



October 22, 2021

**BY ELECTRONIC MAIL: [zoning@topsfield-ma.gov](mailto:zoning@topsfield-ma.gov)  
AND FIRST-CLASS MAIL**

Topsfield Zoning Board of Appeals  
Topsfield Town Hall  
8 West Common Street  
Topsfield, MA 01983

Re: Application for Comprehensive Permit – 57 Perkins Row, Topsfield

Dear Members of the Board:

This Firm represents William and Natalie Whelan (the “Whelans”) of 63 Perkins Row in Topsfield, whose properties abut the proposed 40-unit housing project at 57 Perkins Row (the “Project” and the “Site”), which is the subject of a pending application for a comprehensive permit under General Laws Chapter 40B, Sections 20-23 proposed by Perkins Landing, LLC (the “Developer”). I am writing to respond to John Shea’s comment letter, dated September 22, 2021, which was submitted to the Board on behalf of the Developer.

By way of introduction, I have been practicing wetlands law for 20 years. Over that time, I have represented public and private clients in wetlands-related matters across eastern Massachusetts. I also regularly appear before conservation commissions, handle wetlands appeals before MassDEP, and adjudicatory appeals before the Office of Appeals and Dispute Resolution (“OADR”). I was chair of the Somerville Conservation Commission for 10 years.

**I. The Developer must re-delineate Riverfront Area under the Topsfield Wetlands Bylaw.**

First, all parties agree that there is no binding delineation of Riverfront Area on this Site under the Topsfield Wetlands Bylaw (the “Bylaw”). Page 2 of Mr. Shea’s letter confirms that “[t]he RFA delineation under the Topsfield Wetlands Bylaw... does not enjoy a valid approval.”

Accordingly, the Developer must obtain a new delineation of Riverfront Area under the Bylaw, so the Board can evaluate the extent of Project impacts in this area, and determine whether any requests for waivers from the Bylaw’s Riverfront Area requirements are justified. If the extent of Riverfront Area under the Bylaw is unknown, the Board will not be able to assess the full impact of any waiver, including whether the waiver presents insurmountable public health, safety, environmental or planning impacts that may outweigh the need for housing.

Therefore, the Board should require the Developer to submit a new Riverfront Area delineation under the Bylaw before proceeding with its evaluation of the Project.

## **II. The 2015 Order of Conditions did not approve a Riverfront Area delineation for the Site under the state Wetlands Protection Act.**

The December 18, 2015 Order of Conditions (“OOC”) did not explicitly approve a Riverfront Area delineation for the Site under the state Wetlands Protection Act (the “Act.”) In fact, the OOC is clear that it approved only certain specified work for the 5-lot subdivision proposed by the prior owner of the Site, and nothing else. The OOC’s “Special Conditions Pursuant to the Massachusetts Wetlands Protection Act and Regulations” lists the following “Additional General Condition” in bold on page 19 of the OOC:

- 2. This Order of Conditions (OoC) authorizes ONLY the proposed construction of a subdivision roadway, wetland replication area, constructed pocket wetland, buffer zone restoration, and associated activities, at 57 Perkins Row, Topsfield, as shown on the APPROVED PLAN OF RECORD and related documents, above, filed with the TCC and discussed during the hearing. Any additional activities on the site will need prior review and possibly additional permit(s) from the TCC.**

The Commission’s “Approval” under the Act further clarifies that: “To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.” (OOC, p. 2). This includes condition #2., above. Accordingly, the restriction in condition #2. limiting the Commission’s authorization to only certain proposed construction and wetland replication activities supersedes any inference that the OOC is a blanket approval of every single notation on the plan of record. Accordingly, the 2015 OOC did not approve the Riverfront Area delineation under the Act.

The 2015 OOC also does not incorporate any Riverfront Area delineation under the Act from the May 14, 2015 Order of Resource Area Delineation (“ORAD”) for the Site. The 2015 ORAD did not approve any Riverfront Area delineation under the Act. The 2015 ORAD confirms several resource areas as “Accurate” on the Site, but not Riverfront Area under the Act. Rather, it confirms the Riverfront Area delineation only under the Bylaw, listing as accurate only the:

200-foot Riverfront Area of the Ipswich, where shown on the Plan of Record, marked as “200’ Riverfront Area (3.3 +/- Acres within the Parcel Boundary) (Topsfield By-Law)”

The ORAD further contains a “NOTE” clarifying that: “No other Resource Area boundaries considered with this Abbreviated Notice of Resource Area Delineation or any others that may exist on this and/or any abutting properties are verified with this Order of Resource Area Delineation.” (ORAD, p. 2). Mr. Shea is also in agreement that the ORAD “approved RFA under the Bylaw, but not under the WPA” (the Act). Accordingly, there can be no suggestion that 2015 OOC incorporated or extended any approval of Riverfront Area under the Act from the ORAD, because no such approval was ever granted.

### **III. The status of the 2015 OOC is immaterial, because the Project requires a new Notice of Intent, and therefore, a new Riverfront Area delineation under the Act.**

Finally, it does not matter whether the 2015 OOC has been extended under the Governor's Covid-19 Executive Order 42, or even whether the 2015 OOC approved a Riverfront Area delineation under Act, because the Developer's new Project is so fundamentally different from what was previously approved in the 2015 OOC that a new Notice of Intent is necessary. See MassDEP Wetlands Program Policy 85-4.2. (in determining whether "the requested change is great enough to warrant the filing of a new Notice of Intent or whether it is of a relatively minor nature and can be considered as an amendment to the original Final Order of Conditions .... the issuing authority should consider such factors as whether the purpose of the project has changed, whether the scope of the project has increased, whether the project meets relevant performance standards, and whether the potential for adverse impacts to the protected statutory interests will be increased.... If the determination is made that the project purpose or scope has changed substantially or that the interests specified in the Wetlands Protection Act are not protected, then the issuing authority ... should require the filing of a new Notice of Intent.")

The new Notice of Intent for this Project also cannot incorporate a prior Riverfront Area delineation under the Act, both because: (1) the 2015 OOC did not approve Riverfront Area under the Act, as explained above; and (2) a new Notice of Intent cannot be used to extend wetland boundary delineations in a prior (even unexpired) Order of Conditions for a completely different project. The new Applicant must start afresh.

There is nothing in the Act, the Wetlands Protection Regulations at 310 CMR 10.00 *et seq.* (the "Regulations"), or in MassDEP policy or guidance documents to suggest that a new Notice of Intent can extend wetlands delineations in an Order of Conditions for a completely different project, where the underlying Order of Resource Area delineation has also expired. Notably, Mr. Shea's letter does not cite to any legal precedent, regulation, or caselaw that would suggest otherwise. Pursuant to 310 CMR 10.03(1), it is the Applicant that has the burden of proof that the proposed work complies with the Act and Regulations. Here, the Developer has provided no basis to support the position that a new Notice of Intent can extend a Riverfront Area designation under the Act under the circumstances here.

Such a position would also be contrary to public interest, because wetlands move and change over time – requiring re-delineation to make sure that the public's interests in drinking water supply, flood control, storm damage preventing, and preservation of wildlife habitat (among other interests) are protected. This is why the Act and Regulations limit Orders of Resource Area Delineation and Orders of Conditions to 3 years, with limited opportunities for extensions.<sup>1</sup> Here, the Developer is taking the position that a Riverfront Area delineation from a December 18, 2015 Order of Conditions can be extended with a new Notice of Intent for an entirely different (and more intensive) project, such that any new approval would extend the Riverfront Area delineation an additional 3 years (and perhaps 5 years) from at least 2022 until 2025 – 2027. It is ridiculous to suggest that a wetlands delineation from 2015 could be extended

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<sup>1</sup> Pursuant to 301 CMR 10.05(6)(d): "Except as provided in M.G.L. c. 131, § 40 for maintenance dredging, an Order of Conditions, Order of Resource Area Delineation, or Notification of Non-significance shall be valid for three years

in such a manner until 2027, or even beyond, by filing successive Notices of Intents for completely different projects. This is why projects which change so much that they require a new Notice of Intent must start over with a new wetland boundary delineation, where there is no ORAD in effect for the Site.<sup>2</sup>

Therefore, we respectfully request that the Board require the Developer to file for a new Abbreviated Notice of Resource Area Delineation (“ANRAD”) with the Conservation Commission that re-assesses the Riverfront Area delineations under both the Act and Bylaw before proceeding with any further review of this project.

Thank you for your consideration of these comments.

Very truly yours,

*/s/ Elizabeth M. Pyle*

Elizabeth M. Pyle

cc: Clients  
Paul Haverty, Esq.  
Topsfield Conservation Commission

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<sup>2</sup> The ORAD for this Site expired on May 14, 2018. Mr. Shea confirms the ORAD’s expiration on page 3 of his letter.