

October 26, 2021

VIA E-MAIL TO M. LARKIN FOR
E-MAIL DELIVERY TO R. MORIARTY

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

Re: Perkins Landing, LLC
Comprehensive Permit Application
57 Perkins Row, Topsfield

Dear Chairman Moriarty and ZBA Members:

On behalf of Perkins Landing, LLC, I submit this response to the October 22, 2021 letter from Elizabeth Pyle, Esq. on behalf of the Whelans.¹ Although I disagree with most of her claims (except those where she agrees with my September 22, 2021 analysis and opinion), I must respond to several of her glaring errors.

I. The December 18, 2015 Order of Conditions (OOC)

1. The OOC approved the subdivision project under the Wetlands Protection Act (WPA). In issuing the approval under the WPA, the Commission approved the wetland resources shown on the NOI plans, including the Riverfront Area shown on the plans. The Commission could not approve the project without approving the RFA delineation shown on the NOI plans. Whether the approval of RFA is “explicit” or “implicit,” it is merely semantics. The

¹ We apologize for this late breaking response, but we received the Pyle letter late Friday, October 22nd, and could not discuss a response with the Applicant until yesterday.

Commission had to approve the RFA, BVW and Buffer Zone delineations under the WPA in order to approve the project. It was New Meadows' prerogative to adopt the RFA delineation under the Act which was not approved in the ORAD. In fact, its decision paid off in the 2015 approval OOC under the WPA.

2. The OOC approval under the WPA was duly recorded in the Southern Essex Registry, and extended by the Commission until December 8, 2021 and the OOC and its RFA delineation runs with the land. It is likely the Applicant will file an NOI with the Commission and the ZBA for the Comprehensive Permit Application. Contrary to Attorney Pyle's claim, the Applicant is entitled to use the unexpired and approved RFA delineation to design and plan for compliance of the new project under the WPA. She does not challenge that the OOC will remain valid under the COVID-19 Executive Order until 2023. It is not "ridiculous" that the wetlands delineations remain valid and extended for use in the new NOI.

Her reference to MassDEP Program Policy 85-4 is misplaced. The policy deals with Amending an Order of Conditions. Whether a new NOI or an amendment to the final OOC is appropriate for project changes, does not require new delineations. Instead, the policy states:

"In making this determination, 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."

The determination made on relevant performance standards and protection of statutory wetland interest is based on the project changes as measured against the final OOC approved delineations of wetland resource areas. The policy does not suggest at all that the delineations should be

revisited in making the determination. Once again, her opinion overreaches and is not supported by law and policy.

Given her claimed practice of wetlands law for 20 years, it is astounding that she cannot (or will not) acknowledge the validity of the 2015 delineations approved in the 2015 OOC as extended, since this is common knowledge in the industry.

II. The RFA under the Bylaw

There is no disagreement that the RFA delineation under the Bylaw was approved under the May 14, 2015 ORAD and it expired on May 14, 2018. However, the RFA Bylaw delineation was adopted again by New Meadows in the 2015 NOI and shown on the Plans. The denial OOC under the Bylaw issued on December 18, 2015 did not rule on the accuracy of RFA under the Bylaw because the Commission denied the project for other reasons unrelated to RFA. It stands to reason that, if the Commission had issue with the RFA boundary (or any other wetland boundaries under the Bylaw), such issues would have been addressed during their review of the 2015 NOI. If not, it stands to reason that such issues would have been included in or formed the basis of the denial. But this is not the case. Instead the Bylaw denial focused solely on the extent and type of work proposed within the Buffer Zone, not the boundaries of any resource areas.

III. The ZBA and Commission Cannot Require the Applicant to File a New ANRAD

It is solely the Applicant's prerogative how to seek review of the WPA and Bylaw RFA. Applicants are not required by law to first use the ANRAD process. Applicants have the option

of seeking approvals of delineations in an NOI. Under 310 CMR 10.05(4)(b)2 of the MassDEP

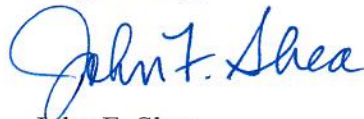
Wetlands Regulations:

To establish the extent of bordering vegetated wetland and/or other resource areas on land subject to protection under M.G.L. c. 131, § 40, applicants **may** use the Abbreviated Notice of Resource Area Delineation for the confirmation of a delineated boundary of bordering vegetated wetlands and/or other resource areas on the site, prior to filing a Notice of Intent for proposed work. Alternatively, the boundary of bordering vegetated wetland or other resource areas may be determined through the filing of a Notice of Intent.

It is my understanding that the Applicant will seek such approvals in an NOI to be filed with the ZBA.

We respectfully request that you reject the positions argued by the Whelans.

Respectfully,



John F. Shea

JFS:npr

cc: Michael Larkin, Perkins
Ann Marton, LEC
Paul Haverty, Esq.
Topsfield Conservation Commission
Elizabeth Pile, Esq., Whelans