

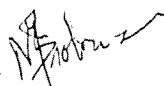
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FR: Mark Bobrowski   
TO: Beth Rennard, City Solicitor

July 3, 2012

RE: Proposed PUD

You have asked me whether the PUD proposed by MRM Project Management, LLC ("MRM") on Grove Street, partially within the BPD District, complies with the residential area limit set forth in Section 7.3.3.3 of the Zoning Ordinance ("ZO"). You have also asked me whether other sections of the ZO come into play.

You have provided me with the following documents:

- \* Site layout plan for the MRM PUD;
- \* Memorandum of Lynn Duncan to the City Council dated August 29, 2008;
- \* Correspondence of Councillor Prevey to the Planning Board, dated May 17, 2012;
- \* Memorandum of Danielle McKnight to Planning Board ("McKnight Memorandum"), dated April 24, 2012.

I have reviewed these documents, as well as the pertinent sections of the ZO. I offer the following opinion.

First, to put the controversy regarding the eligibility of this PUD in perspective, I remind the Planning Board and other interested parties that there is a marked distinction between "eligibility" for a PUD special permit and the "grant" of such special permit. In short, only those projects that meet each and every requirement of Section 7.3 are eligible for consideration. However, the Planning Board has discretionary authority to deny even those projects that are eligible:

Neither the Zoning Enabling Act nor the town zoning by-law gives . . . an absolute right to the special permit. . . . The board is not compelled to grant the permit. It has discretionary power in acting thereon. The board must act fairly and reasonably on the evidence presented to it, keeping in mind the objects and purposes of the enabling act and

the by-law. *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638-639 (1970).

Thus, a "board may deny a special permit even if the permit might have been lawfully issued." *Humble Oil v. Board of Appeals of Amherst*, 360 Mass. 604, 605 (1971) ("The mere fact that the standards set forth are complied with does not compel the granting of a special permit. . .").

As to the MRM proposal, you have informed me that some City Councillors and abutters have questioned the computation of the area devoted to "residential uses and associated improvements, such as parking and landscaping" which is capped in Section 7.3.3.3 of the ZO at fifty (50%) percent. The "nonresidential" areas, which the McKnight Memorandum identifies as 51% of the total land area of the parcels, are shown on the site plan as hash-marked areas.

I see nothing in the conclusion set forth in the McKnight Memorandum that is fundamentally inconsistent with the language of Section 7.3 in general, and Section 7.3.3.3 in particular. Section 7.3.5 clearly establishes that "usable open space" is a separate category of land use within a PUD. This has been appropriately counted as a "nonresidential" portion of the land area. There is no front, rear, or side yard requirement set forth in Section 7.3.4.1. The hash-marked area shown on the site plan does include the residential building footprints, the spaces between the three buildings, the parking areas devoted to these buildings, and portions of the access road located in the BPD District to reach the parking areas. I assume that all landscaping is within the parking areas or the spaces between the three residential buildings. I also assume that the access road heading across the tracks to the north has been included in the residential portion of the property, because it is not hash-marked. Access to a residential site is a residential use. *Harrison v. Building Inspector of Braintree*, 350 Mass. 559 (1966).

Finally, I see nothing in any other section of the ZO that denies the MRM project eligibility to apply for a PUD special permit. Section 7.3.1, which states the purpose of the PUD provision, simply sets introductory guidelines for consideration. The core of the PUD special permit decision is (1) in the eligibility criteria of Sections 7.3.2 to 7.3.5, inclusive, and (2) the special permit granting criteria of Section 7.3.8. While the purpose clause calls for Master Plan compliance, I note that Section 7.3.8.2 allows for deviation in appropriate circumstances.

Therefore, it is my opinion that the calculation of the "residential area" in the McKnight Memorandum is legally sound. I make no representation as to whether, after application of the criteria set forth in Section 7.3.8, a special permit should be granted or denied for the MRM PUD.

Please let me know if you have any questions regarding my opinion.