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January 23, 2018

Planning Board
Town of Stockbridge
Town Hall
50 Main Street
P.O. Box 417
Stockbridge, MA 01262

Re: 37 Interlaken Road; Proposed Zoning Amendment

Dear Planning Board Members:

On December 7, 2017, the Trustee of the 35-37 Interlaken Road Realty Trust submitted a proposed amendment to the Town's Zoning Bylaw, which would make extensive changes to Section 6.6, Cottage Era Estate Development Adaptive Re-Use or Rehabilitation, for the purpose of permitting hotel and resort condominium uses as of right. As discussed below, this change would expand the uses allowed pursuant to Section 6.6 and would introduce new density and dimensional requirements that are not imposed by the existing Section 6.6. Perhaps most importantly, however, the requested amendment would also constitute a significant departure from the Town's historical practice of requiring approval of such uses by Special Permit review by the Board of Selectmen.

Below is an outline of the significant changes involved in this proposal.

1. Special Permit v. Site Plan Review

Section 6.6 currently authorizes the Board of Selectmen to permit allowed uses for Cottage Era Estates through the special permit process set forth in Sections 6.6.3 and 6.6.4. The proposed amendment would eliminate this process in favor of a site plan review process conducted by the Planning Board for "Resort Uses" and would provide no review process for other allowed uses. As described below, special permits and site plan approvals are different in important respects. Notably, the proposed amendment would eliminate the Town's discretion to determine whether a proposed use is appropriate in a specific instance, making all allowed uses as of right. In other words, the Town would be required to permit such uses if the other requirements set forth in the amended bylaw are satisfied.

In general, site plan review involves regulation of a use that is allowed by right. Such review "is justifiable as an informational tool which discloses the specifics of the project, including the proposed location of buildings, parking areas, and other installations on the land, and their relation to existing conditions such as roads, neighboring land uses, public features, and ingress and egress roads." *Prudential Ins. Co. of America v. Bd. of Appeals of Westwood*, 23 Mass. App. Ct. 278, 282 n. 6 (1986). Thus, the purpose of site plan

review is not to review the appropriateness of a proposed use or to prohibit such use; rather, site plan review is limited to regulation of a proposed use by imposing reasonable terms and conditions. *Id.* at 281-82.

Because it is limited to regulating the details of a project, site plan review is most appropriately used to determine whether the specific details of a proposal have been adequately designed to protect the public interest. Special permit review, on the other hand, is most appropriately used to determine whether and under what circumstances a proposed use will be appropriate on a particular parcel or whether such use should be disallowed.

A special permit granting authority's power to grant or deny special permits is discretionary, and a decision of a special permit granting authority will not be disturbed unless it is based on an untenable ground or is unreasonable, whimsical or capricious. *See Gulf Oil Corp. v. Bd. of Appeals of Framingham*, 355 Mass. 275, 277 (1969) and cases cited. Consequently, special permit granting authorities have substantial discretion in determining whether to grant or deny a special permit.

In contrast, a board that is performing a site plan review does not have discretionary power to deny the use. "Site plan approval procedures, unlike special permits and variances, involve no special permission or dispensation." *Bowen v. Bd. of Appeals of Franklin*, 36 Mass. App. Ct. 954, 954-55 (1994). Thus, the Appeals Court has held that a board may reject a site plan only where (1) the plan fails to furnish adequate information required by the bylaw or (2) "although proper in form, [the site plan] may be so intrusive on the needs of the public in one regulated aspect or another that rejection by the board would be tenable." *Prudential*, 23 Mass. App. Ct. at 283 n. 9. The second ground is typically found where, "despite best efforts, no form of reasonable conditions could be devised to satisfy the problem..." *Id.* Thus, a board reviewing a site plan is limited to imposing conditions on the plan except in extraordinary circumstances.

Unless otherwise provided in the local bylaw, site plan approval requires only a majority vote of those present at the meeting. *Osberg v. Planning Bd. of Sturbridge*, 44 Mass. App. Ct. 56, 59 (1997). The proposed amendment would not change the majority vote requirement. Pursuant to *M.G.L. c.40A, §9*, in contrast, approval of a special permit requires a vote of a supermajority of the special permit granting authority. Because the Select Board is a three-member board, the grant of a special permit by the Select Board requires a unanimous vote.

Appeals from the denial of a special permit are made directly to court pursuant to *M.G.L. c.40A, §17*. With respect to site plan review, however, courts have distinguished between site plan reviews that are tied to the issuance of a special permit and those that are tied to the issuance of a building permit. In cases where the site plan review bylaw is really a special permit process (that is, the reviewing board has discretion to deny the use), the board's decision may be appealed directly to court pursuant to *M.G.L. c.40A, §17*. Where the site plan review is tied to the issuance of a building permit, however, the decision is appealable to the Zoning Board of Appeals. As proposed, the amendment would

not provide the Planning Board with any discretion, meaning that appeals would be made to the Zoning Board of Appeals in the first instance.

In sum, the proposed amendment would eliminate Town review of residential and agricultural uses under Section 6.6 and would significantly modify review of resort uses. The amendment would eliminate all discretion from the Town's decision to allow a particular resort use, remove decision-making authority from the Board of Selectmen in favor of a more limited review by the Planning Board, reduce the quantum of vote required for project approval, and alter the process for appealing a decision made pursuant to the amended bylaw.

Note that these changes would apply to all Cottage Era Estate properties, including any that currently hold Special Permits under the current Zoning Bylaw. Thus, regardless of the provisions of any current Special Permit, existing developments of Cottage Era Estates would be entitled to expand the range of uses on the property without any additional review by any permitting board.

In addition, the current requirement that the Cottage Era Estate contain at least 75% of the area and frontage of all the parcels that are commonly owned is proposed to be eliminated. The purpose of the existing provisions was to compel property owners to put the bulk of their land into a single principal lot so as to minimize the amount of land available for potential development as conventional subdivisions. With the provision eliminated, the property owner may be able to undertake both a re-use or re-habilitation project on the Cottage Era Estate and conventional subdivisions on contiguous parcels.

2. Density and Dimensional Requirements

Section 6.6 currently does not establish any density or dimensional requirements. The proposed amendment would establish limits as follows:

- Residential dwellings – one dwelling unit per three acres of contiguously owned or “controlled” land. This provision appears to allow density of the Cottage Era Estate to be based on the size of outlying parcels, without limiting what can be done with those parcels.
- Hotels – up to 100 rooms and suites.
- Resort condominiums – one unit per acre of contiguously owned or controlled land.

Residential uses could be clustered for purposes of preserving open space and agricultural land.

The proposed amendment would additionally establish a height limit equal to that of the “primary pre-existing historic building (originally constructed prior to 1920) located on a Cottage Era Estate.”

3. Site Plan Approval Standards

The proposed amendment would insert a new subsection establishing standards and criteria for site plan review of resort uses, including requirements related to:

- Preservation of historic characteristics to the extent feasible;
- Ground and surface water protection;
- Connections to the Town sewer and water mains satisfying subdivision standards; and,
- Safe vehicular and pedestrian movement within the resort and to adjacent public ways.

The Planning Board would be required to approve any resort developments that satisfy these requirements.

4. Allowed Uses

Currently, Section 6.6 authorizes the Board of Selectmen to permit, by special permit, the following uses of a Cottage Era Estate:

- One-family dwellings;
- Open space recreational uses;
- Hotels and restaurants where food is served primarily for consumption within the building;
- Commercial greenhouses, nurseries, or landscape gardening;
- Agriculture, viticulture, horticulture, or floriculture;
- Conference and retreat facilities, including facilities for private parties and weddings;
- Studios where artists can work and display their art;
- Resorts (defined as a use that includes a building or group of buildings with sleeping rooms for 20 or more transient guests; food service in a public dining room; indoor and outdoor recreational facilities; and a range of activities and amenities intended to be provided to guests predominantly on-site for the duration of their stay).

The proposed amendment preserves each of these uses, but also expands allowed uses to also include:

- Two-family dwellings and associated amenities, such as clubhouses, swimming pools and tennis courts;
- Resort uses, including:
 - Multi-family condominium buildings operated in conjunction with a hotel or resort, in which there may be a combination of individually-owned dwelling units and units under the operational control of a managing hotel company;
 - Amenities such as food services, cleaning, recreational uses and hotel concierge services; and,

- o Accessory uses including restaurants, taverns/bars, catering facilities; indoor and outdoor recreational facilities; spa, fitness and health facilities; artist studios and galleries and retail shops and boutiques.

As described above, all of these uses would be permitted as of right. Resort uses would be subject to the limited site plan review described above. All other uses, however, would not be subject to review under Section 6.6 as proposed.

Please let me know if I can provide any additional assistance.

Sincerely,

A handwritten signature in black ink, appearing to be 'J. Raymond Miyares', written over a large, stylized letter 'R' that serves as a background for the signature.

J. Raymond Miyares

cc: Select Board
D. Fillio