

A meeting of the Township of Hamilton Planning Board was held on the above date with Chairman David Wigglesworth presiding. Other members present were Harry Bilicki, Richard Cheek, Wayne Choyce, Aline Dix, John Kurtz and Heather Tomasello. Also present were Steven Filippone, Engineer Consultant, and John Rosenberger, Solicitor.

Compliance with the Open Public Meetings Law was acknowledged.

Hamilton Mall, LLC (Modification to Condition of Approval) – Keith Davis, Attorney; Clinton Cochran, KRAVCO's Vice-president for Assets and Property Management; William Schu, Hamilton Mall Manager; Edward Spitel, P.E.; and Clay Emerson, PhD, were present.

Mr. Davis informed those present that KRAVCO was requesting that the Board modify the condition of approval granted for the Hamilton Mall addition project that required the storm water management system to be functioning per the design of the remediation plan and construction documents prior to issuance of a Certificate of Occupancy for Phase One. He related what had taken place to date with regard to the relief previously granted by the Board from that condition, and stated that KRAVCO anticipated beginning construction of the remainder of Phase One, the Streetscape, within the first quarter of 2014, but would need the requirement eliminated in order to secure the necessary bank funding for the project.

Mr. Davis stated that the condition had hampered KRAVCO's efforts to secure tenants, as it could not guarantee a signed lease that fixates when a Certificate of Occupancy could be issued. He advised that they would not be able to construct the Streetscape if the condition were not modified, and commented that construction of the streetscape would generate economic activity within the Municipality and a significant tax ratable.

Mr. Davis expressed the opinion that the request not to link issuance of Certificates of Occupancy to the performance of the storm water management system was a reasonable request because the Township was protected. He stated that KRAVCO had demonstrated its commitment to remediating the basins by investing thousands of dollars to date, and by hiring a design team in July to develop a plan for additional work to the basins so they would infiltrate better than they are currently. He further stated that there is in place a Letter of Credit in the amount of \$918,782.40, and expressed the opinion that the Letter of Credit was tremendous leverage on the part of the Township to make sure that the improvements take place. Mr. Davis noted that KRAVCO had not requested any reductions in the Letter, and had chosen to allow it to remain in full force and effect, even though the improvements had been constructed. He stated that KRAVCO would not be requesting a reduction in the foreseeable future while it works through the issues. Mr. Davis pointed out that the Applicant had recorded a Declaration of Covenants and Restrictions for Drainage Structures with the County for the storm water management system, which obligates KRAVCO to maintain the system and grants the Township certain rights.

In response to a question, Mr. Davis expressed the opinion that a Letter of Credit was better than a performance bond, as a bond was effectively an insurance policy, while a letter of credit was money being reserved for a particular purpose that was being held by a financial institution.

Mrs. Dix questioned whether there was a difference between a performance guarantee that was intended to ensure that something is constructed to certain specifications and one which was intended to solve a problem. Mr. Davis responded by stating that KRAVCO would prefer not to have its money encumbered by the Letter of Credit held up indefinitely, and would like to have the amount partially reduced or completely released so it could be used for other purposes. He expressed the opinion that it was tremendous leverage the Township had over the Applicant to make sure it lives up to its obligation to construct the improvements. Mr. Davis further stated that he was "fudging" on the response because he didn't know the exact answer to the question; that it depended on the form of the Letter of Credit and the nature of the improvements and where they stand.

Mrs. Dix stated that the performance guarantee posted by the Applicant was for the purpose of the remediation of the system and not to build the system.

Mr. Rosenberger reviewed the copy of Letter of Credit that was contained within the Planning Board file, and advised that it was specific to construction of the remediation plan

Mr. Rosenberger advised that the money tied up in the Letter of Credit could not be released until the Governing Body officially releases it, or until a judge orders its release as a result of litigation, so there would be a great deal of leverage in terms of how the remediation issues are addressed. Mr. Rosenberger, also, advised that the Township had at its disposal the recorded Declaration of Covenants and Restrictions for Drainage Structures which affords the Township the ability to compel certain actions, and he pointed out that the ability of the Applicant to meet its obligation under the Covenants may be more plausible than a different applicant because of the nature of the Company and its ongoing activities throughout the Country.

Mr. Rosenberger stated that he had spoken to Mr. Filippone and Mr. Davis to see if it would be possible to work out a tightly coordinated and controlled reporting mechanism so there would be regular, timely and informative reports if the condition is removed. The discussion involved requiring the submission of monthly reports to Mr. Filippone, who would review and assess them as to value, and decide whether the Applicant would need to return to the Board for discussion. The idea was to allow KRAVCO to proceed with the remainder of Phase One while monitoring the activity involving the basins; and if a determination is made that the remediation plan is not going forward, and the Applicant was not acting in accordance with its responsibilities, the Township could then take action against the Letter of Credit and the issue of what the Letter is protection against would be addressed at that time. Mr. Rosenberger pointed out that the Township could, also, act in accordance with the terms of the recorded Declaration of Covenants and Restrictions for Drainage Structures.

Mr. Cheek pointed out that there would be considerable cost associated with the Township attempting to “pull” the Letter of Credit and with acting in accordance with the provisions of the recorded Covenants. It was Mr. Cheek’s opinion that the Township would be better served if the Board did not remove the requirement, but work with the Applicant so it could move forward with the project by reviewing progress at the time the Certificates of Occupancy are needed.

Mr. Cheek advised of his experience with difficulty “calling” performance guarantees, and commented that there would be resistance to releasing the funds if the improvements specified within the cost estimate were constructed. He expressed concern that removing the requirement would eliminate the leverage the Township now has to make sure the basins are functioning as designed, and that the Township would not be able to draw upon the performance guarantee to fix the problem if KRAVCO decides that it did not want to undertake further remediation efforts to meet the seventy-two hour requirement.

Mr. Davis stated that there would be a series of tenants moving into the streetscape, and the Applicant would not be able to contract with them if it were forced to proceed in the manner suggested by Mr. Cheek, as they could not commit to a timeline and a certificate of occupancy. He pointed to the positive history KRAVCO had with the municipality and the money invested in the project to date, and stated that he took umbrage to the suggestion that KRAVCO would not live up to its obligation.

Mr. Wigglesworth asked that testimony be provided with regard to the status of the investigation as to why the basins weren’t draining within seventy-two hours.

Mr. Davis advised that KRAVCO had hired Dr. Clay Emerson of Princeton Hydro and Ed Spitel, P.E., to investigate why the basins were not draining within seventy two hours, and he stated that testing had commenced, but it would take time to evaluate the situation and make a recommendation.

Dr. Emerson advised of his credentials and described what had been done to date to collect the necessary data, so the situation could be evaluated and a recommendation could be made. He noted that he has been maintaining contact with Mr. Filippone.

In response to Board members' questions, Mr. Emerson stated that more rainfall was needed, in addition to more time, and he commented that what he has seen so far was promising.

Mr. Davis stated that they were dealing with the timeline centered around gathering of information from the basins and developing a plan to address the issues and a timeline for KRAVCO to actually sign leases.

Mr. Spitel stated that he anticipated having a report and then developing a plan of action by late this year or early next year, and he commented that the weather at that time could present a problem with implementing the plan. It was his opinion that work would probably not take place until July or August of next year. He noted that there were different issues associated with each basin and the time to correct each basin's problem would differ.

Mr. Spitel pointed out that the basins were now functioning and there was no water leaving the site

In response to a question with regard to the target date to have tenants under lease in order to apply for a building permit for the remainder of Phase One, Mr. Cochran stated that their lender requires signed leases for seventy five percent occupancy before they would release funding for construction, and it was KRAVCO's goal to have those signed leases by December 31, 2013. Mr. Cochran stated that, if that were to occur, the space would be turned over to the tenants by late fall, 2014, and it was anticipated that the stores would open at various times during 2015, depending upon their schedules. He stated that no leases were signed as of this date, as they were unable to guarantee when they would open. Mr. Cochran noted that KRAVCO was in the process of negotiations with tenants, who want to locate there as part of a group, and they believed they had commitments for all but one space.

Mr. Filippone stated that he has been in contact with Mr. Emerson on a regular basis. He advised as to what occurs with regard to release of the performance guarantee and posting of a maintenance guarantee, and read a section of the Declaration of Covenants and Restrictions for Drainage Structures in an effort to provide assurance that there would be a requirement for maintenance of the basins and a method to address the matter upon lack of performance after release of the guarantees.

Board members asked questions related to lack of maintenance, basin function requirements, what would happen if the basins never meet the seventy two hour requirement and what legal battle would ensue if a request was made for release and it was denied.

Mr. Rosenberger advised that the legal issues would be similar to an insurance claim where the carrier would attempt to avoid liability and there would be significant efforts on all sides to enforce or avoid responsibility of the claim. He commented that bond litigation is very technical and very demanding

Mr. Choyce questioned what leverage the Township had, beyond the performance guarantee, to compel the Applicant to meet the seventy-two hour requirement. Mr. Filippone responded that he would not recommend release of the performance guarantee if the basins were not meeting that requirement.

Mr. Cheek suggested that the Board retain control over the issue by allowing issuance of permits and certificates of occupancy for leases signed within a specified time period, and then monitoring the basin remediation process, with additional permits and certificates of occupancy not being permitted if a determination is made that the Applicant has not made any progress with regard to the basin issues. Mr. Cheek expressed concern with regard to loss of leverage if the condition were modified as requested by the Applicant, and concern with regard to the potential cost associated with attempting to draw upon the performance guarantee and the possible resulting litigation.

Mr. Davis stated that the Applicant could not proceed with negotiations with tenants with that type of condition in effect, and he asked the Board to weigh the importance of the project proceeding as approved against the basins draining within the Ordinance specified time

period, taking into consideration all that has been done to date and the commitment by the Applicant to address the basin issues and its ability to follow through.

In response to Mr. Wigglesworth's request that the Applicant present a "common ground" and equitable solution, Mr. Davis stated that he believed the proposal to present monthly reports on progress being made to the Board's Engineer, who would have the ability to compel the Applicant to return to the Board if he felt they were not fulfilling its obligation. Mr. Davis commented that, if the Board continues to use the issuance of building permits and certificates of occupancy as leverage, the Applicant would never be able to get to where it needs to be with regard to leasing.

Mr. Bilicki expressed concern that collecting the data and developing a solution could take as long as a year. Mr. Davis pointed out that the basins had been remediated such that there is no longer danger of overflowing; that storm water was being maintained on site; and that the basins were working, but not to the seventy two hour standard.

Mr. Choyce asked Mr. Filippone what the probability was now of the basins overflowing into the watershed, as they had previously done, and what major event would have to occur for water in the basins to leave the site. He further questioned how much of a threat they were to the watershed in the area the way they are now functioning. Mr. Filippone responded to the questions, and expressed the opinion that the basins were currently no threat to the watershed downstream, as they had volume to store the largest storm.

Mr. Choyce pointed out that there were negative events happening prior to any additional improvements to the site, and there had been substantial improvement to the previous condition, decreasing the likelihood of storm water leaving the site. He questioned how much more would be achieved with that last improvement, but commented that he was not suggesting that requiring the basins to meet the seventy-two hour standard be abandoned.

Mr. Filippone added that the basins had been full, with no storage capacity, and he advised as to what had been happening with storm water prior to construction of the remediation improvements.

Mrs. Dix questioned the status of the basin located between the Race Track and the Mall, and she commented that she would not like to see that basin become an obstacle to going forward, as flow from the Race Track property is not entirely under the Mall ownership's control. Mr. Davis advised that the issue involving that basin probably wouldn't be resolved until the Race Track is redeveloped. In response to Mrs. Dix's question as to whether activity in the parking lot at the Race Track could affect the flow to that basin, Mr. Davis stated that is one of the things that Dr. Emerson would be evaluating as part of his analysis. Mr. Filippone noted that the silt issue had been resolved.

Mr. Choyce questioned what "hammer" the Board would have if the proposed monthly reports show little or no progress in Mr. Filippone's opinion.

Mr. Rosenberger stated that, by having a regular and prompt report, it would be known if a problem is developing, which would then be reported to Township Committee, Township Counsel and the Township Engineer to pursue any remedies under the various documents that are in place. He pointed out that withholding the issuance of certificates of occupancy would not be something that could be done to compel correction of the problem if the Board removes the language from the resolution that requires the basin to be functioning as designed.

Mr. Davis advised that a notice of violation of the site plan could be issued because the storm water management system was not functioning as designed.

Mr. Rosenberger advised that there were a variety of things that could be done, all under the jurisdiction of the Governing Body if the Board removes the control it had imposed through the condition, some of which could be costly, and he expressed the opinion that, to a certain extent, there has to be faith in with whom you are dealing.

Mr. Cheek stated that he was resistant to removal of the condition, as it was a way to compel compliance, and he questioned why the Bank would not be willing to fund the project, if

the Board was willing to provide enough time to secure the seventy five percent and guarantee permits and certificates of occupancy for the seventy five percent.

Mr. Davis advised as to what the Bank would require of the Developer prior to releasing funding, and he stated that it would need to be assured that the Applicant would be able to lease the remaining twenty-five percent.

Mr. Cheek responded that the Applicant would be able to get certificates of occupancy for the remaining twenty-five percent if the Board finds that the Applicant is diligently proceeding with correcting the problem.

Mr. Davis distributed a chart depicting level of basin discharge pre-remediation and post remediation, and Dr. Emerson explained.

A discussion took place, and Mrs. Dix expressed the opinion that the Applicant's situation was different from other projects in that tremendous effort and expense was put forth to remediate the basins and that the developer was actively working to solve the problems so they can continue to develop the site.

Mr. Choyce pointed out that Mr. Filippone was still involved with the process and the recorded Declaration of Covenants and Restrictions for Drainage Structures would be in place even after the basins are accepted.

Mr. Cheek suggested that the Applicant approach the Bank to advise of the Board's concern and report the Bank's response to the Board at the next meeting. Mr. Davis stated that Mr. Cochran has already indicated it is a problem.

Mr. Davis stated that the Applicant was in a very difficult position, as the issue was keeping them from going forward with the project, and that the Applicant was very close to signing the leases and having a ground breaking early next year.

Mr. Wigglesworth announced that there would be a ten minute recess.

After the recess, Mr. Wigglesworth opened the hearing to public comment.

Fred Akers, Administrator for the Great Egg Harbor River Council and Watershed Association was present and commented on the condition of the basins pre-remediation and post-remediation. He noted the improved conditions, and the importance of the basins being maintained so they would continue to function as designed for years to come.

Mrs. Dix moved, seconded by Mr. Choyce, to close the public portion of the hearing. SAID MOTION CARRIED WITH ALL MEMBERS VOTING "AYE", NO "NAY", NO "ABSTAIN".

Mr. Davis stated that he had spoken to KRAVCO's Counsel, Lisa Pliskin, and she indicated that the concept proposed by Mr. Cheek would not be workable from the Bank's perspective.

Mr. Kurtz moved, seconded by Mr. Choyce, to modify Condition of Approval No. 5 to set forth that the "The remediation plan shall be completed and installed prior to the issuance of a Certificate of Occupancy for Phase I." and to delete "and all basins must be functioning per the design of the remediation plan and construction documents.", conditioned upon the submission of a monthly report to the Board's Engineer, setting forth the efforts to collect and analyze basin data and the efforts to design and install remediation technology to bring the basins into compliance with the design standard, to include any additional information requested by the Board's Engineer to assist in the analysis, with the Applicant making periodic informational presentations from time to time to the Board, as may be requested by the Board, to report progress being made.

ROLL CALL VOTE ON THE ABOVE MOTION:

Mr. Adams – Not present.

Mr. Bilicki – Yes. He commented that it was a difficult decision to make, but he respected Dr. Emerson’s credentials and had confidence that the Applicant had the ability to follow through.

Mr. Cain – Not present.

Mr. Cheek – No. He stated that he felt the monthly reports would be useless, as leverage would be lost if the condition is modified, and that it would be costly for the Township if it had to pursue other remedies to correct the problem if the Applicant fails to do so. He stated that he, also, felt the Applicant could have compromised so the Board would have had some type of leverage.

Mr. Choyce – Yes. He commented that it was a difficult decision to make, but he recognized KRAVCO’s willingness to cooperate with Mr. Filippone; KRAVCO’s commitment to the Township; and the fact that it would take a year or so to evaluate the basins, develop a plan and then implement it. He stated he was putting a lot of faith in the testimony by the Applicant and had confidence in Mr. Filippone’s judgment when reviewing the reports.

Mrs. Dix – Yes. She stated that she believed that the Mall has had a long-standing commitment to the Township; that they were doing everything that they could; that time and rainfall would be needed to complete the analysis; and that the Board would be keeping a “hammer” on the Applicant by requiring the monthly reports.

Mr. Kurtz – Yes. He stated that he was voting in favor, because he believed KRAVCO had demonstrated the desire to have all basins functioning properly, based on the testimony provided by the Applicant’s representatives, the Board’s Engineer and the agreement to provide a monthly report.

Mr. Percy – Not present

Mr. Rogers – Not present

Mrs. Tomasello – No. She commented it was not an easy decision to make, and she agreed that a lot of work had been done, but she could not vote yes because of her awareness of problems with basins that do not function properly.

Mr. Wigglesworth – Yes. He stated that KRAVCO had demonstrated due diligence by seeking competent consultants to develop a solution for the problem and he had confidence in Mr. Filippone.

SAID MOTION CARRIED.

Proposed Amendment to Land Use Ordinance – The Board considered Township Committee’s request for a recommendation to amend the Land Use Ordinance to modify Section 203-123 C. Installation of Improvements, to change “certificates of occupancy” to “building permits” and to place time limits with regard to completion of building units within a subdivision.

It was explained that the requirement within Section 203-123 C relates to when the final roadway overlay would be applied, and there had been problems with certain developments that had reached the threshold for the overlay and the Zoning Officer could not issue the Certificate of Compliance because of the requirement, even though the house was ready for occupancy. It had resulted in a hardship for the persons purchasing the houses. The proposal to change the threshold to issuance of the building permit would eliminate the problem because the overlay would need to be applied before the building permit would be issued at ninety percent.

With regard to the recommendation related to time limits for completing the units, Mr. Rosenberger expressed the opinion that it would be outside of the Township’s authority under the Municipal Land Use Law to do so. He pointed out that there were prescribed time limits for both preliminary and final approvals, and provision for extensions of those approvals, and it would be in derogation of the Statute to impose further requirements.

Mr. Cheek moved, seconded by Mrs. Tomasello, to recommend to Township Committee that Article II, Section 203-123 C of the Land Use and Development Ordinance be amended to change “certificates of occupancy” to “building permits”, and to advise that the Board’s Solicitor expressed the opinion that placing time limits on completion of subdivisions would be in derogation of the Municipal Land Use Law. SAID MOTION CARRIED WITH ALL MEMBERS PRESENT VOTING “AYE”, NO “NAY”, NO “ABSTAIN”.

Public Comment – Mr. Wigglesworth opened the meeting to public comment and there was no response.

Mr. Choyce moved, seconded by Mrs. Tomasello, to close the public portion of the meeting. SAID MOTION CARRIED WITH ALL MEMBERS VOTING “AYE”, NO “NAY”, NO “ABSTAIN”.

Adjournment – Mr. Bilicki moved, seconded by Mr. Choyce, to adjourn the meeting. SAID MOTION CARRIED WITH ALL MEMBERS PRESENT VOTING “AYE”, NO “NAY”, NO “ABSTAIN”.

Respectfully submitted,

Nancy Rainbow,  
Planning Board Administrator