

**CITY OF NEWARK
DELAWARE
PLANNING COMMISSION
MEETING**

December 4, 2007

7:30 p.m.

Present at the 7:30 p.m. meeting were:

Chairman: James Bowman

Commissioners: Ralph Begleiter
Angela Dressel
Mary Lou McDowell

Commissioners Absent: Chris Hamilton
Rob Osborne
Joe Russell

Staff Present: Roy H. Lopata, Planning Director

Chairman James Bowman called the Planning Commission meeting to order at 7:30 p.m.

1. AGENDA ITEM #1: THE MINUTES OF THE NOVEMBER 6, 2007 PLANNING COMMISSION MEETING.

The minutes of the November 6, 2007 Planning Commission were unanimously approved as received.

2. AGENDA ITEM #2: REVIEW AND CONSIDERATION OF AN AMENDMENT TO THE ZONING CODE ADOPTING A “LEED” ENERGY CONSERVATION PROGRAM.

Mr. Lopata summarized his report to the Planning Commission which reads as follows:

“Based on recommendations from the Newark Conservation Advisory Commission, the Planning and Building Departments’ research, and discussions at City Council, the Planning Department has prepared the following report and recommendation regarding the City’s adoption of a LEED energy conservation program. LEED – “Leadership in Energy and Environmental Design” – is the United States Green Building Council’s (USGBC), “green” building rating system and is the most prominent national construction industry energy conservation program with a uniform methodology to measure the energy conservation performance of new buildings. Typically, cities that adopt LEED programs establish a voluntary system of incentives for construction based on energy conservation principles. LEED, while at the moment available for commercial buildings, will be expanded to include residential structures in the near future. The USGBC is currently conducting a pilot test of a LEED residential program.

In any case, based on the Planning Department’s discussions with Conservation Advisory Commission Chairman Steve Dentel, a review of Conservation Advisory Commission materials, and detailed discussions with the key principal of Gabel Associates, LLC – one of the nation’s leading energy conservation consulting firms, specializing in building energy analysis – we will be suggesting below that LEED be incorporated into the City’s Zoning Code site plan approval process.

Please note, in addition, that following the Building Department review of the 2006 International Energy Conservation Code, City Council, on October 8, 2007

approved an update of the City's local Building Code requirements that established a new set of energy efficiency standards for Newark. These requirements will impact all buildings constructed in the City – residential, commercial, industrial and those owned by the University of Delaware.

The Planning Department's LEED "green" building Zoning Code amendments report follows:

Current Regulations

The City's site plan approval process is Newark's "neo traditional planning," Zoning Code procedure, that for residential developments of five acres or more with a minimum of ten dwellings, permits developers to waive Zoning Code area requirements [side yards, setbacks and so on] and provides for density bonuses, if the proposed development meets, "excellence in land use planning" criteria. For example, plans that show, "distinctiveness and excellence of site arrangement," may, qualify for a density bonus of four units per acre in the RH district – a district that is normally limited to two units per acre. Similarly, for site plan approval plans, in the RT district, with a 2.9 unit per acre maximum requirement, six dwelling units per acre are permitted; and in the RS district, which is limited to 4.84 units per acre, eight dwelling units are permitted. Similar bonuses are provided for the other residential districts.

Except for a special category for existing industrial buildings in the floodplain – which was drafted solely for the renovation of the NVF site (the Mill at White Clay) and the reconstruction of the Schaefer Cider Mill, a long-delayed State Parks project – there are no bonuses of this kind for industrial or commercial uses.

To qualify for the site plan approval "waivers," in addition to providing for excellence in site design, common open space, or outstanding architectural features, qualified plans may also include:

"Energy conservation, defined as site and/or construction design which the building, planning, and electric department directors find will result in more efficient use of energy produced through fuel sources of coal, oil, wood, and nuclear materials, than normally would be expected using conventional site, and/or construction design; and also defined as site and/or construction design which the building, planning, and electric departments find will result in more efficient energy through the substitution of alternate fuel sources for gas, oil, coal, wood, and nuclear materials. Site and/or construction design shall include one, or combination of the following:

- a. Any energy system including supply elements, furnaces, burner, tanks, boilers, related controls, energy distribution components which use any source(s) of energy other than solar energy;
- b. Energy storage equipment consisting of containers, heat exchangers, piping and other transfer mechanisms (including fluids, gases or solids), controls, and related structural support for transporting and storing collected energy, including structural elements designed for use in passive solar energy systems;
- c. Solar energy systems consisting of solar energy collectors, energy storage facilities (if used), and distribution components, including passive solar energy systems which use natural and architectural components to collect and store solar energy without using any external mechanical power;
- d. Elements of construction or site design for energy efficiency not directly part of energy systems as defined above in subsection a., b., and c."

As you can see, the City has in place a methodology that lends itself to revision to accommodate the LEED program.

Proposed Amendments

In order to incorporate the LEED certification or a similar building energy conservation rating system into the City's site plan approval process, the Planning Department suggests that the Planning Commission, after receiving public input, consider the amendments below that would utilize the existing Zoning Code procedures to provide for "green" building construction. Please note that the intent here is to revise and redefine the current energy conservation standards for the residential waivers and bonuses and to establish a new site plan approval energy conservation bonus system for industrial and commercial uses. As we have discussed with the Conservation Advisory Commission Chairman, however, the Planning Department remains concerned that our most prolific builder in the City – the University of Delaware – will not be covered by any of these proposed Zoning Code revisions because, the University is totally exempt from the City's Zoning Code specifications.

In any case, our proposed amendments, for the Commission's consideration, follow:

Amendment One

Amend Zoning Code Article XXVII, **Site Plan Approval**, Section 32-97, "Purpose," (a), by adding, after the sentence reading, "Uses not otherwise permitted within a district are restricted to those provided for in this article and to properties with a minimum size of five acres and that shall accompany residential subdivisions with a minimum of ten dwellings," the following:

"; in addition, for energy conservation only as stipulated below, site plan approval shall apply for permitted uses within business and industrial districts for all new construction and the expansion of existing buildings more than 50% of their existing size."

Amendment Two

Amend Zoning Code Article XXVII, **Site Plan Approval**, Section 32-97, "Purpose," Section (a)(6), by deleting the current language and replacing it with the following:

"Energy conservation defined as site and/or construction design that the Building Department has certified meets or exceeds the "Certified" level as stipulated in the LEED – Leadership in Energy and Environmental Design – United States Green Building Council program or a comparable Building Department approved energy conservation program."

Amendment Three

Revise Zoning Code Article XXVII, **Site Plan Approval**, Section 32-98.2 "Density Bonus," by adding a new paragraph to the existing language which shall read as follows:

"With site plan approval for new uses in business and industrial districts and/or the expansion of existing buildings more than 50% of their current size that comply with Section 32-97(a)(6) above, such buildings may be increased in gross floor area up to 15% beyond their permitted size in their respective zoning districts. That is, area requirements, including parking, height limitations, etc., shall not apply up to 15% of the existing limitations for such buildings."

Recommendation

The Planning Department suggests that the Planning Commission review this report, receive public input, and **recommend that City Council amend Zoning Code Article XXVII, Site Plan Approval as noted above.**

Mr. Bowman: Are there any questions from the members of the Commission?

Mr. Ralph Begleiter: The Conservation Advisory Commission, a voluntary body like ours, presumably takes into account conservation related matters. Do they take into account other kinds of costs of a program like this? Here is what I am getting at. If we give someone a bonus of a 15% expansion – height, fewer required parking spaces, extra floor space – we may, in fact, encourage energy conservation by doing that, but are incurring other costs that were, perhaps, not taken into consideration by the CAC. For example, there is a bonus to the City, it is great to have energy conservation, but if you end up having more cars to park then you have spaces to park them in then we have gained in one area but we have lost in another. If we end up with more floor space in a building and as a result you have more people going to work in that building, then we end up with a traffic cost that is not taken into account by virtue of consideration of the energy conservation of the building. My fundamental question is – and you may have taken this into account – does this revision take into account the overall cost to the City. What benefit to the City of making these changes take into consideration or does it only take into account the benefit of energy in this sphere of energy conservation?

Mr. Lopata: Ralph, I would answer that in two ways. First, the CAC spent over a year studying the LEED Program. They also had a public workshop -- with experts with the LEED program who came and spoke to us. That was well over a year ago. They made a very good presentation about how LEED works. Secondly, while I did not speak to them directly about that issue, I can say that they spent a lot of time studying this. Perhaps, more directly related, from my discussions with the CAC members, the chairman, and the meeting I went to when they did discuss this, they clearly are putting a premium on energy conservation. I think their view is that energy conservation is more important than allowing larger buildings. I spoke to Steve at great length about just what you are talking about. There is a tradeoff here. It is not simply bigger buildings because bigger buildings have other costs.

Another important point to remember is that this program it is voluntary. And it is not like we are “giving away the barn,” here. 15% of a commercial or industrial building is not a huge increase. It is a relatively small increase. The housing part of this program is, essentially, already in the Code. We do that now. We just use different criteria.

Mr. Begleiter: Would it make sense or not to refer this for review to, let’s say the City Electric Department and the parking people?

Mr. Lopata: We are the “parking people.” I do not have too much concern with that because people in the energy saving business are now providing less parking, which, this would essentially do by having a larger building less parking because that is supposed to be a disincentive for people to drive to a place. I am not sure that is true.

Mr. Begleiter: Maybe I am mistaken but doesn’t it say somewhere that you get a relaxation of the parking?

Mr. Lopata: Yes. Let’s suppose you have a building that is 15% larger but the amount of parking would be the same for the building that is 15% smaller. The theory is that the additional parking you would otherwise need, those motorists are not going to go there because there would not be any spaces. That is the theory. For example, a place that requires ten spaces, that now needs 15 with the bonus, now you would only have ten, those other five parkers cannot go there because the parking is not there.

We have had that used that same theory downtown with parking waivers, and to a certain extent that has worked. Main Street is booming. You have heard me say this before, the key ingredient I think in our downtown renaissance, the fact that we have been able to put more businesses downtown, has been our parking waiver system.

In any case, one of the things we could do, and I will do, is make sure Mr. Dentel is available to talk about this as this gets to the Council level because I think that is the key issue before us.

Mr. Begleiter: I think it is an important thing to consider, things like the height, for example, there is cost for doing away with that, too. The cost is the way the City looks. Maybe that is okay with us. They may be willing to make that trade off.

Mr. Lopata: I will give you the example that I gave Steve. We had the same discussion, interestingly -- I was taking your position. I said the Home Depot could have been 15% bigger. Would we have wanted that? The Home Depot is a project that under these rules, they would have probably loved to have said we complied with this because it is good PR. The large corporations do these things now. Be that as it may, I cannot give you a straight answer to that. Steve would probably say, I still think energy conservation is worth the 15%. I know he would say that.

Mr. Begleiter: Don't get me wrong. I am not suggesting that energy conservation is not worth it. I am just concerned about whether we are saying that energy conservation is completely worth it so we are going to give up X, Y and Z and maybe we don't even know what X, Y and Z are. If we do know and we are doing this consciously, we are saying never mind the design standards that we considered earlier this year, we have decided to raise the building by 15% height. That is okay, we have decided that.

Mr. Lopata: If they meet the LEED requirements, which are onerous, by the way . . . , the other side of the coin is that LEED is not easy to get. They do have to get special LEED certification, a LEED certified architect or engineer is required. It is not a simple thing, but, again, the trade-off here is a larger building in the industrial/commercial area for energy conservation. In fact, I wanted to make it mandatory and do this a different way -- not have bonuses. And the CAC did not agree with me, which I thought was a little unusual. Steve had done a lot of research and his sense was that LEED was so onerous that that would probably backfire.

I also talked to Michael Gabel, who I made reference to in my report, who helped write the State of California energy standards who is, in fact, my brother-in-law. I talked to him a great length, and he is a very "green" guy. He said that we did not want to make this mandatory because it would drive everybody away. You would have no construction. As you will also notice, I also touch on the University issue.

Mr. Begleiter: Is it true that the University is the most prolific builder in Newark?

Mr. Lopata: By far, more than anyone else. Now, I say that, but remember the Chrysler site is going to be vacant so, there will be a point in time when that may not be accurate unless another auto company goes in there. We could have a lot of construction at one time at that site. But, putting Chrysler aside, year in and year out the University, in square footage, builds much more. Interestingly enough, many universities around the country have voluntarily agreed to come under the LEED program. The University of Delaware is not one of them, and Steve and the CAC are not happy about that.

Mr. Begleiter: I think that may change.

Mr. Lopata: President Harker may have a different view on that.

Mr. Begleiter: He is very interested in that sort of thing.

Mr. Bowman: If there are no other questions from the table, we will open it for any questions from the members of the public who are here.

Mr. Howard Smith. 107 E. Park Place. I am familiar with LEED certification and programs. I have a background in architecture. What I would ask you to consider since this is a zoning regulation and LEED certification is very difficult, very time consuming and very lengthy, I can see the situation where you will end up with a project that is complete, never does get its LEED certification, and then I do not know what you do then with the owner of a completed building that was supposed to get certified and never went through with it and never got certified for whatever reason. I am not sure what the consequences are. You cannot get the certification first.

Mr. Lopata: The enforcement would be our Building Department. They would not get a CO.

Mr. Smith: Really?

Mr. Lopata: Yes. It is just like any other zoning regulation. If it doesn't comply, it doesn't comply. There is no point in doing this . . .

Mr. Smith: You often do not get the certification until long after the building is completed.

Mr. Lopata: Well, they will have trouble then.

Mr. Smith: That sounds dangerous.

Mr. Lopata: There is no point in doing this if we cannot enforce it. Other cities are doing the same thing. We are not alone. I could not find one city that made it mandatory, which is another thing I looked for.

Mr. Smith: I think that would be more difficult.

Mr. Lopata: That would be very difficult, but they are using this voluntary approach with bonus systems of one kind or another. I used the one we already had. It seems to me there has got to be a way to make that work because other cities are doing it. Other cities are also doing their own buildings, which is something we have, essentially, agreed to. We just don't build very much. The City of Newark I mean.

Mr. Begleiter: This would apply to the City of Newark wouldn't it?

Mr. Lopata: Again, it is a bonus. What bonus would we get?

Mr. Begleiter: A bigger building, fewer parking spaces.

Mr. Lopata: We are exempt from zoning so theoretically we would not need to do it.

Mr. Begleiter: You complain about the University being exempt.

Mr. Lopata: Let me back up. We have already said that we are going to try to come under those standards. The amount of building we do is infinitesimal.

Mrs. Jean White: 103 Radcliffe Drive. I do not profess to be knowledgeable on LEED. I did go to one or two Conservation Advisory Commission meetings where this was discussed and have read about it here or there in the newspaper. I have, however, some questions and a couple of comments.

I was wondering in general, there must be studies on this, how much more does it cost for a developer to build a LEED certified building over a regular building? I do know that there are various ways that one can reach the basic LEED certification. There is a whole bunch of different components, but the builder or developer does not have to do every single one. They have to do a sufficient number of those things.

Mr. Lopata: It is a point system.

Mrs. White: So, some LEED certified buildings might get their points using one set of things and another LEED certified building might get them using different ones with, perhaps, overlapping between the other one. It could be that some of these are more expensive than others. But, there must be studies that have been done that show in general how much more it adds to the cost.

I am wondering about the relationship of the incentive that is given vs. the cost of doing the LEED. For example, RS zoning, if done by site plan approval normally it

would be 4.84 units per acre but with site plan approval it could go up to eight units per acre, which is a 65 % increase in the density. If, in fact, somebody sometime comes back with a plan to do site plan approval, which, hopefully, will be an improvement independent of LEED, that is a 65% increase. It seems like it is a rather large increase doing something, excellence of design, saving open space and some other things like that that I sort of feel that a developer should do anyway.

I wondered if LEED in of itself without doing the other things like the excellent design, creating clustering and more open space, having the contours of the land be considered in building, will just the LEED qualify the housing development or the commercial building for getting this extra space or are they going to do other things as well? In other words, is just one thing going to do it?

Another question I had, when the building is certified by LEED, in general, how much either the residential home or the commercial building saves in energy. I know that is a broad question that depends on how the energy is gotten, the electricity and things like that. It is not an easy thing to answer but there is a saving to the developer and the owner of the commercial building – they are getting a benefit right there by saving the energy cost. I am trying to put this in all together in terms of how much more it would cost to build the building and how much is saved by building a LEED building and is the incentive in line with those first two things? Is this incentive too little or is it too much?

Then we get to the bonuses for the industrial or commercial where we, actually, are not talking about greater density as much as, say, number of units, but we are talking about the ability to build a building either with a 15% bigger floor footprint. I did not realize it included increasing the height.

Mr. Lopata: 15% gross floor area could be done in different ways. It could be taller, wider, and fatter.

Mrs. White: Is it costing 30% more or is it costing 5% more? Is 15% a reasonable amount? If it is costing 10% more, should we be giving them a 15% ability to build it 50% bigger?

Another question I had is, if you do the approved LEED Program for the City of Newark, why should it be site plan approval? Since it is voluntary anyway, shouldn't there be ways to encourage even regular housing developments for the developer to get an increase in density to be built with certain types of standards that are LEED?

Mr. Lopata: Your last question -- there already is another program for individual homes. If people do energy efficient improvements to their home, they can get breaks through a State program that the City is part of. I do not know all the details, but that already exists. There is this program that Council adopted a year or so ago that people can qualify.

Mrs. White: That is the one that we pay in our electric bill. There is a little small fee of a few cents.

Mr. Lopata: Yes, that is part of a statewide program.

The site plan approval issue of what qualifies is cumulative. The language is, "in order to qualify, the site plan approval plan shall be based upon distinctiveness and excellence of site arrangement and including, but not limited to. . . ." Energy conservation is one of the criteria.

Mrs. White: So, presumably, any one of those things that you mentioned in and of itself enough to get the density bumped.

Mr. Lopata: If you just had common open, that would not be enough or if you just had energy conservation.

Mrs. White: Is it a sliding scale? I was just thinking of the RS zoning from 4.84 units per acre up to eight.

Mr. Lopata: We never had anybody get to eight. It is a sliding scale from a practical standpoint. That gets back to the first part of your question which is sort of related to what Commissioner Begleiter was talking about – cost and whether it is worth the trade off. The literature that I looked at, which is mostly on the web, is rife with examples that nobody can figure this out. It is all over the place because some parts of the country they say that the costs are astronomical and LEED does not work and other places say it is reasonable. So, it is very difficult to give you an answer. But, let me give a little part of an answer. According to the LEED information that I have from the United States Green Building Council, they charge \$500 to \$2,000 per home just to apply.

Mrs. White: This is to apply to the Council.

Mr. Lopata: The Green Building Council; \$2,000 per home is a hefty fee, so if you are developing 50 houses, this sounds like a disincentive to do this. That does not include any of the engineering, any of the extra insulation, the higher R rated windows and so on. I am just giving you that number because it is the only one I have.

Mrs. White: Is that countrywide?

Mr. Lopata: This is from “Frequently Asked Questions” from this organization. That is one number I could tell you about. If you go on the web you will find architects and engineers in the energy business who will tell you don’t to LEED, it is too expensive. I think, frankly, we are probably, erring on the side of being too onerous. This is new to us. It is new to Delaware. As far as I know, we are the only city in the state that will have this program if it is adopted. So, we are taking baby steps because, remember, this is voluntary. It will be very interesting to see the first project that comes in. By the time the first project comes in, the rules may have been changed from the folks that do this stuff because it is a moving target.

Mr. Begleiter: The relationship between winning LEED certification and the 15% benefit, I think we have to remember that the 15% bonus that the City would give, the bonus is not an incentive to a builder to save money on construction costs. The incentive is to save energy. If it costs more to do that, then that is up to the builder to decide whether saving energy as a societal goal is worth doing in order to get the 15% extra floor space or whatever. So, I don’t think it is right to pose the question of, is 15% the right incentive if it is going to cost him so much more to do it. That is going to be up to the builder. My concern was not about the cost to the builder; my concern is the societal cost . . .

Mrs. White: I appreciate the comment, in cost I was trying to, actually, not include just the construction cost but the extra time to consider it, the time you spend looking at your plans, and the time cost as well. I agree, you are looking at a societal cost, but on the other hand, one could in some extreme talk about whether the incentive is so large that it doesn’t make sense for a city to offer it, whatever that would be.

Mr. Lopata: Let me just turn this around. Site plan approval was adopted in 1972 or 1973 before I was Planning Director. The standards are so hard that you can count on two fingers – Evergreen and the NVF site – that have had site plan approval that I can recall. That’s going back 40 years. So, I wouldn’t be concerned that we are suddenly giving away the shop.

Mrs. White: The other thing was talked about that if you get this you are getting a bigger building and then there may be other aspects other than energy conservation that one should consider the total pros and cons or the benefits.

Mr. Lopata: This does not mean they get it if we put in the Code. It still has to go through Planning Commission and Council. This is not automatic.

Mrs. White: I understand. Where I was leading to is that in today's housing climate, buildings in general are more energy efficient than they were 10, 20, 50, 100 years ago. We have lots of insulation. We have double paned windows and all sorts of things that I do and don't know about. Actually, I read some place that because residential houses are getting much bigger, that the gains in energy conservation aren't keeping up with the sizes of the houses. So, we are making more energy efficient houses but people are living in bigger and bigger houses. I was raising that question again.

Mr. Lopata: This does not make the houses bigger.

Mrs. White: I know this doesn't make the houses bigger but in the case of the commercial building, hopefully, that extra space would be put to use with two businesses or ten businesses or whatever. It is the idea that when things are bigger, they may be very energy efficient, but there might have been a way to do whatever it is with less.

At a Conservation Advisory Commission meeting I attended, I think, there was talk of having a requirement of all developers go through the LEED checklist – maybe we were only talking about commercial buildings that time – that every developer would go through the checklist but only those that opted to do the LEED would go on ahead. Even if you didn't do it, it would become an educational tool, and, actually, many of those builders or developers would find out that they actually had satisfied a number of the LEED requirements even if they chose not to do LEED. In addition, there would be a small fee, which is done in other municipalities that do LEED that would go into a fund that would be used for things that would be related to conservation whether it be education for LEED or whatever. At the time I thought that sounded very good. What happened to that?

Mr. Lopata: Steve is reviewing that with the Building Department because that would be a Building Code requirement. If everyone had to apply for it, they would do it through the Building Department.

Mrs. White: So, that idea has not been dropped.

Mr. Lopata: It is not dropped. They are very much interested in that. I am not sure how the efficacy of that approach but they are going to review that.

Mrs. White: On page 3, at the bottom, for the Site Plan Approval, you have, "the LEED Program or a comparable Building Department approved energy conservation program." I, actually, feel that that should be taken out. There is an alternative energy conservation program right now which I think the construction industry has come forth with – I am only speaking of what I heard, so I don't know if this is true – which is not felt to be as good as the LEED Program. I think it would be better to leave it out and if something comes along later and you want to put it in, fine. But, I feel that it is premature to put that in right now because it opens it up to somebody being able to get all these incentives and increased densities for something that isn't as stringent as the LEED.

Mr. Bowman: If there are no further comments from the public, we will be it back to the table. Are there any further comments from the Commission? I think our capitalistic system will settle a lot of this.

MOTION BY MCDOWELL, SECONDED BY DRESSSEL THAT THE PLANNING COMMISSION RECOMMEND THAT CITY COUNCIL APPROVE THE FOLLOWING PLANNING DEPARTMENT PROPOSED AMENDMENTS TO THE ZONING CODE:

AMENDMENT ONE

AMEND ZONING CODE ARTICLE XXVII, SITE PLAN APPROVAL, SECTION 32-97, "PURPOSE," (A), BY ADDING, AFTER THE SENTENCE READING, "USES NOT OTHERWISE PERMITTED WITHIN A DISTRICT ARE RESTRICTED TO THOSE PROVIDED FOR IN THIS ARTICLE AND TO PROPERTIES WITH A MINIMUM SIZE OF FIVE ACRES AND THAT SHALL

ACCOMPANY RESIDENTIAL SUBDIVISIONS WITH A MINIMUM OF TEN DWELLINGS,” THE FOLLOWING:

“; IN ADDITION, FOR ENERGY CONSERVATION ONLY AS STIPULATED BELOW, SITE PLAN APPROVAL SHALL APPLY FOR PERMITTED USES WITHIN BUSINESS AND INDUSTRIAL DISTRICTS FOR ALL NEW CONSTRUCTION AND THE EXPANSION OF EXISTING BUILDINGS MORE THAN 50% OF THEIR EXISTING SIZE.”

AMENDMENT TWO

AMEND ZONING CODE ARTICLE XXVII, SITE PLAN APPROVAL, SECTION 32-97, “PURPOSE,” SECTION (A)(6), BY DELETING THE CURRENT LANGUAGE AND REPLACING IT WITH THE FOLLOWING:

“ENERGY CONSERVATION DEFINED AS SITE AND/OR CONSTRUCTION DESIGN THAT THE BUILDING DEPARTMENT HAS CERTIFIED MEETS OR EXCEEDS THE “CERTIFIED” LEVEL AS STIPULATED IN THE LEED – LEADERSHIP IN ENERGY AND ENVIRONMENTAL DESIGN – UNITED STATES GREEN BUILDING COUNCIL PROGRAM OR A COMPARABLE BUILDING DEPARTMENT APPROVED ENERGY CONSERVATION PROGRAM.”

AMENDMENT THREE

REVISE ZONING CODE ARTICLE XXVII, SITE PLAN APPROVAL, SECTION 32-98.2 “DENSITY BONUS,” BY ADDING A NEW PARAGRAPH TO THE EXISTING LANGUAGE WHICH SHALL READ AS FOLLOWS:

“WITH SITE PLAN APPROVAL FOR NEW USES IN BUSINESS AND INDUSTRIAL DISTRICTS AND/OR THE EXPANSION OF EXISTING BUILDINGS MORE THAN 50% OF THEIR CURRENT SIZE THAT COMPLY WITH SECTION 32-97(A)(6) ABOVE, SUCH BUILDINGS MAY BE INCREASED IN GROSS FLOOR AREA UP TO 15% BEYOND THEIR PERMITTED SIZE IN THEIR RESPECTIVE ZONING DISTRICTS. THAT IS, AREA REQUIREMENTS, INCLUDING PARKING, HEIGHT LIMITATIONS, ETC., SHALL NOT APPLY UP TO 15% OF THE EXISTING LIMITATIONS FOR SUCH BUILDINGS.”

VOTE: 4-0

AYE: BEGLEITER, BOWMAN, DRESSEL, MCDOWELL

NAY: 0

ABSENT: HAMILTON, OSBORNE, RUSSELL

MOTION PASSED UNANIMOUSLY

3. AGENDA ITEM #3: REVIEW AND CONSIDERATION OF AN AMENDMENT TO THE SUBDIVISION AND DEVELOPMENT REGULATIONS REGARDING COMPLETION REQUIREMENTS FOR CONSTRUCTION IMPROVEMENTS.

Mr. Lopata summarized his report to the Planning Commission which reads as follows:

“From time to time over the recent past, the City has received complaints from homeowners living in relatively new and large residential subdivisions concerning their perception that developers have taken an inordinate amount of time to complete the construction improvements within their development. Construction improvements are the public facilities in a subdivision, typically including streets, sidewalks, curbs, stormwater facilities, utilities, public parkland and related items. Because large subdivisions are often constructed and sold in sections, homeowners must use partially

completed construction improvements (usually streets without the final blacktopping) for a period of time. Most recently, residents in District Six have complained through Councilman Markham about the length of time needed to complete the construction improvements in the Woods at Louviers subdivision off Paper Mill Road. As a result, in order to try to improve this process, the Public Works and Planning Departments, in conjunction with the City Manager's Office, have provided a suggested Subdivision and Development Regulations amendment intended to underscore time limits for the completion of construction improvements. In addition, we are suggesting that the Regulations be amended so that the City would have the explicit right to utilize the developer's "bond" for the completion of these facilities, if necessary. This right is implicit in the Regulations under the existing language.

Proposed Amendment

Amend Subdivision and Development Regulations Section 27-22(c) "***Standard conditions and procedures for construction improvement plan,***" Subsection 11, "***Notification, certification, acceptance and guarantee of construction improvements,***" which reads as follows:

"Following the inspection and completion in full of the construction improvements, the following shall occur:

- a. Appropriate notice to all property owners of record in the subdivision that the construction improvements are under review by the city for certification as complete and ready for use. Such notices shall explain that the property owners may provide comments in writing to the public works department and/or the council representative in the district within which the subdivision is located concerning the construction improvements.
- b. Certification by the public works director that the construction improvements are complete and ready for use according to approved plans and specifications."

by substituting the following language for subsection "b," [in **bold and underlined**] and relettering the remaining subsections:

"Following their inspection and the public works director's determination of substantial completion of the construction improvements, the following shall occur:

- a. Appropriate notice to all property owners of record in the subdivision that the construction improvements are under review by the city for certification as complete and ready for use. Such notices shall explain that the property owners may provide comments in writing to the public works department and/or the council representative in the district within which the subdivision is located concerning the construction improvements.
- b. The public works director shall issue the developer a written notification of construction improvements that have not been satisfactorily completed. Such notification shall stipulate that the developer shall satisfactorily complete, subject to the approval of the public works director, all public improvements within one year from the date of the issuance of the written notification specified in this subsection. If the construction improvements specified in the written notification are not satisfactorily completed within the required time period, the city, at its discretion, shall have the authority to complete the required construction improvements. Funds for the completion of these construction improvements by the city shall be drawn from bonds or other secured instruments, in accordance with subsection 10 above.**

- c. Certification by the public works director that the construction improvements are complete and ready for use according to approved plans and specifications.”

Recommendation

The Planning Department suggests that the Planning Commission review this report, receive public input and recommend **that City Council approve the amendment to Section 27-22(c) of the Subdivision and Development Regulations as described in this report.**

Mr. Bowman: Are there any questions from the Commission?

Mr. Begleiter: Obviously, we have not had the problem very much so it is not that big of a concern; but if we do this, would it put the onus for construction on the City and effectively allow a developer to promise when they are getting ready to develop to build the streets, curb cuts, sidewalks, and have a bond and then the developer says that it is a pain to finish and says let the City take the money and let them build it. Is that going to distract from other projects that the City personnel should be focusing their attention on? And does it, potentially, leave the City with a bill for installing and improvements that turn out to be higher than the bond amount?

Mr. Lopata: The thing that covers that is that the bond is 150% of the cost to complete the work. The bond is posted when we estimate what it would cost to finish the work. Construction improvements are supposed to be done within five years initially and then you have this extra year. The 150% sort of covers us.

Your first statement is the one that I think is most operative. This just does not happen very much. If it is a problem, we will have to change that.

Mr. Begleiter: What I was going to suggest as a possible amendment – if you don’t think it is necessary, you don’t have to do it – but I thought, what if you put in a scale that says not only do we have the right to exercise the money and finish off the construction, but the amount increases by a certain percentage each year, or every six months, or by the month, or whatever it is so that builder actually has an incentive to move more quickly rather than drag it out to the last minute and then say, oh alright, we will do it. Build in some sort of an increasing penalty which they could easily avoid by simply doing what they say they would do in the first place. Do you think that is a good idea or unnecessary?

Mr. Lopata: That remains to be seen. They want the 150% back, believe me.

Mr. Begleiter: The Woods of Louviers obviously doesn’t. You said that was a problem there. They are obviously not hot-to-trot to get their money back.

Mr. Lopata: That is an unusual circumstance.

Mr. Begleiter: But, it is the circumstance for which you are writing this legislation.

Mr. Lopata: You are right. The only thing I can say is that the 150% ought to cover that.

Mr. Begleiter: How does this happen. We would hire a private contractor to do it?

Mr. Lopata: We would get a contractor to do it. We would not actually do it.

Mr. Begleiter: I am concerned that the City has committed, let’s say, to pay a road or something and all of a sudden the City cannot pave the road with the City crews. . .

Mr. Lopata: We would hire another contractor to come in and do it.

Mr. Begleiter: On page 2 in the bold underlined paragraph, I will just suggest these two word additions. In the second line, “the Public Works Director shall issue the developer

written notification of (any) construction improvements that have not been satisfactorily completed.” And, then in the fourth line up from the bottom, the one that starts “required time period, the city, at its (sole) discretion. . .” Only the City gets to decide, there is no dispute over this, they don’t get to go court, have an arbitrator, or anything like that.

Mr. Lopata: That strengthens it.

Ms. Dressel: If the City ended up having to do the work, would it benefit the City to add a charge at the end as well for the fact that the City had to go in and take care of this work because the builder did not comply?

Mr. Lopata: That is what the 150% is for.

Ms. Dressel: They wouldn’t get anything back?

Mr. Lopata: They get part of their bond back. Let’s suppose it is the sidewalks, we would go the sidewalk work but, obviously, take out the 150% of what was estimated for sidewalk work and they could get the money back for other uses – sort of a penalty clause, which is what Ralph was getting at.

Ms. Dressel: Would that 150% of the cost of doing the sidewalks cover the cost of your additional time, administrative costs and things like that.

Mr. Lopata: That is the cost of government.

Ms. Dressel: I just want to make sure they are doing their work.

Mr. Lopata: To me, that is what government is supposed to be doing. That is our job. If our inspectors need to go out extra, that is what they are there for. The Public Works person has to spend more time; the City Attorney has to fiddle with the bonds.

Mr. Bowman: At some point I think the City does have the opportunity of incurring a legitimate charge having to go out to negotiate a contract for somebody else to do that work which you can back bill to the original contractor on his original bond.

Mr. Lopata: Exactly. All the costs, every bit of it, will be charged to that.

Mr. Bowman: The other piece of this is – I’m not sure Newark does it – typically, are the bonds put in an escrow account that bears interest?

Mr. Lopata: I am really not sure, Jim.

Mr. Bowman: If you are looking at a problem with inflation of cost over that time, that bond can be placed to draw interest and then, ultimately if the guy does his job right he can get his money back with some interest. I have heard of that being done.

Mr. Lopata: I am not sure.

Mr. Bowman: Any other questions from the members of the Commission? If not, we will open it up to the floor. Any questions from the public? Hearing none, we are back to the table.

MOTION BY BEGLEITER, SECONDED BY DRESSSEL THAT THE PLANNING COMMISSION RECOMMEND THAT CITY COUNCIL APPROVE THE FOLLOWING PLANNING DEPARTMENT PROPOSED AMENDMENT TO THE SUBDIVISION AND DEVELOPMENT REGULATIONS, WITH THE COMMISSION SUGGESTED REVISIONS:

AMEND SUBDIVISION AND DEVELOPMENT REGULATIONS SECTION 27-22(C) “**STANDARD CONDITIONS AND PROCEDURES FOR CONSTRUCTION IMPROVEMENT PLAN,**” SUBSECTION 11, “**NOTIFICATION, CERTIFICATION,**

ACCEPTANCE AND GUARANTEE OF CONSTRUCTION IMPROVEMENTS,”
WHICH READS AS FOLLOWS:

“FOLLOWING THE INSPECTION AND COMPLETION IN FULL OF THE CONSTRUCTION IMPROVEMENTS, THE FOLLOWING SHALL OCCUR:

- c. APPROPRIATE NOTICE TO ALL PROPERTY OWNERS OF RECORD IN THE SUBDIVISION THAT THE CONSTRUCTION IMPROVEMENTS ARE UNDER REVIEW BY THE CITY FOR CERTIFICATION AS COMPLETE AND READY FOR USE. SUCH NOTICES SHALL EXPLAIN THAT THE PROPERTY OWNERS MAY PROVIDE COMMENTS IN WRITING TO THE PUBLIC WORKS DEPARTMENT AND/OR THE COUNCIL REPRESENTATIVE IN THE DISTRICT WITHIN WHICH THE SUBDIVISION IS LOCATED CONCERNING THE CONSTRUCTION IMPROVEMENTS.
- d. CERTIFICATION BY THE PUBLIC WORKS DIRECTOR THAT THE CONSTRUCTION IMPROVEMENTS ARE COMPLETE AND READY FOR USE ACCORDING TO APPROVED PLANS AND SPECIFICATIONS.”

BY SUBSTITUTING THE FOLLOWING LANGUAGE FOR SUBSECTION “b,” AND RELETTERING THE REMAINING SUBSECTIONS:

“FOLLOWING THEIR INSPECTION AND THE PUBLIC WORKS DIRECTOR’S DETERMINATION OF SUBSTANTIAL COMPLETION OF THE CONSTRUCTION IMPROVEMENTS, THE FOLLOWING SHALL OCCUR:

- a. APPROPRIATE NOTICE TO ALL PROPERTY OWNERS OF RECORD IN THE SUBDIVISION THAT THE CONSTRUCTION IMPROVEMENTS ARE UNDER REVIEW BY THE CITY FOR CERTIFICATION AS COMPLETE AND READY FOR USE. SUCH NOTICES SHALL EXPLAIN THAT THE PROPERTY OWNERS MAY PROVIDE COMMENTS IN WRITING TO THE PUBLIC WORKS DEPARTMENT AND/OR THE COUNCIL REPRESENTATIVE IN THE DISTRICT WITHIN WHICH THE SUBDIVISION IS LOCATED CONCERNING THE CONSTRUCTION IMPROVEMENTS.
- b. THE PUBLIC WORKS DIRECTOR SHALL ISSUE THE DEVELOPER A WRITTEN NOTIFICATION OF ANY CONSTRUCTION IMPROVEMENTS THAT HAVE NOT BEEN SATISFACTORILY COMPLETED. SUCH NOTIFICATION SHALL STIPULATE THAT THE DEVELOPER SHALL SATISFACTORILY COMPLETE, SUBJECT TO THE APPROVAL OF THE PUBLIC WORKS DIRECTOR, ALL PUBLIC IMPROVEMENTS WITHIN ONE YEAR FROM THE DATE OF THE ISSUANCE OF THE WRITTEN NOTIFICATION SPECIFIED IN THIS SUBSECTION. IF THE CONSTRUCTION IMPROVEMENTS SPECIFIED IN THE WRITTEN NOTIFICATION ARE NOT SATISFACTORILY COMPLETED WITHIN THE REQUIRED TIME PERIOD, THE CITY, AT ITS SOLE DISCRETION, SHALL HAVE THE AUTHORITY TO COMPLETE THE REQUIRED CONSTRUCTION IMPROVEMENTS. FUNDS FOR THE COMPLETION OF THESE CONSTRUCTION IMPROVEMENTS BY THE CITY SHALL BE DRAWN FROM BONDS OR OTHER SECURED INSTRUMENTS, IN ACCORDANCE WITH SUBSECTION 10 ABOVE.

- c. CERTIFICATION BY THE PUBLIC WORKS DIRECTOR THAT THE CONSTRUCTION IMPROVEMENTS ARE COMPLETE AND READY FOR USE ACCORDING TO APPROVED PLANS AND SPECIFICATIONS.”

VOTE: 4-0

AYE: BEGLEITER, BOWMAN, DRESSEL, MCDOWELL

NAY: 0

ABSENT: HAMILTON, OSBORNE, RUSSELL

MOTION PASSED UNANIMOUSLY

There being no other items the meeting adjourned with Mr. Bowman wishing the Commission and members of the public a happy and safe holiday.

Meeting adjourned at 8:30 p.m.

Respectfully Submitted,

Elizabeth Dowell
Secretary, Planning Commission