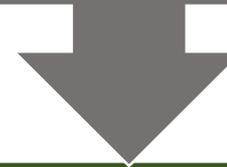
Note: One thing that the Board cannot do is change the Zoning Bylaw on a Project. Whatever bylaw is in effect at the time of the application filing are the rules that apply.

How do you obtain Judicial Review of a local Site Plan Review Decision?

Case law makes clear that Chapter 40A, § 17 does not create a right to appeal a Site Plan Review decision.



But when the bylaw or ordinance provides for a right of appeal under 40A, § 17, courts will allow the appeal to proceed.



Otherwise, judicial review is available only after appealing a building permit decision to the Board of Appeals, and appealing the Board's decision to get into court.

Site Plan Peculiarities

What rules apply to Site Plan Review permits?

- Supermajority?
- Constructive approval?
- Public hearing?

How detailed must the findings be in an approval?

See *Bowen v. Bd. of Appeals of Franklin*, 36 Mass. App. Ct. 954, 955 (1994) (because “site plan review has to do with regulation of permitted uses, not their prohibition, as would be the case with a special permit or a variance ... the local board need not be held to as demanding a standard of reporting of the factual and legal underpinnings of their approval of a site plan.”)

Can a Site Plan Review board impose stricter dimensional regulations as a condition of approval?

Yes, see *Muldoon v. Planning Bd. of Marblehead*, 72 Mass. App. Ct. 372 (2008).

Open Questions

What standard when reviewing an abutter appeal of an approval?

What standard does a court apply when reviewing a site plan denial?

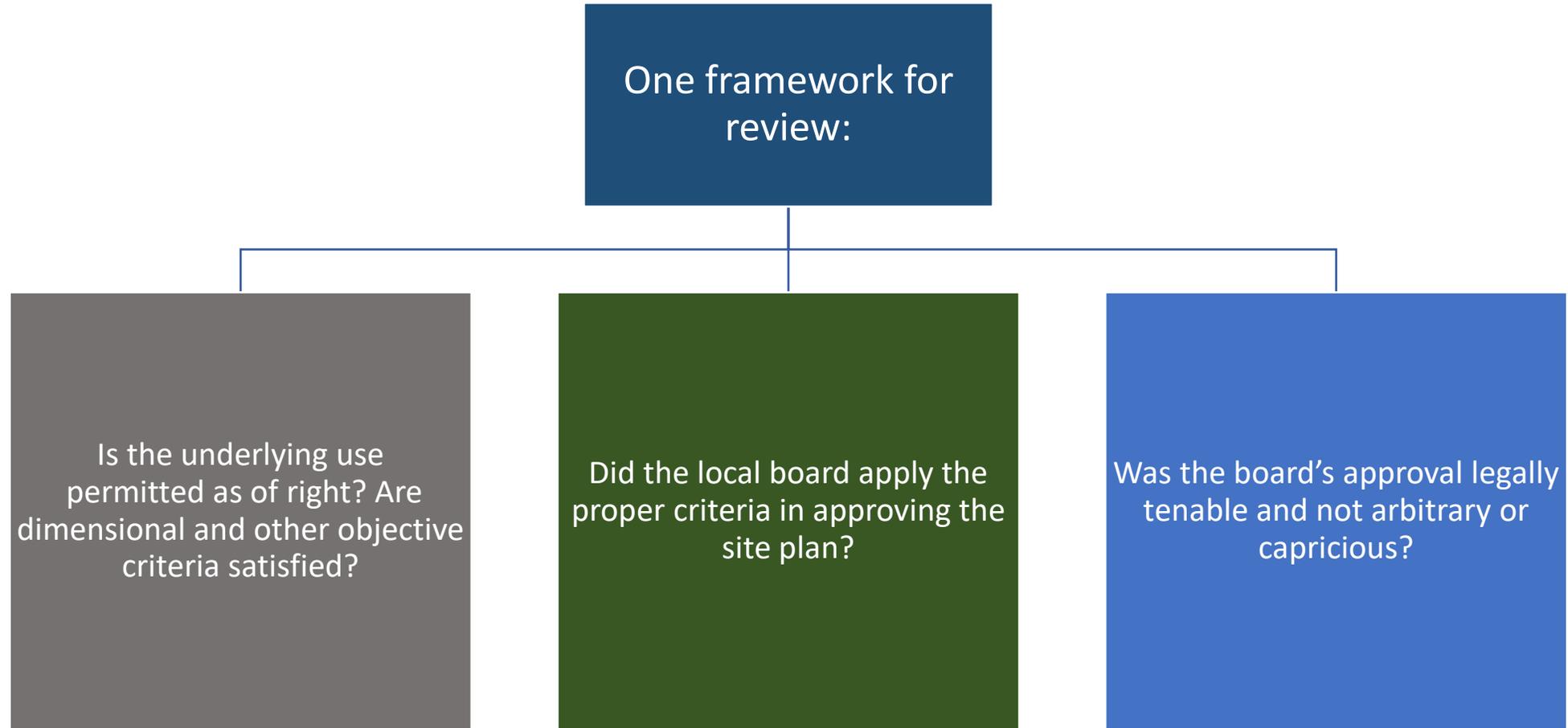
What standard when reviewing an approval with conditions in an appeal brought by the applicant?

Must an abutter propose specific conditions the board failed to impose? Can an abutter hope for a better result than a remand?

In an abutter appeal, are the requirements to demonstrate status as a “person aggrieved” the same as a discretionary special permit or variance?

How can an approval of an as-right use be arbitrary and capricious?

A possible answer



DAVIS MALM
ATTORNEYS

MM
MORIARTY
TROYER &
MALLOY LLC
ATTORNEYS AT LAW

The Future of Development in Massachusetts

- Codification or Status Quo?
- History
 - Codification Efforts
 - Home-Rule Interests



References

- *Willis v. Nelson*, No. 19 MISC 000041 (RBF), 2019 WL 2180689, at *1 (Mass. Land Ct. May 20, 2019) (Foster, J.)
- *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986)
- *Epstein v. Plan. Bd. of Marblehead*, 100 Mass. App. Ct. 1128 (2022)
- *Bowen v. Bd. of Appeals of Franklin*, 36 Mass. App. Ct. 954 (1994)
- *Muldoon v. Plan. Bd. of Marblehead*, 72 Mass. App. Ct. 372 (2008)
- *Castle Hill Apts. L.P. v. Plan. Bd. Of Holyoke*, 65 Mass. App. Ct. 840 (2006)
- *Quincy v. Plan. Bd. Of Tewksbury*, 39 Mass. App. Ct. 17 (1995)



DAVIS MALM
ATTORNEYS



MORIARTY
TROYER &
MALLOY LLC
ATTORNEYS AT LAW



Questions?

Shawn M. McCormack
Davis Malm
(617) 589-3895
smccormack@davismalm.com

Michel L. Wigney
Moriarty Troyer & Malloy, LLC
(617) 934-4550
mwigney@lawmtm.com



DAVIS MALM
ATTORNEYS

