



July 27, 2021

**BY ELECTRONIC MAIL: 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, of 63 Perkins Row, Topsfield, a neighbor to the proposed 20-unit housing project at 57 Perkins Row (the “Project” and the “Project 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”) from Medfield, Massachusetts. I am writing to provide the Board with our initial comments, concerns and recommendations for specific steps the Board should take during its public hearing.

I. Introduction

By way of background, I have been practicing land use and zoning law for over 20 years and have represented public and private clients in over a hundred Chapter 40B projects over that time, including defending decisions at the Housing Appeals Committee and in Massachusetts courts. I currently serve as special municipal counsel to several municipalities on Chapter 40B matters.

Probably the most significant function of Chapter 40B is to empower the local zoning board to waive any local bylaw, regulation, policy or procedure that would render the construction of the project “uneconomic.” G.L. c. 40B, §20. Thus, the most important task of the Board’s public hearing is to evaluate the Developer’s waiver requests, and determine whether the public health, safety, environmental or planning concerns presented by those waivers outweigh the regional need for housing (in which case they should be denied).

There is a prevailing myth that local bylaws and regulations do not apply to Chapter 40B projects. This is wrong. Local rules apply to Chapter 40B projects unless the developer can prove that waivers are needed to make the project economically viable, and that the need for affordable housing outweighs the “local concerns” protected by the local bylaws and regulations for which waivers are sought. This balancing test was illustrated in the case of Reynolds v. Stow

Zoning Bd. of Appeals, Appeals Court No. 14-P-663 (Sept. 15, 2015), where the Court ruled that it was “unreasonable” for the zoning board to grant waivers from a local water resource protection bylaw given demonstrated impacts from the 37-unit project’s septic system on nearby private drinking water wells. To put this standard in plain English, the Board need only grant waivers to the extent they are necessary to make the project economically viable, and then only if the waivers do not present insurmountable public health, safety, environmental or planning impacts that outweigh the need for housing.

II. Process Concerns

First and foremost, we are concerned that the Board does not yet have initial reports from its peer review experts on the Project’s critical design issues, specifically, stormwater and wastewater management, wetland impacts, and traffic safety and access. Your public hearing opened on April 27, 2021, and under the Chapter 40B regulations, the Board is obligated to close the hearing within 180 days (October 25, 2021). While this may seem like a long time from now, in my experience these projects typically go through multiple rounds of design iterations and peer review comments. If the Board is only meeting once a month, it will be very difficult to get all of this work done over the next three months.

III. Substantive Concerns

A. The Application is Incomplete.

The application materials submitted by the Developer are woefully inadequate to enable the Board to properly evaluate the Project and the waivers being requested. Most significantly, “blanket” waivers are being requested from the Topsfield Wetland Bylaw and Regulations and the Topsfield Board of Health’s supplemental septic system regulations. These are important regulatory provisions that were adopted to protect sensitive wetland and water resources, which are directly threatened by the development of this Project. No information has been provided by the Applicant to substantiate its waiver requests (e.g., a water budget, habitat evaluation, mass balance analysis, etc.) and it appears based on commentary already in the public record that the delineation of the wetland resource boundaries is materially inaccurate on the Developer’s site plans.

Another notable omission is a Traffic Impact and Access Study (“TIAS”). See, e.g. Topsfield Subdivision Regulations, § 4.3.2. The Project’s sole means of access is off of Perkins Row, a narrow country road with tight corners and limited sight lines. The Project driveway is set back just a few feet from its southerly property boundary, which will inhibit intersection sight distance. There is no data provided on existing travel speeds on Perkins Row, or whether the intersection can accommodate minimum sight distances.

There are no state regulations governing minimum sight distances at intersections, but there are widely-accepted industry standards published in the manual “Geometric Design of Highways and Streets” by the American Association of State Highway and Transportation Officials (“AASHTO”). The Massachusetts Department of Transportation (“MassDOT”) Project

Development and Design Guide, Chapter 3, contains a section on sight distances, and states that project designers should refer to the AASHTO Manual “for the use and calculation of sight distances.” § 3.7 (p. 3-37). The AASHTO standards have been accepted by state Housing Appeals Committee in Chapter 40B appeals as minimum criteria for public safety. See, *Washington Green Development, LLC v. Groton ZBA*, HAC No. 04-09 (Sept. 20, 2005) (a project’s failure to meet minimum AASHTO sight distances represent a “public safety hazard” that, if unmitigated, would outweigh the need for affordable housing).

Finally, your Fire Chief has already raised a concern as to whether the internal roadways, which are design to have 8% grades, will accommodate turning movements for the Town’s ladder truck. Typically, developers will provide computer-generate simulation models, demonstrating that all fire apparatus can navigate the internal roadways without any obstructions. This “swept path” analysis is a requirement under the state Fire Prevention Code. That information has not been provided by the Developer.

We recommend that the Board insist on the Developer providing substantiating data and reports, particularly for its environmental bylaw waivers, and a TIAS conforming to MassDOT’s Project Development and Design Guide. The Developer should also respond to the Fire Chief’s letter, providing a “swept path” analysis as required under the state Fire Prevention Code.

B. The List of Requested Waivers is Inadequate.

The Applicant is inappropriately asking for “blanket” waivers from Topsfield’s Wetland Bylaw and Regulations, Stormwater Management and Erosion Control Bylaw, Scenic Road Bylaw, and Soil Removal Bylaw, as well as the Topsfield Conservation Commission’s soil testing and tree removal policies, the Board of Health’s supplemental septic system regulations, and the Planning Board’s subdivision rules and regulations.

As your Conservation Administrator Heidi Gaffney correctly noted in her memorandum of June 21, 2021; it is an elementary principle of Chapter 40B that so-called “blanket waivers” are not allowed. Further, while the Project is technically not a subdivision in the sense that individual lots are not proposed, Chapter 40B regulations are explicit that “the Board may look to subdivision standards such as requirements for road construction as a basis for project conditions, in which case the applicant may seek waivers from such requirements.” 760 CMR 56.05(7).

Most concerning of the Developer’s omissions is the apparent inaccurate delineation of the Riverfront boundary on its site plans, which would materially affect the viability of the Project. The Ipswich River Watershed Association, Mass Audubon, and the Topsfield Conservation Commission have all questioned the accuracy of that delineation in comment letters to the Board in May and June, 2021. There does not appear to be a dispute at least as to the delineation of the Riverfront under the Wetlands Bylaw, from which a waiver has been requested, but the Applicant has not even shown *that* boundary on its plans, rendering it

impossible for the Board to make an educated judgment as to whether that portion of the Bylaw should be waived.

We recommend that the Board immediately require the Developer to itemize every deficiency with the above-named bylaws and regulations for which it needs a waiver, and require the Developer to justify the need for each waiver.

We further recommend that the Board require the Developer to file an ANRAD application to the Topsfield Conservation Commission for technical review of all wetland jurisdictional boundaries that are applicable to the waivers being sought. The Developer must fund this technical review under G.L. c. 40, § 53G.

We anticipate that we will have many additional comments to make on this application as the public hearing progresses. Thank you for the opportunity to provide comment.

Very truly yours,


Daniel C. Hill

cc: Clients