

Real Estate Journal

COVERING ALL OF LONG ISLAND, NEW YORK CITY AND UPSTATE NEW YORK

The pitfalls of incorporating compliance consultant comments as a condition of approval

hg Howard Geneslaw



Gibbons, P.C.

jp Jennifer Porter



Gibbons P.C.

Board Review and Incorporation of Consultant Comments as a Condition of Approval

Municipal boards reviewing development applications often lack the time and expertise to conduct a thorough review of all of the necessary components in order for an approval to be issued. As such, a board will often rely upon the expertise of its consultants to advise on certain components of an application such as traffic, engineering, architecture, planning and landscaping. Typically, consultant comments are prepared in the form of a memorandum addressed to the reviewing board which sets forth requested plan changes as well as recommendations to the board as to what actions should be taken, what procedures must be followed and the like. Some boards will require that an applicant comply with all of the requested plan changes; others will entertain objections orally at the work session or hearing, while still

others require submission of written objections. This process usually occurs over the course of several meetings and oftentimes several comment memorandums from several different consultants are prepared prior to the time a decision is made on the application.

Problems can arise when a board seeks to approve a land use application conditioned upon compliance with consultant comments but does not specify (a) which consultant(s) it is referring to; (b) the date of the comments which must be complied with; or (c) what specific comments must be satisfied. This can be particularly troublesome for applicants who have previously been advised by the board that they did not need to comply with certain consultant comments but who are now bound to comply with the comments by virtue of the issuance of an approval requiring compliance with all consultant comments as a condition of approval. In order to avoid this from occurring, it is critical

for applicants to be aware at all stages of the review process as to how consultant comments are being handled by the board.

Strategies for Avoiding Generic References Requiring Compliance with Consultant Comments as a Condition of Approval

There are several things an applicant can do throughout the review process in order to avoid being subjected to comply with "consultant comments" as a vaguely-referenced condition of their approval. First, when an application is submitted to a municipal board, the applicant should ask (a) what consultants will be reviewing the application; (b) what the protocol is for the issuance of consultant comments, i.e., by memorandum or by oral comment at the meeting; and (c) whether the applicant will be provided with a copy of any written comments prior to or at the meeting. The applicant should then inquire whether comments can be addressed by the applicant at the meeting, or if the applicant is permitted to respond to the comments in writing. Thereafter, the applicant should document either verbally during the meeting or by written response, the applicant's position concerning compliance with each of the consultant comments and the board's determination as to

whether or not compliance will be required.

When the applicant believes the board is getting ready to grant an approval, the applicant should be prepared to discuss the conditions during the meeting so as to ensure that no conditions will be adopted that were not previously discussed with and acknowledged by both the applicant and board. The applicant should also request the opportunity to review and comment on the conditions set forth in the resolution prior to adoption by the board. It is important that the resolution identify with specificity the particular comments with which compliance is required, rather than a generic reference like "subject to board engineer's report."

By taking these steps, an applicant can save time, money and the aggravation associated with having to comply with comments the applicant did not previously agree to or was not previously required to comply with by the board.

Howard Geneslaw is a director and Jennifer Porter is an associate at the law firm of Gibbons P.C., which has offices in New York, N.Y., Newark and Trenton, N.J. and Philadelphia, Penn.