

September 22, 2021

Robert J. Moriarty, Chair
Topsfield Zoning Board of Appeals
8 West Common Street
Topsfield, MA 01983

Re: Perkins Landing, LLC Comprehensive
Permit Application, Topsfield, MA

Dear Chairman Moriarty and ZBA Members:

On behalf of Perkins Landing, LLC, I submit this analysis and opinion on the regulatory and legal status of Riverfront Area ("RFA") and the 100-foot buffer zone extending on the property from an off-site Bordering Vegetated Wetland ("BVW"). I reviewed in detail all filings with the Topsfield Conservation Commission (the "Commission") made by the former developer and owner, New Meadows Development, LLC, and the Decisions made on those filings by the Commission.

I was engaged by Perkins Landing, LLC, the current owner and Applicant before the ZBA for a Comprehensive Permit, to conduct an independent assessment based on my 39 years practicing wetlands law before Conservation Commissions under the Wetlands Protection Act, M.G.L. c. 131, § 40, the MassDEP Wetlands Protection Regulations, 310 CMR 10.00 (collectively, the "WPA"), and local Wetlands Protection Bylaws (and Ordinances) and implementing Regulations. I represent clients before MassDEP in Superseding Order of Conditions and Adjudicatory Hearing appeals. I also represent clients before the Army Corps of Engineers and U.S. EPA on projects involving the federal Clean Water Act and the Rivers and

Harbors Act. To supplement this brief introduction, I include my resume (Attachment 1). I had no prior relationship with Perkins Landing or the property prior to this recent engagement.

It is my professional opinion that the RFA and the buffer zone to BVW delineations under the WPA on the Notice of Intent plans were reviewed and approved by the Commission, and remain valid and in full force and effect. The RFA delineation under the Topsfield Wetlands Bylaw (the “Bylaw”) does not enjoy a valid approval.

The following text is my detailed analysis that references attached documents. A list of documents is Attachment 2.

1. Order of Resource Area Delineation (“ORAD”)

New Meadows Development filed an Abbreviated Notice of Resource Area Delineation (“ANRAD”) on December 3, 2014 with a plan prepared by the Morin-Cameron Group, Inc. The plan showed Riverfront Area (“RFA”) under the Topsfield Wetlands Bylaw *and* under the Wetlands Protection Act (“WPA”), BVW and the 100-foot Buffer to off-site BVW. The ORAD issued on May 14, 2015 determined as “Accurate” the BVW boundary (as modified), the 100-foot Buffer Zone under the Bylaw, and RFA under the Bylaw. The ORAD curiously does not explicitly deny the delineation of RFA under the WPA. (Attachment 3) The ORAD did **not** determine as “Inaccurate” the boundary to any other resource area (e.g., RFA under the WPA).

The ORAD includes “Findings” and a “Note” that suggests the Commission approved RFA under the Bylaw, but not under the WPA.

FINDINGS: A jurisdictional (Act and Bylaw) Intermittent Stream flows from offsite, to the South/SE through the B/C series wetlands, to offsite. The Topsfield General Wetlands Bylaw (Bylaw) and Regulations definition of “Mean Annual High Water” differs from the MA Wetlands Protection Act and Regulations 310 CMR 10.58

definition; for this ORAD, the Riverfront Area was delineated and verified based on the Bylaw definition. Under the Bylaw, the Buffer Zone is a Resource Area, with functions and values.

NOTE: 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.

New Meadows did not appeal to MassDEP/NERO. The ORAD was recorded in the Registry. The ORAD expired on May 5, 2018. The ORAD was used in preparing the 2015 Notice of Intent (“NOI”).

2. The Order of Conditions

On July 1, 2015, New Meadows filed an NOI under the WPA and Bylaw for a subdivision roadway, wetland replication area and associated activities. The NOI plans showed the Bylaw RFA and Buffer Zone approved in the ORAD, and the same RFA and 100-foot Buffer Zone delineations under the WPA as shown on the ORAD plan. The Commission issued Orders of Conditions on December 18, 2015: one approved the project under the WPA, and the other denied it under the Bylaw. (Attachment 4) The OOC approved the RFA under the WPA as shown on the NOI plans. The duly recorded OOC approval runs with the property.

The denial portion of the OOC under the Bylaw does not discuss any deficiencies concerning the RFA or Buffer Zone to off-site BVW under the WPA. Finding No. 10 merely states the Bylaw defines RFA as 200 feet from mean annual high water. This statement describes a difference in the WPA and Bylaw RFA definitions and is not a finding on the status of RFA in the NOI. In finding No. 11, the OOC denial adopts the ORAD approval of RFA under

the Bylaw and the WPA. Attachment A to Bylaw Denial Order makes two findings concerning RFA. Finding No. 10 provides:

Several definitions in the Bylaw vary from those in the Act and State Regulations 310 CMR 10.00 et seq. In particular and related to this Notice, the Bylaw defines *Riverfront Area* as “the area of land measured horizontally 200 feet from the mean annual high-water line of a perennial river or stream. Mean Annual high Water shall mean the farthest horizontal extent of flooding in an average year. When determining the extent of said flooding, the commission shall employ indicators such as changes to vegetational communities; stain lines on abutments, rocks, trees and culverts; fluvial deposits; changes in slope; bank undercuts; and other easily identifiable indicators of the presence or flow of water. When available from a reliable public source, gauge data may also be used to aid in the determination of the extent of flooding in an average year.”

Finding No. 11 merely repeats language in the ORAD and in Finding No. 11 of the OOC Approval:

An Order of Resource Area Delineation 307-0720 was issued May 14, 2015 under the Act and the Bylaw, verifying Riverfront Area, BVW, BLSF (at elevation 36.5 feet), and Buffer Zone (a Bylaw Resource Area) boundaries.

It is important to note that the denial OOC is based on an alleged failure to establish a basis for approving a Waiver for work in Buffer Zone, a resource area under the Bylaw, and more specifically an incomplete alternatives analysis to justify the Waiver under the Bylaw. The Commission found that the Project fails to avoid or prevent unacceptable significant or cumulative impacts on BVW, Buffer Zone to BVW, and Buffer Zone to a potential vernal pool. The Alternatives Analysis filed by New Meadows to support the requested Waiver for work in BVW (driveway improvements) and in Buffer Zone was deemed inadequate. The Commission found there was no overriding public interest to support granting a Waiver. The denial OOC under the Bylaw was not based at all on RFA. By issuing a denial under the Bylaw, the Commission did not approve the RFA delineation under the Bylaw.

The approval OOC under the WPA was recorded in the Southern Essex Registry. On October 11, 2017, the Commission granted an Extension Permit of the OOC under the WPA until December 8, 2021. (Attachment 5)

The Denial OOC was appealed to Essex Superior Court in 2016.

3. The Bylaw Denial Certiorari Appeal to Superior Court

In 2016, New Meadows filed an appeal of the Denial OOC in Essex Superior Court under Certiorari. There is no trial in this type of proceeding. Review by the Court is of the Administrative Record from the public hearing and Motions for Judgment on the Pleadings with Memoranda filed by the Parties. I reviewed the Memoranda and they understandably do not address RFA, because it was not a basis for the Denial OOC. RFA under the WPA and the Bylaw also were not discussed by the Court in its Decision. (Attachment 6)

4. The OOC Approval under the WPA is still Valid

Local permits in effect during the COVID-19 state of emergency are eligible for tolling under Chapter 53, § 17, of the Acts of 2020 (the “Covid Extension Act”). The Order of Conditions (“OOC”) is a local permit that is eligible for an extension under the Covid Extension Act.

The Covid Extension Act provides as follows (emphasis added):

(a) As used in this section, the following words shall have the following meanings unless the context clearly requires otherwise:

“Permit”, a permit, variance, special permit, license, amendment, extension, or **other approval** issued by a permit granting authority pursuant to a **statute**, ordinance, bylaw, rule or regulation, whether ministerial or discretionary.

“Permit granting authority”, a local, district, county or regional official or a **local**, district, county or regional **multi-member body that is authorized to issue a permit**.

(b) Notwithstanding any general or special law, rule, regulation, charter, ordinance or by-law to the contrary, during the governor's March 10, 2020 declaration of a state of emergency:

(iii) a permit in effect or existence as of March 10, 2020, including any deadlines or conditions of the permit, shall not lapse or otherwise expire and **the expiration date of the permit**, or time period for meeting a deadline or for performance of a condition of the permit, **shall toll during the state of emergency**.

Tolling pauses the running time of the OOC.

In the Governor's Covid-19 Executive Order No. 42 (Order Resuming State Permitting Deadlines and Continuing to Extend the Validity of Certain State Permits), applicable to state permit approvals, the rule for calculating the amount of time left after tolling was to "determine how many days remained as of March 10, 2020 until the approval ... would have expired, and that same number of days will remain as of the date that the state of emergency is terminated." Order No. 42, at ¶ 3. This same calculation rule applies for local permits under the state WPA. There is nothing in the Covid Extension Act that limits the tolling effect only to permits that expired during the State of Emergency; if the permit was in effect or existence, then it gets tolled.

Accordingly, the OOC would be extended under the Covid Extension Act. Applying the rule for calculation for Order No. 42, the new OOC's expiration date should be determined as follows. On October 11, 2017, the Topsfield Conservation Commission extended the expiration date of the OOC to December 18, 2021. The OOC was in existence as of March 10, 2020, when the State of Emergency was issued. As of March 10, 2020, the OOC had 648 days left until its expiration date. Therefore, with tolling, the OOC had 648 days left as of June 15, 2021, when the State of Emergency was lifted. See Covid-19 Order No. 69, at ¶ 3 (terminating state of

emergency at 12:01 am on June 15, 2021). That puts the new expiration date at **March 25, 2023**.

The RFA delineation under the WPA remains valid and in effect.

5. Massachusetts Audubon Claims to ZBA

The June 22, 2021 Audubon comments on the 40B application are fundamentally flawed, and specifically the erroneous allegation that *“the Riverfront Area depicted on the project plans and subject to jurisdiction under the Massachusetts Wetlands Protection Act has not been reviewed or approved by the Topsfield Conservation Commission”* (emphasis added). As described above, the RFA under the WPA was reviewed and approved by the Commission in the OOC. Audubon pivots and argues the Commission did not decide RFA under the ORAD. Audubon fails to recognize that the ORAD expired, and the RFA and Buffer Zone delineations under the WPA were approved in the OOC.

Audubon coyly alleges that the *“unofficial Riverfront Area line depicted on the plan does not appear to be correct”* based on unsubstantiated “visual observations” by persons unknown.

Audubon speculates that:

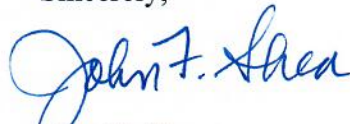
If indeed the 200-foot Riverfront Area is more extensive than the “unapproved” line depicted on project plans, this would place a considerable portion of the area proposed for development within this resource area, possibly exceeding the amount of alteration allowed under the WPA Regulations.

The ZBA should reject the unsubstantiated and incorrect allegations about RFA and the potential impact on the Comprehensive Plan.

Conclusion

It is my opinion that the RFA and 100-foot Buffer Zone to off-site BVW delineations under the WPA were approved in the OOC and remains legally valid.

Sincerely,


John F. Shea

JFS:npr
Attachments (6)

cc: Michael Larkin, Perkins
Ann Marton, LEC