



Neighborhoods and Neighbors First!

Colonie Town Hall
534 New Loudon Road
Latham, NY 12110

September 10, 2019

Dear Supervisor Mahan and Town Board Members,

The Town Board has scheduled a public hearing on September 12, 2019 for the purpose of approving an amendment to the Town's Planned Development District Law. The proposed amendment would authorize the Planning and Economic Development Department Director (Director) to solely approve amendments to a Planned Development District (PDD).

Specifically, the proposal provides for ONLY the addition of a new subsection "H" to Section 190-71 of the Land Use Law which is titled "Town Board Action". All other provisions would remain the same. The proposed amendment reads as follows:

"Post Decisions and limitations. After a PDD is approved, any subsequent development proposed which substantially complies with the density, location and uses of the approved PDD shall be administratively reviewed for approval by the Director of the Planning and Economic Development Department without the need for additional public hearing."

Right now, the Colonie Land Use Law requires a two-step process for approval of PDD amendments. First, an applicant must submit a formal application to the Town Board for a referral to the Planning Board as a major site plan review. After its major site plan review, the Planning Board will make findings and recommendations to the Town Board. See Section 190-69, 190-70 and 190-71. The Town Board will then approve or disapprove the PDD amendment request. The proposed amendment would improperly remove town boards from their ability to review the PDD amendment and leave such approval to the sole and non-reviewable discretion of the PEDD Director.

We question the legality of this unusual proposal. New York State Town Law authorizes a town board to legislatively create a PDD under very limited and unique circumstances. Section 261-C of the NYS Town Law prescribes the purpose of a Planned Unit Development District (or Planned Development District) and the procedures for their creation:

Planned unit development district regulations are intended to provide for residential, commercial, industrial or other land uses, or a mix thereof, in which economies of scale, creative architectural or planning concepts and open space preservation may be achieved by a developer in furtherance of the town comprehensive plan and zoning local law or ordinance. A town legislative body is hereby authorized to enact, as part of its zoning local law or ordinance, procedures and requirements for the establishment and mapping of planned unit development zoning districts. (Similar language has been adopted in the Colonie Land Use Law).

A PDD is not depicted on a municipality's initial zoning map; rather, a PDD approval is "an amendment to the zoning ordinance which reclassifies the land in question." See 12 NY Jur2d Buildings Section 247. The approval of a PDD requires town board legislation; such legislation cannot be amended without further legislative action.

Consequently, we doubt that New York State law would permit a non-elected, appointed planning department official to act in lieu of a legislative body and approve PDD's or amendments thereto, as this proposed legislation would allow, since such amendment would affect a local statutory act. In fact, the New York State Attorney General has determined that the only authority to approve a PDD lies with a legislative body or a duly delegated administrative body such as a planning board or commission. See 2012 NY OP. Atty. Gen. No. 1 2012 WL 256202. This carefully circumscribed jurisdiction must extend to PDD amendments, as well. It is no coincidence that an informal survey of the land use codes of other NYS municipalities found no provisions to allow a town department head to amend a PDD with such broad discretionary powers.

This proposal also raises procedural due process and jurisprudence issues and may result in violation of the NYS Open Meetings Law.

Putting aside the questionable legality of this amendment, we note that there have been fewer than 10 requests for PDD amendments. These requests for individual units within a PDD were to allow back decks, a swimming pool, an air conditioning pad and a screened back porch. At first glance these requests appear to be de minimus in nature and characterized by town planning officials as bureaucratic headaches for them and as inconveniences for individual property owners.

However, there is a good reason for requiring these special procedural steps. The initial PDD approval enabled developers to circumvent the Town's duly enacted zoning law and resulted in much greater residential density and otherwise impermissible layouts...along with decreased development costs and increased development profits for the developer.

Indeed, a PDD is such a specialized item that, in granting approval, the Town Board must make specific findings, such as the project's benefits to the community, and impose conditions related to the PDD approval. These findings and conditions must be confirmed by the Town Board when any amendments are approved. It is clearly beyond the authority (*ultra vires*) of a department head to make these findings when NO clear and explicit standards for guidance or review have been provided.

As the Supervisor and Town Board members are well aware, the Town's PDD approval process to date has been controversial and criticized by residents before and during the recent 2019 Comprehensive Plan Review update. Town residents and adjacent homeowners have questioned the actual public benefit of several PDD approvals that allowed greater density and greater negative impact to the adjacent and surrounding neighborhoods than would development permitted under existing zoning.

The 2019 Comprehensive Plan update committed the Town Board to ensure an efficient and fair development approval process that is predictable, transparent, and protective of the Town's environment and the residential character of its neighborhoods. The 2019 update provides that

"The Town's zoning should be refined following adoption of the Comprehensive Plan Update. Reevaluate the Planned Development District (PDD) regulations to ensure that the Town is obtaining desired benefits in return for the development flexibility and higher potential densities that PDDs provide."

It would appear that Supervisor Mahan already agrees that piecemeal amendment carving out Town Board and Planning Board review would be a bad idea:

"This comprehensive plan gives us the opportunity to review the land use laws and make amendments for appropriate changes based on what's good for all, not for any specific group," said Supervisor Paula Mahan during a recent interview. "The fact is that the laws are the laws, the requirements for development, all of that. It's laid out. It's a process."

Times Union July 28, 2019.

We submit that the Town must conduct a full evaluation of the PDD process rather than adopt piecemeal PDD law changes such as this. To do otherwise obviously violates the letter and spirit of the new Comprehensive Plan.

In addition, the language of this amendment leaves way too much room for interpretation. It does not even specify whether any PDD could be amended administratively, or just one with a site-specific amendment application. "Substantially complies" regarding density means what, exactly? Does an application for a second garage on one lot "substantially comply" with the PDD's density? With its use? What about a shed or a chicken coop? In or out? For the director or the Town & Planning Board to determine? A list of administratively approvable amendments would be preferable to this amendment's non-specific and mushy language.

Town Board review of PDD amendments would unquestionably ensure that any amendment is fully compliant with Town Board approval conditions and conducted within a public forum, with due process, and pursuant to the NYS Open Meetings law and General Municipal Law. How can any of these legal requirements be met by an employee out in the "field"?

Finally, we request confirmation regarding whether the Colonie Land Use Law Review committee has reviewed this proposal and made recommendations to the Town Board, and whether the town attorney has prepared a legal opinion regarding the legal sufficiency of this proposed amendment. We ask that response to these questions be made public. We also ask whether this legislation been referred to the Albany County Planning Board pursuant to the NYS General Municipal Law. In the event the town attorney is unable to prepare a legal opinion concerning the legality of this amendment, we ask that the Town Board request a formal opinion from the New York State Attorney General's office before taking further action on this legislation.

In conclusion, we urge the Town Board to proceed cautiously and reject this amendment which will delegate away your legislative duty in this fashion. Piecemeal amendments to the Colonie planned development district law such as this proposal are inconsistent with the full review of this law you specifically enacted in the Town's 2019 updated Comprehensive Plan.

Respectfully submitted,

SAVE Colonie: A Partnership for Planning