

HILL & BARLOW

A Professional Corporation

STEPHEN M. NOLAN
Direct Line: 617-428-3269
E-Mail: snolan@hillbarlow.com

May 29, 1998

BY TELECOPIER (349-4097)

Mr. Paul Hollings
Administrator
Mayor Michael J. Neville Manor
650 Concord Avenue
Cambridge, Massachusetts 02138

Re: MEPA Analysis

Dear Paul:

Following is a description of the MEPA process for your information. The MEPA process begins with the filing of an environmental notification form ("ENF") with the MEPA unit of the Executive Office of Environmental Affairs ("EOEA"). The ENF is a ten-page form appended to the MEPA regulations that is completed by the project proponent. Once the ENF is submitted to EOEA, a notice of availability is published in the Environmental Monitor. The Environmental Monitor is published every two weeks. The ENF must be submitted at least seven days prior to the date of publication of the Environmental Monitor. Accordingly, the time between filing the ENF and publication can range from seven to 21 days. Thereafter, there is a 30-day comment period during which the Secretary of EOEA holds a so-called scoping session with respect to the project. At the end of the 30-day period, the Secretary issues a statement on the ENF that either provides no environmental impact report ("EIR") is required or sets a scope of a required environmental impact report. If no environmental impact report is required, the relevant state agencies may issue permits, approve financial assistance or take other actions.

If an EIR is required, the proponent prepares a draft environmental impact report ("DEIR") for submission to EOEA. This process normally takes two to three months, but may take longer in the case of a complex project. The availability of the DEIR is also published in the Environmental Monitor. Again, the time period from filing the DEIR with the MEPA unit and the publication in the Environmental Monitor is seven to 21 days. After publication, there

HILL & BARLOW

Mr. Paul Hollings
May 29, 1998
Page 2

is a 30-day comment period following by a seven-day period for the Secretary of EOEa to issue a statement on the DEIR. In rare cases, the DEIR is approved by the Secretary. In the remainder of cases, the Secretary makes comments on the DEIR that must be addressed in a final EIR ("FEIR"). The preparation of the FEIR normally takes less time than the preparation of the DEIR; nonetheless, one to two months is usually required to prepare the FEIR. Again, the availability of the FEIR is published in the Environmental Monitor within seven to 21 days after the filing of the FEIR. A 30-day comment period follows, after which the Secretary has seven days to issue a statement on the FEIR. In the normal case, the FEIR is accepted, assuming it has addressed all the comments made by the Secretary on the DEIR.

Once the FEIR is accepted, agencies issuing permits or granting assistance must make so-called Section 61 findings. Such findings are required by General Law, Chapter 30, Section 61 prior to the issuance of a permit or the granting of assistance. The agency must make a finding describing the environmental impact, if any, and must make a finding that all feasible measures have been taken to avoid or minimize the impact. Once the Section 61 finding has been issued, the agency may proceed to grant its permit or other assistance.

An ENF is only required to be filed if a project requires agency action, financial assistance or a permit. For such projects, an ENF must be filed if the project (i) exceeds a categorical inclusion threshold, (ii) exceeds a review threshold with respect to a particular agency permit, (iii) exceeds a review threshold for a particular agency action or financial assistance, (iv) is in a designated area of critical environmental concern ("ACEC") or (v) is subject to a fail-safe determination by the Secretary of EOEa.

The proposed Neville Manor project does not appear to trigger any of the categorical inclusion thresholds set forth in 301 CMR 11.25. The closest applicable categories are the following:

- (18) Construction of 350 or more new residential units.
- (19) Any project providing 1,000 or more new parking spaces; any project generating 3,000 or more new vehicle trips per day.
- (20) Any project entailing demolition of a building, or destruction of an archeological site, listed on the State Register of Historic Places.

The project appears to be safely below all of these limits. Our research at the Massachusetts Historical Commission indicates that Neville Manor is not listed on the State Register of Historic Places.

HILL & BARLOW

Mr. Paul Hollings
May 29, 1998
Page 3

With respect to particular agency permits, there are several of the permits listed in 301 CMR 11.26 that could apply to the Neville Manor project:

- (2) Department of Public Works. Curb-cut permits and other activities pursuant to M.G.L. c.81, ss. 7C and 21 which grant access to a state highway by means of a new or altered driveway servicing:
 - (a) a residential development having 50 or more dwelling units;
 - (b) a non-residential development having 25,000 square feet or more of gross interior space or 200 or more parking spaces; or
 - (c) any project generating 1,000 or more new vehicle trips per day.
 - (5) Executive Office of Environmental Affairs. Approval for conversion of local parkland and open space for which Commonwealth funds have been expended. Release of conservation restriction earlier approved by the Secretary.
 - (6) Metropolitan District Commission. Curb-cut permits and other activities pursuant to M.G.L. c. 92, ss. 33 and 35 which grant access to an MDC highway or parkway by means of a new or altered driveway servicing:
 - (a) a residential development having 50 or more dwelling units;
 - (b) a non-residential development having 25,000 square feet or more of gross interior space or 200 or more parking spaces; or
 - (c) any project generating 1,000 or more new vehicle trips per day.
 - (7) Department of Environmental Quality Engineering
 - (a) Wetlands Thresholds
3. The issuance of a Superseding Order of Conditions permitting any dredging, filling, altering or removal of:
- a. one thousand square feet or more of salt marsh, or five thousand square feet of bordering vegetated wetland;
 - b. five hundred feet or more of bank; or

HILL & BARLOW

Mr. Paul Hollings

May 29, 1998

Page 4

- c. one-half acre or more of any other area subject to the Wetland Protection Act.

- (h) Water Supply Thresholds. Plan approval or permit issuance for any of the following:

- 4. Release of surplus water supply land of two acres or more.

(11) Department of Public Health.

- (a) Certificate of Need for construction of a new health care facility with total project cost (including design, engineering and equipment; excluding land acquisition) of \$10 million or more.
- (b) Certificate of Need for a new long-term care facility having 100 beds or more or for an increase in an existing facility by 100 beds or more.

Again, it appears that the project is below all of the limits or does not require the permits indicated. Our preliminary research indicates that Concord Avenue is a Cambridge city street and the property under development does not abut Fresh Pond Parkway. Accordingly, no state or MDC curb-cut permits are required. No order of conditions is to be sought for filling of bordering vegetated wetland or any other area subject to protection under the Wetlands Protection Act.

As to the release of parkland or open space for which Commonwealth funds have been expended, this does not appear to apply to the project. There are two determinations necessary if the foregoing provision is to apply. First, the land must be considered parkland or open space. Secondly, Commonwealth of Massachusetts funds must have been expended "for" such land. As to the classification of the land, the case of Harris v. Town of Wayland, 392 Mass. 237 (1984) is illustrative. In that case, a question arose about the purpose for which a particular parcel of land was held. The Court looked to the original vote authorizing the acquisition of the property, stating "cases which refer to land acquired by a city or town usually refer to that land as having been acquired for a specific purpose". Id. at 241. The examples given were acquisition of land "for school purposes", "for conservation purposes", "for highway purposes". If we look to Chapter 137 of the 1888 Mass. Acts and Resolves, it is clear that the acquisition of the land around Fresh Pond was "for the purpose of providing a reservoir and storage basin for the said city [of Cambridge] and preserving the purity of the

HILL & BARLOW

Mr. Paul Hollings

May 29, 1998

Page 5

waters to be held in said Fresh pond and distributed therefrom, and protecting and improving the shores and vicinity thereof". The authorization does not refer to the land as being acquired for parkland or open space. There is very little guidance in Massachusetts law regarding the definition of parkland and open space. G.L. Chapter 45, Section 1 defines "park" as including "a city or town common dedicated to the use of the public, or appropriated to such use without interruption for a period of 20 years". Cases regarding the conversion of parkland for other purposes generally relate to land that was unequivocally obtained for park or open space purposes and referred to as such in the grant or taking of the land. None of these words appear in the statute authorizing the taking of land around Fresh Pond. The second prong of the inquiry is whether Commonwealth funds have been expended for the parkland or open space. The applicable provision in the MEPA regulations describes parkland and open space "for which Commonwealth funds have been expended". It is unclear whether this intends to cover financial assistance for acquisition or for improvement and maintenance. Under either definition, however, it does not appear that the site of Neville Manor has been the subject of state expenditures for acquisition or maintenance as parkland or open space. The land was originally acquired by taking by the City of Cambridge, not by The Commonwealth of Massachusetts. I do not have sufficient information to determine whether any Commonwealth of Massachusetts funds were ever expended on the land in question, but given that the land has been the site of the Neville Manor Nursing Home for approximately 70 years, it appears unlikely that the Commonwealth has expended funds on account of such land being parkland or open space.

As to the release of a conservation restriction, such restrictions to be effective must be recorded in the applicable registry of deeds. The title information I have reviewed does not indicate any conservation restriction applicable to the Neville Manor site.

As to the release of water supply land, the analysis is complicated. Although the land surrounding Fresh Pond was originally purchased as water supply land, the State Legislature authorized the City of Cambridge to use a portion of the land for "city home" on April 7, 1925 (1925 Mass. Acts and Resolves, Chapter 225). The 1925 legislation did not identify a specific site, but rather provided that "No lands shall be used for such a site without the approval of the state department of public health nor until plans for the construction of adequate works for the purification or disposal of sewage, drainage or other polluting organic matter, which may be discharged from lands so used, have been submitted to and approved by said department, and provided further that said work shall be constructed and maintained in accordance with plans so approved". At some point subsequent to the enactment of the 1925 statute, the "city home" site was shown on Assessor's Map 266 as the "City Infirmary". This suggests that the City of Cambridge prepared a description of the site for the "city home" subsequent to the

HILL & BARLOW

Mr. Paul Hollings

May 29, 1998

Page 6

1925 enactment and obtained the approval of the Department of Public Health. Thus, although the legislation itself did not describe a specific parcel, the subsequent approval of plans for the "city home" appeared to have contained such a description. Although there has been some suggestion that no specific parcel of land was ever identified as the site for the "city home", it is unlikely that the assessors would have drawn a separate lot description without some basis for doing so. If the "city home" parcel was separately identified, it would appear that the parcel that is the location of the nursing home was long ago removed from the status of water supply land and, pursuant to a legislative enactment, dedicated to the use of a "city home". Although the definition of a "city home" is not self-explanatory, its common meaning would imply a home for the infirm, whether through illness, disability or age. A nursing home and appurtenant assisted living facility would appear to fit within the general meaning of the term "city home". The important fact, however, is not whether the proposed use of the land exactly qualifies as a "city home", but rather that the water supply land was previously authorized by the legislature to be utilized for non-water supply purposes. A redevelopment of the facility would not then be characterized as a release of surplus water supply land, since that release would have occurred at the time of the original change of use of the land to a "city home". Although the April 29, 1992 memorandum of Diane Wynshaw-Boris states that some residual "policing" power may have been retained by the Cambridge Water Board over the site, it does not appear that the site is actually water supply land at this time. Accordingly, I do not believe the proposed groundleasing of the site for redevelopment would constitute a "release of surplus water supply land" within the meaning of the MEPA regulations.

Finally, with respect to the Department of Public Health, there is some ambiguity regarding the Certificate of Need threshold. The number of beds in the nursing facility is to be reduced, but there will be 100 beds in a new building on the site. Nonetheless, it would seem appropriate to categorize this project as the relocation of the existing facility into a new building, rather than the abandonment of a facility and the construction of a new facility. This characterization is consistent with the Certificate of Need filing, which described the basis for the filing as "substantial capital expenditure" rather than "original licensure". Further, the determination of need filing described the estimated capital expenditure as \$7,370,000, less than the \$10,000,000 MEPA threshold. The narrative description contained in the submission is also consistent with the characterization of this as a redevelopment of the existing nursing home, rather than an entirely new nursing home. The fact that the new nursing home building will not be located within the existing building, but rather elsewhere on the site, does not dictate a conclusion that a new facility is being developed. Although there is some ambiguity on the matter, it seems to be the better conclusion that no ENF is required based upon the application for a determination of need.

HILL & BARLOW

Mr. Paul Hollings

May 29, 1998

Page 7

With respect to the review thresholds for agency actions and financial assistance, only one of the categories set forth in 301 CMR 11.27 appears relevant:

- (2) Housing. A project yielding 100 or more new residential units (which may include up to 10,000 s.f. ancillary commercial space), other than through rehabilitation or reconstruction of existing units.

Since the number of new housing units being constructed is less than 100 (the nursing beds are not residential units and are merely being reconstructed on site) this threshold is not exceeded by the Neville Manor project.

As to the category for areas of critical environmental concern, we have determined through research at the MEPA office that there are no areas of critical environmental concern in the City of Cambridge. Accordingly, there will not be automatic ENF jurisdiction as a result of being located in an ACEC.

This leaves the last basis for MEPA jurisdiction, the so-called fail-safe provision. The fail-safe provision states as follows:

- (a) Upon written request by two or more agencies or ten or more persons, or at the initiative of the Secretary, the Secretary may require the submission of an ENF and compliance with other procedures mandated by these regulations for a project which otherwise does not meet review thresholds, where, as the case may be, all necessary permits have not yet been granted, an application for financial assistance has not yet been acted upon, or an agency project has not yet commenced, and the Secretary makes a formal finding that:
1. the project has the potential to cause significant impacts on the environment;
 2. either:
 - a. it was not reasonably possible with due diligence to have foreseen such potential damage when the review threshold covering the project was promulgated,
 - b. the likely damage would be caused by a unique conjunction of circumstances which, taken separately, would not ordinarily cause such damage; or

HILL & BARLOW

Mr. Paul Hollings

May 29, 1998

Page 8

- c. the project requires a permit pursuant to legislation enacted or regulation promulgated after the effective date of these regulations;
3. submission of an ENF and compliance with other procedures mandated by these regulations is essential to avoid or minimize such damage; and
4. requiring an ENF and compliance with other procedures mandated by these regulations will not constitute severe hardship to the proponent.

It is impossible to predict whether the Secretary will attempt to assert fail-safe jurisdiction over the project, but the project does not appear to constitute one that has a potential to cause significant impacts on the environment (see Haley and Aldrich report). Nor does the project appear to constitute one that was not capable of being foreseen when the review thresholds were promulgated or to result in damage from a unique conjunction of circumstances which, taken separately, would not ordinarily cause such damage. The only complicating factor here is the proximity of the project to Fresh Pond. Nonetheless, the provisions of the Wetlands Protection Act and Chapter 91 are designed to avoid impacts on such resources and no permit is required under either of those statutes. Accordingly, the assertion of fail-safe jurisdiction would be extremely aggressive on the part of the Secretary of EOE.

I have also reviewed the proposed new MEPA regulations that are expected to go into effect this summer. The categories for filing an ENF under the new regulations are by and large less stringent than those contained in the current regulations. For instance, there is no trigger for an ENF based on a Certificate of Need. There is, however, one notable exception: an ENF must be filed with respect to demolition of all or any exterior part of any structure listed on the inventory of historic and archeological assets of the Commonwealth. We have determined from the Massachusetts Historical Commission that the property is not listed on the inventory of historic and archeological assets of the Commonwealth. Another change in the new regulations relates to the fail-safe review provisions. Those provisions under the new regulations clearly state that they may be invoked only where there is preexisting MEPA jurisdiction. Thus, it appears even less likely that the Secretary of EOE would attempt to assert fail-safe jurisdiction over the Neville Manor project given the less strenuous jurisdictional thresholds under the new regulations. The transition rules in the new regulations state that they apply to all projects for which no ENF was filed prior to the effective date of the regulations.

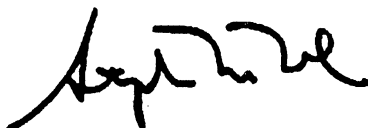
You have also inquired about the applicability of certain regulations adopted by the Department of Environmental Protection relating to water supply land. In particular,

HILL & BARLOW

Mr. Paul Hollings
May 29, 1998
Page 9

310 C.M.R. §22.24 states that "no supplier of water may sell, lease, assign or otherwise dispose of or change the use of, any lands used for water supply purposes without the prior written approval of the Department. The Department will not approve any such disposition or change in use unless the supplier of water demonstrates to the Department's satisfaction that such action will have no significant adverse impact upon the supplier of water's present and future ability to provide continuous adequate service to consumers under routine and emergency operating conditions..." This provision appears to be based upon §15B of G.L. c.40 and related statutory enactments. The applicability of this provision depends upon the effect of the 1925 statute discussed above. The statute authorized a change of use of water supply land to a "city home". If the parcel identified by the Cambridge Assessors was approved as the site of the city home by the Department of Public Health, then I would assert that the current redevelopment does not constitute a change of use. It is interesting to note that even if the redevelopment is considered a change of use, the MEPA threshold relating to water supply land only refers to release of surplus water supply land of two acres or more. A change of use would not fall within this MEPA threshold. Thus, even if DEP approval is necessary on the theory that the redevelopment constitutes a change of use of water supply land, MEPA review would not necessarily be triggered if the above discussion regarding identification of a particular parcel for use as a "city home" is correct.

Sincerely,



Stephen M. Nolan

SMN/bb

cc: Penny Cobey, Esq.
John O'Brien

387709

495

Legal opinion as to whether a Massachusetts
Environmental Policy Act (MEPA) review
of the Neville Manor project is required.