

M E M O

TO: Acme Township Planning Commission, Township staff, consultants

FROM: OLSON, BZDOK & HOWARD, P.C.

DATE: September 24, 2009

RE: Legal parameters for review of VGT Phase I site plan application

Introduction

The rules for reviewing this application are more complex than they would be under typical circumstances. The rules for this project are derived from a combination of requirements from the zoning ordinance, terms of the special use permit, and court orders issued in litigation over this project.

The purpose of this memo is to explain how these different requirements fit together, and to provide a “road map” for review of the application. In general, it can be said that the zoning ordinance sets the baseline rules for review. The SUP, which was originally drafted by Jim Christopherson but substantially re-written by the applicant, modifies certain requirements of the zoning ordinance. The court orders then modify the SUP in certain ways. The result is a project review that looks something like this:

Zoning Ordinance

Sets standards,
process & requirements
Except as modified by

Special Use Permit

Approves some project
features,
restricts authority over
some conditions

Court Orders

Returns to Township
some authority related to
traffic, environmental,
market, and Master Plan

We explain the details below. A checklist for review is found at the end of this memo if you want to skip the detailed discussion. The checklist starts on page 24.

This memo is exempt from public disclosure due to attorney-client privilege. The Planning Commission can waive the privilege and release the memo for public review, if you wish.¹

¹This memo is legal advice to the Township, prepared solely for the Township's use, and if the Township waives privilege this memo should not be construed by anyone else as an admission or waiver on behalf of the Township of any point of law or fact.

Applicable Zoning Ordinance

Like with any project, the starting point is the zoning ordinance. The first question, however, is which zoning ordinance to apply: the zoning ordinance in place in 2004,² when the SUP was signed, or the ordinance in place today, as a result of the 2008 “content-neutral” re-write?

While the Township has some discretion to determine which version to apply, the more cautious answer appears to be the 2004 version of the ordinance. The SUP states:

12.0 APPLICABLE LAWS:

The Project shall be subject to all applicable restrictions and requirements as set forth in the Acme Township Zoning Ordinance of 1979, as amended.

The ordinance in place in 2004 was called the “Acme Township Zoning Ordinance of 1979, as amended.” The content-neutral re-write was not enacted as an amendment to the 1979 ordinance – it was enacted as an entirely new ordinance, the “Acme Township Zoning Ordinance,” in 2008.

It is true that the SUP simply refers to the “Acme Township Zoning Ordinance” in other places:

3.0 EFFECT OF APPROVAL

... The approval of the Conceptual Plan gives the Applicant/Owner the right to develop the Property as set forth in the Conceptual Plan subject to: (1) the terms and conditions of this Special Use Permit; and (2) the requirements of the Acme Township Zoning Ordinance, including the requirements for site plan approval under Section 8.22.6.

11.0 RIGHTS

The rights set forth in this Special Use Permit are in addition to those rights granted to Acme Township and the Applicant by the Township Rural Zoning Act and other appropriate statutes and laws, including the Acme Township Zoning Ordinance. The Applicant agrees that it accepts the conditions imposed under this Special Use Permit.

However, the SUP also refers to certain zoning ordinance sections that were re-numbered in the 2008 re-write (Section 8.22 Mixed Use Planned Development, for example). Therefore, because the reference to the Zoning Ordinance of 1979 is in the SUP section on “Applicable Laws,” and because other references to the zoning ordinance can be interpreted both ways, we believe it would be safest to look to the 1979 version as the governing ordinance for this project.

It is worth asking the applicant if it would consent to use of the 2008 zoning ordinance to process this application. We believe the newer version is more direct and has

²For reference, VGT attached a copy of the earlier version of the zoning ordinance as Tab 20 of the binders.

improved procedures. A short clarifying agreement on the SUP would be all that was needed.

Zoning Ordinance Requirements

The VGT property is zoned R-3, Urban Residential. VGT has an SUP for this property, called a "Special Use Permit - Conceptual Plan Approval."³ The SUP is for a mixed-use planned development, under Section 8.22 of the 2004 version of the zoning ordinance.

Section 8.22 is a planned unit development, or PUD, type of ordinance. A PUD ordinance draws a line around the boundaries of a large parcel, and then says that different rules apply within the parcel's boundaries than in the rest of the zoning district:

SECTION 8.22.3 DIMENSIONAL & USE RESTRICTIONS:

In acting upon an application for a Mixed Use Planned Development, the Township Board may alter and establish lot size limits, required facilities, buffers, open space areas, density limits, setback requirements, height limits, building size limits, off-street parking regulations, landscaping rules, miscellaneous regulations and density and intensity limits where such regulations or changes are consistent with the intent of this section and the standards set forth herein.

The Township Board may also authorize principal and other uses not permitted in the district where the land is located, provided that such are consistent with the intent of this section, the standards set forth herein. Dimensional and parking use restrictions of the underlying zoning shall not apply to the area within an approved Mixed Use Planned Development unless expressly retained in the permit.

Section 8.22.7 of the zoning ordinance says:

SECTION 8.22.7 MIXED USE PLANNED DEVELOPMENT EFFECT: After approval of a Mixed Use Planned Development site plan, the land to which it pertains shall be developed and used in its entirety only as authorized and described in the order approving the Mixed Use Planned Development or only as authorized by the provisions of this Ordinance which would apply if the Mixed Use Planned Development order had not been issued.

The review process for a mixed-use planned development has two steps. Section 8.22.5 of the 2004 zoning ordinance says:

³The Township refers to the SUP for a mixed use planned development as a "conceptual" SUP because one of the requirements to apply for the SUP phase is that a "concept site plan" be submitted.

Procedure:

(1) A Mixed Use Planned Development application shall be submitted to the Planning Commission and Township Board for review and approval following the procedures set forth in Sections 8.1.2(3) and (4).

(2) Upon issuance of a Special Use Permit for a Mixed Use Planned Development, the developer shall request site plan approval for all or any portion of the proposed development prior to the issuance of a Land Use Permit for any construction.

In other words, the first step in review of a mixed use planned development application is review of a special use permit, and the second step is site plan review.

As stated, VGT has an SUP, and is now applying for site plan review for Phase I of the development. Phase 1 is a Meijer store and at least one main road for the development.⁴ To apply for site plan review of any project, the following information is required by Section 8.1.2(2):

(2) Data Required: Every application shall be accompanied by the following information and data:

a. The special form supplied by the Township Zoning Administrator filled out in full by the applicant, including a statement of supporting evidence showing compliance with the requirements of Section 8.1.3.

b. Site plan, plot plan, or development plan, drawn to scale, (preferably 1' - 50') of total property involved showing the location of all abutting streets, the location of all existing and proposed structures and their uses, and the location and extent of all above ground development, both existing and proposed.

c. Preliminary plans and specifications of the proposed development.

d. The Planning Commission and Town Board may require a written Impact Assessment to include the following information:

1. A written description of the environmental characteristics of the site prior to development, i.e., topography, soils, vegetative cover, drainage, streams, creeks or ponds.

2. Types of uses and other man made facilities.

⁴Curiously, Meijer does not appear to be actively participating in the application, based on the materials submitted so far. They are not listed as part of the project team, for example.

3. The number of: People to be housed, employed, visitors or patrons and vehicular and pedestrian traffic.

4. Phasing of the project including ultimate development proposals.

5. Natural features which will be retained, removed and/or modified including vegetation, drainage, hillsides, streams, wetlands, woodlands, wildlife and water. The description of the areas to be changed shall include their effect on the site and adjacent properties. An aerial photo may be used to delineate the areas of change.

6. The method to be used to serve the development with water and sanitary sewer facilities.

7. The method to be used to control drainage on the site and from the site. This shall include runoff control during periods of construction.

8. If public sewers are not available to the site the applicant shall submit a current approval from the health department or other responsible public agency indicating approval of plans for sewage treatment.

9. The method to be used to control any increase in effluent discharge to the air or any increase in noise level emanating from the site. Consideration of any nuisance that would be created within the site or external to the site whether by reason of dust, noise, fumes, vibration, smoke or lights.

10. An indication of how the proposed use conforms with existing and potential development patterns and any adverse effects.

11. Name(s) and address(es) of person(s) responsible for preparation of statement.

12. Description of measures to control soil erosion and sedimentation during grading and construction operations and until a permanent ground cover is established. Recommendations for such measures may be obtained from County Soil Conservation Service.

13. Type, direction, and intensity of outside lighting.

14. General description of deed restrictions, if any.

To apply for site plan review for a mixed-use planned development, the following additional information is also required:

SECTION 8.22.6 SITE PLAN APPROVAL ADDITIONAL REQUIRED INFORMATION: Upon request for site plan approval of all or a portion of a Mixed Use Planned

Development, the applicant shall provide the following information:

- (1) Descriptive site and elevation plans in accord with Section 8.1.2(2) b & c and showing the type, character and proposed use of land and structures within the area of the Mixed Use Planned Development including square feet per unit, floor area for each use type, height of all structures, whether for rent or sale and any other information as required to describe the character of the proposed use or activity.
- (2) A plan identifying the location and type of individual trees of 10 inch diameter one foot off ground or larger, clusters and types of smaller vegetation clusters and types of smaller vegetation.
- (3) A description of all exterior building materials.
- (4) Population profile for the development.
- (5) Proposed financing.
- (6) Impact of development on local streets, natural features, schools and utilities.
- (7) Market and economic feasibility.
- (8) Such other information pertinent to the development or use.

Failure of the applicant to provide such requested information in a timely manner may be grounds for denial of the application.

Site plan review is governed by the standards for reviewing an impact assessment and site plan for a special use permit. (Section 8.1.3(4)). The impact assessment and site plan review standards are:

- (4) Standards for Review: In reviewing an impact assessment and site plan, the Township Board and the Planning Commission shall consider the following standards:
 - a. That the applicant may legally apply for site plan review.
 - b. That all required information has been provided.
 - c. That the proposed development conforms to all regulations of the zoning district in which it is located.
 - d. That the plan meets the requirements of Acme Township for fire and police protection, water supply, sewage disposal or treatment, storm, drainage, and other public facilities and services.

- e. That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.
- f. That natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so indicated on the site plan and at the site per se.
- g. That the proposed development property respects floodways and flood plains on or in the vicinity of the subject property.
- h. That the soil conditions are suitable for excavation and site preparation, and that organic, wet, or other soils which are not suitable for development will either be undisturbed, or modified in an acceptable manner.
- i. That the proposed development will not cause soil erosion or sedimentation problems.
- j. That the drainage plan for the proposed development is adequate to handle anticipated storm water runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.
- k. That grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties.
- l. That structures, landscaping, landfills or other land uses will not disrupt air drainage systems necessary for agricultural uses.
- m. That phases of development are in a logical sequence, so that any one (1) phase will not depend upon a subsequent phase for adequate access, public utility services, drainage, or erosion control.
- n. That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems, and water and sewage facilities.
- o. That landscaping, fences or walls may be required by the Township Board and Planning Commission in pursuance of the objectives of this Ordinance.
- p. That parking layout will not adversely affect the flow of traffic within the site, or to and from the adjacent streets.
- q. That vehicular and pedestrian traffic within the site, and in relation to streets and sidewalks serving the site, shall be safe and convenient.

r. That outdoor storage of garbage and refuse is contained, screened from view, and located so as not be a nuisance to the subject property or neighboring properties.

s. That the proposed site is in accord with the spirit and purpose of this Ordinance, and not inconsistent with, or contrary to, the objectives sought to be accomplished by this Ordinance and the principles of sound planning.

The zoning ordinance contemplates that site plans can be approved, altered through the use of conditions, or denied:

SECTION 8.1.4 APPROVAL CONDITIONS: A site plan shall be approved if it contains the information required by the Zoning Ordinance and is in compliance with the Zoning Ordinance [and] the conditions imposed pursuant to the ordinance, [other township planning documents] other applicable ordinances, and state and federal statutes.

The bottom line is that under the zoning ordinance, after an SUP is granted the Township reviews applications for site plan review under 19 site plan review standards. The standards are phrased in such a way as to give the Township considerable discretion in their interpretation and application. Based on the standards, the Township has the authority to approve a site plan, deny it, or approve it with conditions.

Special Use Permit

The Conceptual SUP was issued in the fall of 2004, and was negotiated between the attorneys for VGT and the prior Township Board. The SUP has a number of provisions that differ from the provisions of the zoning ordinance when it comes to site plan review. Where such differences exist, we recommend following the SUP. This is because the SUP says to do so:

10.0 RIGHTS: The rights set forth in this Special Use Permit are in addition to those rights granted to Acme Township and the Applicant by the Township Rural Zoning Act and other appropriate statutes and laws, including the Acme Township Zoning Ordinance.

Now, the SUP does say the following on page 3:

To the extent that there are conflicts or discrepancies between this Special Use Permit and the documents described above, interpretation shall be based upon the more strict regulation of the Property, and such interpretation shall be subject to the reasonable judgment of the Acme Township Board of Trustees.

However, the “documents listed above” are the attachments to the SUP (concept site plan, design guide, etc.). They do not include the zoning ordinance, and therefore do not affect the conclusion that where the ordinance and SUP are inconsistent, the SUP controls.

The SUP is 23 pages long, and so we only aim to cover the most important provisions here. We break them down into the following categories: design, traffic, environmental, and market.

SUP on Design

One of the issues that has been raised is that of design. As to the commercial portion of the project, there are two main SUP provisions that bear on design. One of these is the paragraph on the mix of uses, which is on page 3:

The Village at Grand Traverse shall contain a mixture of uses consisting generally of those uses described in the Density and Land Use Table, which generally includes retail uses (approximately 775,000 square feet); an area for civic uses to be developed by others (approximately 40,000 square feet); mixed use (approximately 228 units, and 365,000 square feet); a hotel use (approximately 250 units, and 225,000 square feet); and residential uses of various kinds, including single-family housing, row houses, townhouses, senior housing, and multiple-family housing (with a total of approximately 796 units).

You can see that the SUP prescribes the total square footage of each use type before any site plan is submitted or approved. Therefore, in the absence of any modifications by the court proceedings, it would be hard to argue that the Township could impose a condition on the project that would change the mix of uses.

As to how these uses are designed, the Township potentially has some more leeway. Section 3 of the SUP says:

3.0 EFFECT OF APPROVAL: The current zoning of the Property is R-3. Mixed Use Planned Development is a permitted use of the property in such a district, and on the Property at issue. The approval of the Conceptual Plan gives the Applicant/Owner the right to develop the Property as set forth in the Conceptual Plan subject to: (1) the terms and conditions of this Special Use Permit; and (2) the requirements of the Acme Township Zoning Ordinance, including the requirements for site plan approval under Section 8.22.6.

This section points in two directions. On the one hand, it gives VGT “the right to develop the Property as set forth in the Conceptual Plan.”⁵ On the other hand, that right is “subject to ... the requirements of the Acme Township Zoning Ordinance ...” As noted above, the zoning ordinance gives the Township significant discretion to interpret and apply the site plan review standards, and the authority to approve, deny, or approve with conditions a site plan. So VGT has the right to develop according to the Conceptual Plan, but that right is subject to the Township’s right to approve VGT’s site plans, to deny them, or to impose conditions on them.

⁵The Conceptual Plan is the colored map of the project attached to the SUP, as well as the first map under Tab 2 of the Phase I site plan application binder.

Section 5.9 of the SUP is consistent with this conclusion:

5.9 SITE PLAN REVIEW: Prior to the issuance of any permits for an individual phase, the Applicant must fully comply with the requirements for site plan review under the Acme Township Mixed Use Planned Development Ordinance, Section 8.22 of the Acme Township Zoning Ordinance.

As to the residential component of the project, the SUP already requires that it be re-designed:

5.14. RESIDENTIAL ARCHITECTURE: The Applicant agrees to hire a planner or architect experienced in either neotraditional, traditional neighborhood or new urbanist design to redesign the residential component of the Project. The redesign shall be subject to the approval of the Acme Township Board of Trustees, after review by the Acme Township Planning Commission, which shall occur at site plan approval for the first phase of the project that includes residential uses. The entire area west of the entrance drive and the entire area in the southeast of the Project which is planned as multiple residential shall be redesigned. There will be no reduction of density in the redesign.

Note that VGT is not required to re-design the residential portion of the project until it applies for approval of a phase of the project that includes residential uses. If VGT never builds residential in the project, then it will never have to re-design these areas.

The SUP also requires that VGT submit a manual on architectural standards. This manual is included in the Phase I site plan application. This manual deals with the design of the buildings, and certain features of the areas around the buildings (parking, etc.), but does not deal directly with the design of the overall project. The Township does have authority to review the manual and approve it as part of site plan review.

SUP on Traffic

The SUP contains two sections on traffic. The first, Section 5.6 (Traffic Circulation), addresses roads internal to the development. It primarily deals with ensuring performance by the developer.

The second provision, Section 5.22, deals with the public roads around the development. It is very detailed:

5.22 MARKET, ECONOMIC AND TRAFFIC INFORMATION: During the site plan approval process, Applicant must provide the Acme Township Planning Commission with information on (1) marketing and economic feasibility, and (2) impact of the development on local streets, natural features, schools and utilities. The Applicant has provided Acme Township with a Preliminary Traffic Impact Study Recommendations dated June 7, 2004 by URS. Additional information as suggested or required by the Grand Traverse County Road Commission

and/or the Michigan Department of Transportation ("MDOT") will be required prior to or at the site plan approval stage including, but not limited to:

- (1) Detailed information relating to transportation access interconnections with adjacent properties that have development potential in the future and the estimated decrease in the number of trips onto the public roads.
- (2) Detailed information relating to public and non-motorized traffic facilities to transport persons with alternative transportation and estimated impacts to traffic.
- (3) Detailed information regarding the future impacts, other than the percent of traffic, on Lautner and Bunker Hill Road.
- (4) Detailed information relating to the alternatives of boulevard and fish hooks to eliminate left turns at Lautner Road and/or signalization.
- (5) A complete Traffic Impact Study, as described by the scope presented to MDOT in correspondence dated June 22, 2004 from Gourdie-Fraser ("G FA").
- (6) Detailed information on the individual phases of the development, land uses associated with each phase and projected schedule for each phase's completion. Traffic information should be provided for each phase as well as final build-out, including recommendations for appropriate infrastructure improvements to accommodate the projected impacts.
- (7) Detailed information on the impacts associated with drainage, utilities and other appurtenances within the state highway right-of-way.

The Traffic Impact Study is to be completed prior to any development on the property. To the extent that the Traffic Impact Study concludes that the Applicant's development will result in the need for improvements, the Applicant is willing to accept responsibility for required improvements adjacent to the property which are a direct result of its development and will assist with reasonable monetary contributions toward such improvements, subject to the following conditions:

- (1) Any monetary contributions made by the Applicant for such improvements shall equal not more than the Applicant's proportionate contribution to the need for the improvements consistent with standards applicable to special assessments.
- (2) Other parties whose use contributes to the need for improvements shall be requested to provide monetary contributions in the same manner as the Applicant consistent with standards applicable to special assessments.

(3) The contributions which may be required by the Applicant shall not be affected by whether or not a contribution is in fact made by any other party.

(4) Any disputes between the Applicant and Acme Township regarding monetary contributions shall be addressed by the Acme Township Board of Trustees and shall be subject to judicial review.

Required participation shall meet the standards of the Township Rural Zoning Act and shall be reasonable, not arbitrary, unnecessary or oppressive and must relate to the use of the land.

VGT has submitted an updated traffic study with its Phase I site plan application. The traffic study evaluates existing conditions at M-72 and Lautner Road, and models future levels of service (LOS) at that intersection and at other driveways that VGT proposes to construct into the development. The study models future LOS at these locations at the opening year of each phase of the development, and then at a base year that occurs after the opening year of a phase but before the opening of the next phase. The study recommends improvements to be made at each phase, and models the future LOS with the improvements, and also without the improvements. In some cases the study recommends improvements between the opening of phases, as well. The recommended improvements include traffic signals, additional turn lanes, and additional through lanes.

Speaking very generally, the upshot of the study is that traffic increases with the opening of each phase of the development. The recommended improvements, if made, mitigate some but not all of the impacts of the traffic increases. Then levels of service decline by the next base year, followed by the opening of a new phase and more improvements. Overall, levels of service end up somewhat worse despite the improvements, and much worse if the improvements are not made. There are exceptions to this general characterization.

While several of the site plan review standards in the ordinance address traffic, the SUP arguably limits the Township's ability to impose conditions relative to traffic. This limitation comes in the form of the language about the applicant assisting with reasonable monetary contributions toward improvements recommended by the traffic study, subject to conditions (1) through (4), above. Essentially, those conditions are that VGT pay an amount proportionate to its contribution to the need for the improvements; and that other property owners be requested (but not required) to pay an amount proportionate to their contribution to the need for the improvements. The SUP does not specify who is to be in charge of making the improvements, nor does it specify how the difference will be made up in the event that other property owners choose not to contribute their proportionate share to the improvements. The SUP arguably may not contemplate that a site plan may be denied due to traffic impacts.

Finally with respect to traffic, the SUP contains this section on access to adjacent properties:

5.13 ACCESS TO ADJOINING PARCELS:

Johnson Parcel: The Applicant shall provide an access easement to the property line of the Johnson property. The

Applicant may request a reasonable maintenance agreement from the adjoining property owner.

Gokey Parcel: The Applicant shall provide two access easement connections to connect the Project to the potential future residential development on this parcel. The Applicant may request a reasonable maintenance agreement from the adjoining property owner.

Andres Parcel: The Applicant shall provide for an access easement to this adjoining parcel. The Applicant may request a reasonable maintenance agreement from the adjoining property owner.

TART Trail: Within the Property, the Applicant will provide easements that can be connected to the TART trail system in the future as additional easements can be secured. Additionally, the Applicant, in cooperation with TART and MDOT, shall provide access to the M-72 Right of Way as connection for the TART Trail to the Grand Traverse Resort.

M-72 Corridor Overlay District Ordinance. The Project shall comply with the proposed M-72 Corridor Overlay District Ordinance Landscaping standards as currently proposed.

SUP on Environmental

The SUP contains three provisions related to environmental issues. The first is simply a statement of fact, not a requirement:

5.8 OPEN SPACE: The Acme Township Master Plan has an open space recommendation of twenty percent (20%) to thirty percent (30%) for mixed use projects, which the Applicant must comply with. The Applicant's Conceptual Plan has established this at twenty-five percent (25%) which meets this recommendation.

The second provision requires the use of "innovative techniques" and BMPs for storm water, as well as water quality monitoring in Acme Creek:

5.11 STORM WATER CONTROL AND SURFACE WATER: The Applicant shall use innovative storm water control techniques which shall conform to Best Management Practices to remove sediment, capture nutrients and pollutants, and provide infiltration of the storm water throughout the site. Surface water runoff, road drainage, and properly drainage within the development shall meet the requirements of the Grand Traverse County Soil and Erosion Department and shall be properly maintained by the Applicant. The Applicant also agrees to reasonable monitoring of Acme Creek as a condition of site plan approval.

The third provision requires setbacks from certain features, reiterates the BMPs requirement, and requires an updated wetland delineation:

5.12 ENVIRONMENTAL FEATURE: Applicant acknowledges the existence on the Property of significant environmental features. Consistent with the Mixed Use Plan Development Narrative and the requirements of the Acme Township Planning Commission, these natural features will be preserved as shown on the Development Plan Documents specifically the Acme Creek area shall remain intact (except for a potential linkage to the adjacent Johnson parcel). No structures are to be placed in the floodways and floodplains on the Property. All structures shall be setback no less than 225 feet from Acme Creek, and all detention basins and parking lots shall be placed no closer than 100 feet from the creek. During the public hearing process, issues have been raised about the possible environmental effects of the Project. Prior to or during site plan approval, the Applicant must: (1) verify the use of Best Management Practices according to state and federal laws to minimize the impact of the approved Conceptual Plan on the environment, including Acme Creek; and (2) provide Acme Township with an updated wetland delineation which has been verified by the Michigan Department of Environmental Quality ("DEQ").

SUP on Market

The SUP requires that a market study be provided during site plan review:

5.22 MARKET, ECONOMIC AND TRAFFIC INFORMATION: During the site plan approval process, Applicant must provide the Acme Township Planning Commission with information on (1) marketing and economic feasibility ...

However, the SUP is silent on what is to be done with the market information.

The SUP also requires the applicant to provide detailed information on project phasing:

(6) Detailed information on the individual phases of the development, land uses associated with each phase and projected schedule for each phase's completion ...

However, which components of the project are built during each phase is left to the applicant's discretion:

5.2 PHASING: For each phase of the Project, the Applicant shall submit an application for site plan review, and each phase and each application is subject to the conditions listed in this Special Use Permit and Section 8.22 of the Acme Township Zoning Ordinance. The Applicant shall provide a site plan that illustrates the areas and land uses in each phase of

the project at the Phase One site plan review. The proposed phasing plan submitted by the Applicant at the August 16, 2004 meeting of the Acme Township Planning Commission is attached and incorporated herein as Exhibit "5." The phasing plan may be altered by the Applicant based on market conditions. The Applicant's proposed phasing plan is an estimated plan, which will likely be implemented through several site plan applications under each phase, and the Applicant might make changes to the proposed phasing plan to respond and react to conditions, marketing opportunities, and changes in the economic conditions with regard to the timing of the construction of phases or the staging of the project.

Each phase shall be capable of standing on its own in terms of the presence of infrastructure and open space to be located within such phase, and shall contain the necessary components to insure protection of natural resources and the health, safety, and welfare of users or residents of the project. For purposes of this section, "infrastructure" means roads, entrance ways, parking lots, and spaces, pathways, sidewalks, water lines, sewer lines, landscaping, irrigation, signage, lighting, soil erosion, and sedimentation control, grading, storm water drainage, detention and retention facilities, electric, natural gas, telephone, and any other necessary utilities, but only to the extent such infrastructures are located within the applicable phase or are expressly to serve units or other improvements within the phase.

A phase shall be deemed to be completed for purposes of this section when the site improvements and infrastructure for the phase have been substantially completed and building permits are available for the construction of buildings or homes (or other applicable and approved uses) within the phase. Completion shall not require the sale or lease of the buildings or homes (or residential units).

Court Decisions

In essence, the local trial court found that the SUP provisions just outlined restricted the Township's range of possible decisions, and its authority and discretion under the law, during future site plan reviews. The Court of Appeals reversed the trial court's decision, but explicitly held that the Township would have complete authority over traffic, market, and environmental issues that related to the Township's Master Plan. In this passage from the Court of Appeals decision, the panel summarized the trial court's holding, then discussed the Township's authority vis-a-vis the Master Plan.

The trial court voiced the following concerns with the SUP as granted:

"[T]he SUP as granted strips the Township of meaningful site review and serves merely as a cost allocation

device to lessen the traffic impacts of the project that is approved in all other respects. . . . Traffic, environmental and market studies have been reduced to mere formalities that do not provide the Township authority to rationally and reasonably modify or disapprove the project.

* * *

"The SUP approved by the Township removes the provision recommended by the Planning Commission that would make a traffic study a factor in the overall approval process. Instead, this consideration of traffic has been reduced to a determination of monetary contributions for infrastructure improvements.

"Similarly, the environmental impact is not a factor in approval. . . .

* * *

"[N]othing contained within the SUP as presently issued would provide the Township with the authority to modify or disapprove the project based upon a rational and reasonable assessment of adverse market impact."

However, while the board did make significant revisions to the planning commission's proposed SUP, it is charged with the authority to do so. And we conclude that the final version of the SUP does include "meaningful site review process" because, in addition to specific provisions addressing traffic, the environment, and the market studies, the SUP specifically states that VGT and Meijer are bound, at every phase of the development, by the site approval process set forth in Section 8.22.6 of the ordinance ... [this section was quoted earlier in this memo] ...

Further, although there is no specific language providing for immediate recourse in the traffic, environmental, and market study provisions, VGT and Meijer conceded at oral argument that they are bound by the process set forth above for every site plan application at each phase of the project. Therefore, if the board is not satisfied with the results of the traffic, environmental, or market studies, it has recourse—it can deny site plan approval.

We repeat, the board does have the ability to deny site plan approval if traffic, environmental, or market studies present obstacles to the township's objectives as set forth in the master plan.

On remand from the Court of Appeals, the trial court reinstated the SUP, but with this qualifier:

The SUP should be and hereby is reinstated with the understanding that the Township Board “can deny site plan approval if traffic, environmental, or market studies present obstacles to the township’s objectives as set forth in the master plan.”⁶

Based on these court decisions, the Master Plan has become central to the site plan review process. The simplest and most direct way of following these decisions is to use the above language as an approval standard – one that supplements the site plan review requirements in the zoning ordinance and the requirements and limitations in the SUP.

The Master Plan comes in two parts: an original Master Plan dated 1999 and a Town Center report to the Master Plan dated 2001. For reference, we next point out provisions in both parts of the Master Plan that have relevance to the Township’s objectives relating to traffic, environmental, and market issues. This is not an exhaustive review of the Master Plan’s goals relative to these three topics; it is only meant as a jumping-off point for further study. We recommend that the Planning Commission, with assistance from staff and consultants, should determine which objectives relate to traffic, environmental, and market issues.

The questions for site plan review will then be, does the application meet these objectives? If so, how does it meet them? If not, why not?

Master Plan on Traffic

Original Master Plan

8. Roads within high density districts shall follow mainly a grid system within neighborhoods. State trunklines shall be as intended: roads for through traffic; commercial development along them, except within high density commercial areas, will not be permitted. Road regulating profiles should be developed to provide specific standards for development along highways.

(Page 67, Policies and Actions).

As was stated in the previous section, this plan follows these historic development patterns with the exception that this plan stipulates that high density and intense growth be concentrated in particular areas and that trunklines be maintained for point-to-point transportation not for commercial or other development. Further, access to such trunklines shall be appropriately managed by regulations to ensure they remain aesthetically pleasing while providing the safest, most efficient medium for moving traffic. Future public infrastructure will be developed to service high density areas. Community surveys and various sessions have shown that the majority of Acme Township residents are against a by-pass being built in or passing through the township. The construction of any

⁶February 26, 2009 Order After Appeal from July 6, 2005 Decision & Order.

roadways in the township should be required to meet the goals and policies of the township as enunciated in this plan and other township policy documents.

Such construction should take place to minimize the impact on adjacent land uses, to maintain and establish safe pedestrian and vehicular travel, to enhance efficient traffic flow and to preserve scenic corridors. Studies of the M 72 Corridor indicate the need to regulate access, ridge line development, and general aesthetics of the corridor...

(Page 70, Transportation, Public Facilities and Services).

10. In order to prevent further strip-like development along M 72, that trunkline bearing the majority of current development pressure, design alternatives for future widening shall be considered based upon its impact on traffic flow, safety and adjacent land uses.

Specifically, a divided highway design is encouraged, as it will maintain a safe thoroughfare, with optimal traffic flow, while protecting the visual integrity of the M 72 corridor.

* * *

12. Alternative forms of travel shall be encouraged along the major thoroughfares through the use of separated bicycle lanes, safe pedestrian crossings (use of traffic lights, underpasses, and/or raised medians may be necessary), bus stops or car-pooling areas, and the maintenance of existing railroad infrastructure for future light rail or trail development.

13. Due to the increasing developmental pressure along major thoroughfares, an access management program should be established along those major thoroughfares, whereby specific regulations for shared driveways, service drives and limited access are developed and implemented into the zoning ordinance. Use of the M 72 Access Management Plan, finalized in June of 2001, should be referenced to determine appropriate regulations and management strategies along the M 72 corridor through Acme Township.

(Page 73, Transportation, Public Facilities and Services).

Town Center Report

Why a Traditional Town Center?

Thus far, this report has described what makes a town center a distinctive and memorable place. A town center is not just a place with higher density and a mixture of commercial uses. It must be recognizable as a "town" by following the principles outlined above or variations of them. This approach to planning is sometimes referred to by the terms "new urbanism" or "neo-traditional" planning. Note that architecture is secondary.

Front porches and picket fences may add character, but they are not as important as a pleasant and inviting public realm shaped by well-placed buildings and pedestrian-friendly streets.

Critics have called this approach romantic, nostalgic, or a form of "social engineering." It is none of these; rather, it embodies time-honored development practices that were temporarily discarded during the second half of the twentieth century when maximizing convenience for the automobile became the primary force shaping development patterns. The traditional town form has been rediscovered as we enter the twenty-first century, and many communities have begun to adapt this classic pattern to accommodate the automobile without letting it dominate. Properly implemented, this approach can produce more efficient use of land, less traffic, and more protected open space than conventional suburban development.

(Page 88).

4. The amount of development an area will ultimately receive is a function of market forces, infrastructure, and regulation, in that order of importance. Market forces are shaped by major road infrastructure decisions made elsewhere. These decisions will increase traffic in the M-72 corridor. As M-72 becomes the primary entry into Traverse City, the center of gravity for regional development is likely to shift from Garfield Township to Acme. This effect will be intensified if M-72 is widened to four lanes from Acme to Grayling, as currently planned by the Michigan Department of Transportation (MDOT).

(Page 90).

A re-design of Lautner Road could make it an inviting entryway into the town center rather than a high-speed access road. Most of it would be lined with shop fronts, sidewalks, and street trees in the same manner as Main Street. This can be done with appropriate street design and traffic signals.

M-72 itself would remain a relatively high speed road, although the traffic would be slowed down by a light at Lautner Road and at least two other entrances into the town center from M-72. A green corridor of trees and shrubs would be planted along M-72 that would show just enough of the town center to be intriguing from M-72, but not enough to make M-72 a visual presence in the town center. Slowing the traffic between Lautner Road and Route 31 will result in less noise impact from M-72 than if the traffic went speeding through unimpeded. Additional calming of the impacts created by a high traffic volume could be accomplished through the re-design of M-72 into a boulevard style street. This would allow for safe ingress and egress to and from the Town Center, and allow for a safer pedestrian crossing of M-72.

(Page 96).

Roads

The kinds of streets and alleys found in a traditional town center often do not comply with County street specifications, which are typically oriented toward suburban types of development. No traditional town center can work effectively unless its street system follows the norms of traditional town design, including low design speeds for cars (typically 20 mph), narrow streets and alleys (all in public ownership), wide sidewalks, street trees, on-street parking, pedestrian crosswalks, a variety of additional "traffic calming" measures, and small curb radii at intersections. These design practices are generally not encouraged or permitted by existing street specifications. A large development anywhere in this area will have significant impacts on M-72, U.S. 31, and the local road system. However, traditional town centers, especially larger ones, tend to generate fewer and shorter car trips per household or workplace than the same amount of development scattered in a sprawl pattern. The addition of a connecting road through the Johnson property should reduce the traffic impact of the development on the main intersection between U.S. 31 and M-72.

(Page 101).

Master Plan on Environmental

Original Master Plan

Nothing is more clear from the surveys, visioning sessions, and the opinions expressed during the meetings of this planning process than the importance of the preservation, and even restoration, of the natural terrain of the township. The condition of Grand Traverse Bay and the creeks and streams, which as we have seen have been degraded in some areas and threatened in others, is directly dependent upon the actions that are occurring in their watersheds. In a broad sense, the preservation of the landscape entire [sic] is of paramount concern to Acme Township residents. The balance of farmland, forests, wetlands, creeks, and streams, the Grand Traverse Bay, its urban areas, and even the fallow fields, is what defines the township and the area for most citizens and visitors alike and also provides the underpinnings for the township's economy.

(Page 55).

North of [the Mitchell Creek Watershed] is the Acme Creek Watershed, the largest watershed in the township, with much of its headlands in the Pere Marquette State Forest of East Bay and Whitewater Townships. The Acme creek system,

which is replenished by ground water in various locations, is designated by the Michigan Department of Natural Resources as a cold water trout stream. It supports a strong diversity of plant and animal life. Dominant fish species are coho salmon, brown trout, rainbow trout and mottled sculpin. Macroinvertebrate species are strongly represented throughout the creek system except at specific sites where sand loading has blanketed stone and woody debris. Most of the southern portion of the watershed is undeveloped. This area supports a large diversity of wetland and drought tolerant plant species. Steep slopes in this area provide impressive views of East Bay. The forested area at the southern headwaters in the south central area of the township is referred to by locals as "the gorge" and is prized for its unspoiled primeval likeness. Here, at least three springs connect to establish the main branch. The creek runs through the old Acme Village area and then enters the Grand Traverse Bay.

(Page 39).

The fish and macroinvertebrate communities of Acme Creek are typical of small coldwater, coastal streams within the Northern Central Hardwood Forest Ecoregion. The multiple brown trout age classes captured during our survey indicates that Acme Creek is providing the necessary minimum requirements of food, shelter, and spawning areas. No nuisance algae or plant growth problems were observed during our August survey. Physical habitat conditions were being adversely impacted by sedimentation from nonpoint sources such as subdivision development and streambank instability problems in the village of Acme.

(Page 42, quoting Acme Creek Watershed Planning Project Report by the MDNR).

Town Center Report

Impervious surface coverage controls serve two important purposes. In conjunction with height limits, they cap the total amount of floor space that can be built, limiting the amount of total building that can occur. Environmentally, controlling impervious surface also plays a key role. Numerous watershed studies, including those done for the Acme and Yuba Creek watersheds (see Mapping Impervious Surface Coverage for Watershed Monitoring and Land Use Planning, a publication of the Grand Traverse County GIS Department and the Drain Commissioner's Office), indicate that water quality in a watershed declines dramatically when the amount of impervious surface coverage reaches between 10 and 20 percent. This is because at higher percentages, stormwater runs off-site in greater quantities and at faster rates, picking up pollutants and sediment and carrying them into streams.

(Page 99).

Master Plan on Market

Original Master Plan

Acme Township residents cherish above all the natural and scenic qualities of their community, especially those of East Grand Traverse Bay, its streams, and other wetlands, and feel a strong attachment to the farms, orchards, forests and lakes which predominate the landscape of the township. From the surveys and other planning exercises it is apparent that most residents wish to see an Acme Town Center developing where commercial, civic, and residential structures may be well combined to provide the community with an active and vital center; and most want to see a measured and ordered increase in the amount, diversity, and richness of the community as a whole, while preventing the diminishment of the countryside and not allowing the township to submit to disorganized and senseless sprawl.

(Page 50).

Town Center Report

Limiting Township Build-out While Saving Open Space Resources

A major issue that must be addressed at the outset is how the proposed town center would affect the total population growth and "build-out" of the Township. This report assumes that the Township does not want to see more total building as a result of implementing a town center plan. Rather, the goal is a rearrangement of the development that might otherwise occur, so that it is concentrated in one area of the Township rather than scattered all over it. (This is similar to the Grand Traverse Resort concept, in which all of the permitted building on a large property was concentrated into a few small areas, leaving large amounts of land as recreational open space.) Any implementation scheme for this plan should be "build-out neutral" for the Township as a whole, i.e. it should only rearrange, not increase, total building.

(Page 98).

Individual Site Plans vs. the Whole Project

One of the issues that has been raised is what the Township's purview is when it comes to the entire project. This question is raised by the fact that some information in the Phase I application relates only to Phase I, and some information relates to the entire project. For example, information in the traffic study relates both to Phase I and to later phases of the project. Information in the market study relates to both the Meijer store and the lifestyle mall portion of the project. There are overall grading plans and stormwater

plans included for the entire site. The SUP also requires the applicant to provide detailed information on each phase, including land uses and projected schedule for completion.

The answer to the question of the Township's purview over the project has two parts. The first part is that when reviewing the site plan review standards in the zoning ordinance, the Township should apply those standards to the Phase I site plan only, except where the applicant is asking for approval of a component for the whole site. The second part is that when reviewing the Master Plan issues articulated by the Court of Appeals, the Township should look at both the Phase I site plan, and the entire project where it has information relative to the entire project.

That is because the Court of Appeals did not distinguish between a particular phase and the project as a whole – it just said that the Township “can deny site plan approval if traffic, environmental, or market studies present obstacles to the township’s objectives as set forth in the master plan.” Whether the obstacles presented by the studies relate to one phase, or the effect of several phases in combination with each other, is of no moment. The dispositive question is whether the obstacles exist.

Conclusion

This memo is long so as to ensure that we have covered as many bases as possible under the circumstances. We reserve the right to supplement or modify this advice based on new information or further review. A checklist for review according to the discussion in this memo follows on the next couple of pages.

Checklist for Review follows on next page.

Checklist for Review

Step 1: Has all required information been submitted? This includes:

1. General site plan application requirements from Section 8.1 of the zoning ordinance.
 2. Site plan application requirements specific to a mixed-use project, from Section 8.22 of the zoning ordinance.
 3. Information and documents required by the SUP, including the special requirements on traffic and environmental.
 4. Such other information pertinent to the development or use.
-

Step 2: Review the complete site plan application, impact assessment, and studies, and determine whether the application meets each of these standards from the zoning ordinance:

- a. That the applicant may legally apply for site plan review.
- b. That all required information has been provided.
- c. That the proposed development conforms to all regulations of the zoning district in which it is located.
- d. That the plan meets the requirements of Acme Township for fire and police protection, water supply, sewage disposal or treatment, storm, drainage, and other public facilities and services.
- e. That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.
- f. That natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so indicated on the site plan and at the site per se.
- g. That the proposed development property respects floodways and flood plains on or in the vicinity of the subject property.
- h. That the soil conditions are suitable for excavation and site preparation, and that organic, wet, or other soils which are not suitable for development will either be undisturbed, or modified in an acceptable manner.

- i. That the proposed development will not cause soil erosion or sedimentation problems.
 - j. That the drainage plan for the proposed development is adequate to handle anticipated storm water runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.
 - k. That grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties.
 - l. That structures, landscaping, landfills or other land uses will not disrupt air drainage systems necessary for agricultural uses.
 - m. That phases of development are in a logical sequence, so that any one (1) phase will not depend upon a subsequent phase for adequate access, public utility services, drainage, or erosion control.
 - n. That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems, and water and sewage facilities.
 - o. That landscaping, fences or walls may be required by the Township Board and Planning Commission in pursuance of the objectives of this Ordinance.
 - p. That parking layout will not adversely affect the flow of traffic within the site, or to and from the adjacent streets.
 - q. That vehicular and pedestrian traffic within the site, and in relation to streets and sidewalks serving the site, shall be safe and convenient.
 - r. That outdoor storage of garbage and refuse is contained, screened from view, and located so as not be a nuisance to the subject property or neighboring properties.
 - s. That the proposed site is in accord with the spirit and purpose of this Ordinance, and not inconsistent with, or contrary to, the objectives sought to be accomplished by this Ordinance and the principles of sound planning.
-

Step 3: If any of these standards are not met, the Township can deny the application. Or the Township can determine whether there are reasonable conditions that, if imposed and met, would enable the project to meet the standard in question.

* Note that any conditions imposed related to traffic must comply with these requirements of the SUP:

- (1) Any monetary contributions made by the Applicant for such improvements shall equal not more than the Applicant's proportionate contribution to the need for the improvements consistent with standards applicable to special assessments.
- (2) Other parties whose use contributes to the need for improvements shall be requested to provide monetary contributions in the same manner as the Applicant consistent with standards applicable to special assessments.
- (3) The contributions which may be required by the Applicant shall not be affected by whether or not a contribution is in fact made by any other party.
- (4) Any disputes between the Applicant and Acme Township regarding monetary contributions shall be addressed by the Acme Township Board of Trustees and shall be subject to judicial review.

Required participation shall meet the standards of the Township Rural Zoning Act and shall be reasonable, not arbitrary, unnecessary or oppressive and must relate to the use of the land.

Step 4: Determine whether the following requirements from the SUP are met:

5.2 PHASING

5.3 DENSITY AND LAND USE MIX

5.4 AREA, SETBACKS, BUILDING HEIGHT AND OTHER REGULATIONS

5.5 WATER AND SEWER

5.6 TRAFFIC CIRCULATION

5.7 LANDSCAPING

5.10 LIMITATION ON LARGE RETAIL STRUCTURES

5.11 STORM WATER CONTROL AND SURFACE WATER

5.12 ENVIRONMENTAL FEATURE

5.13 ACCESS TO ADJOINING PARCELS

5.15 DARK SKY LIGHT FIXTURES

5.16 ARCHITECTURAL CHARACTER

5.17 MASTER CONDOMINIUM ASSOCIATION BYLAWS

5.18 FIRE PREVENTION

5.19 OUTDOOR STORAGE

5.20 BONDING

5.21 SIGNS

Step 5: Determine whether there are any other applicable requirements from the zoning ordinance that are not already covered by the SUP, and if so, whether they are met. If not met, determine whether you wish to consider conditions that would enable the requirement(s) to be met.

The zoning administrator can likely help you sort through this question.

Step 6: Ask these three questions. These are the big-picture questions that may require the most time, review effort, and discussion.

1. Does information from the traffic studies present obstacles to the following objectives from the Master Plan?

Insert pertinent Master Plan objectives related to traffic here. (See suggestions above).

2. Does information from the environmental studies present obstacles to the following objectives from the Master Plan?

Insert pertinent Master Plan objectives related to environment here. (See suggestions above).

3. Does information from the market studies present obstacles to the following objectives from the Master Plan?

Insert pertinent Master Plan objectives related to market here. (See suggestions above).