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MASSACHUSETTS AND NEW HAMPSHIRE

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MEMORANDUM

Re: Symes Development & Permitting LLC (“Symes”) Application for Definitive Subdivision Approval; 11B, 146B and 1442 Main Street, Concord, MA

The Town Planner’s report to the Planning Board references truck traffic related to earth removal related to the subdivision. Construction truck traffic was also discussed at the October 6th subdivision public hearing.

There are two core questions regarding the subdivision and truck traffic: First, may the Board properly deny this subdivision under the Subdivision Control Law because of the anticipated volume of construction truck traffic on a State roadway (Route 62) when that roadway has adequate capacity? Second, does Section 6.2.2 of the Planning Board’s Rules and Regulation give the Board the authority to deny this subdivision because the current topography of the site requires the removal of earth from the site in order to meet subdivision requirements?

In addressing those questions, it is appropriate to consider the scope of review under the Subdivision Control Law, which is controlling. The Courts have stated that a planning board cannot reject a subdivision plan merely “*because the board feels general public considerations make such action desirable.*”¹ The Appellate Court has stated that “*A planning board does not have a roving commission. The only purposes recognized are to provide suitable ways for access furnished with appropriate municipal utilities, and to secure sanitary conditions.*”² In analyzing the scope of subdivision review, the Appellate Court has also suggested that “*it is helpful to return to the first principles concerning the object of the subdivision control law and the task of planning boards: to ensure, by regulating their design and construction, safe and efficient roadways to lots that do not otherwise have safe and efficient access to an existing public way.*”³

The applicant understands and does not challenge the right of the Board to look at the sufficiency and suitability of off-site streets to accommodate traffic and to provide access for emergency

¹ *Pieper v. Planning Board of Southborough*, 340 Mass. 157 (1959)

² *Sealand Sisters, Inc vs. Planning Board of Weymouth*, 50 Mass. App. Ct. 346 (2000); 1953 House Doc. 2249, the report of the special commission on planning and zoning.

³ *Gates vs. Planning Board of Dighton*, 48 Mass. App. Ct. 394 (2000)

vehicles.⁴ In fact, the Board has the “*duty to evaluate the adequacy of certain roads outside the ... proposed subdivision that would be used for access to the subdivision...*”⁵ The Board has already done that. The Board has engaged a traffic consultant to assess the circumstances and the reports and testimony by the applicant’s traffic consultant. The Board has also heard the traffic consultant state that Route 62 has the capacity to handle not only the traffic from the subdivision but also the temporary construction truck traffic and that there is adequate sight distance.⁶ The applicant submits that the evidence is clear that the roadway over which the trucks would travel is sufficient to safely transport earth removal and other construction traffic. Further, the applicant has worked with the Town police department and has submitted a traffic scheduling and safety plan. The applicant has agreed to have a police detail at the site connection with Route 62 when earth is being removed from the site.

Concord Planning Board Subdivision Rules and Regulations §6.2.2

Statements have been made that section 6.2.2. of the Concord Planning Board Subdivision Rules and Regulations justifies a denial of subdivision approval based on the proposition that due to “adverse topography” the site is “unsuitable for development” because site regrading would result in earth being removed by truck from the site as part of the development process. This seems to be a novel argument and prompts us to ask whether the Board has ever interpreted or applied section 6.2.2 in this way before?

What is “adverse topography” is not defined. The absence of a definition creates a significant ambiguity. Any governmental regulation should have a clear and predictable standard so a party dealing with a governmental authority knows what is expected and that there is equal treatment and due process. The application of a regulation affects property rights.

The applicant respectfully disagrees that the land is *unsuitable* and submits that denying subdivision approval because earth is being moved is an improper application of section 6.2.2 and would expand that regulation beyond the scope of the Subdivision Control Law.

When the Board reviewed the characteristics of this site under a cluster concept and rendered a favorable report, there was no suggestion from the Board that the “*Land [is]... unsuitable for development due to...adverse topography*”. The fact that the clusters development removed less earth or that the cluster development had double the housing density than this subdivision does not change whether the existing physical topography is adverse.

Once the site is developed there will not be any short-term or long-term impacts resulting from “*improper drainage or adverse drainage, adverse topography, poor soils, bedrock, location of utility easements, or other features which the Board has reason to believe would be harmful to the safety, health and general welfare...*”

⁴ *North Landers Corp. vs. Planning Board of Falmouth*, 382 Mass.432 (1981)

⁵ *Rattner vs. Planning Board of West Tisbury*, 45 Mass. App. Ct. 8 (1998)

⁶ Please see also the truck traffic plan and sight distance plan.

Section 6.2.2 states:

Land which the Planning Board finds to be unsuitable for development due to flooding, improper drainage or adverse drainage, adverse topography, poor soils, bedrock, location of utility easements, or other features which the Board has reason to believe would be harmful to the safety, health and general welfare of the present or future inhabitants of the subdivision and/or its surrounding area, shall not be subdivided or developed unless adequate measures are formulated by the subdivider and approved by the Board to eliminate any short-term or long-term impacts created by development of the unsuitable land.

It might be helpful to breakdown section 6.2.2:

<p>Land ... unsuitable for development..."</p>	<p>The land is what must be unsuitable for development, not the nature of construction activities. All of the features described in that section deal with site characteristics that if not remediated, might have a post-development effect, whether short-term or long-term. That is not the case here.</p> <p>What is actually being said by opponents to the project is the reverse of section 6.2.2 in that they do not want the construction truck traffic so the need for that traffic to develop the site makes the site unsuitable.</p>
<p>adverse topography</p>	<p>The term <i>adverse topography</i> is not defined and is ambiguous. There is no defined standard, criteria or guide to apply in evaluating whether the topography is "adverse". Clarity in a regulation is required for due process.</p> <p>No site is perfectly level, so there is always some regrading required to meet required roadway grades and design standards. At what point does topography become "adverse." What is the objective standard?</p> <p>Even if it were appropriate to categorize the site as having an "adverse topography", that is not a fatal condition. It simply mean that there must be adequate measures used to mitigate the effects from that condition.</p> <p>As to the physical act of removing soils from a site, Section 7.5 of the zoning bylaw that</p>

	<p>specifically addresses the control of earth removal off of a site and vests the Zoning Board of Appeals with that authority.</p>
<p>... features which the Board has reason to believe would be harmful...</p>	<p>The regulation is concerned with site “features” that themselves are “harmful”. It does not deal with the alteration process. In fact, if there are unsuitable features, the regulation requires the elimination of those feature, which in this case is re-grading and earth removal.</p> <p>The opponents’ claim is not that the site features would be harmful, but that off-site activities related to changes to those features might be.</p>
<p>... harmful to the safety, health and general welfare of the present or future inhabitants of the subdivision and/or its surrounding area ...</p>	<p>To be harmful to <u>future</u> inhabitants and the surrounding area, the harmful feature (adverse topography) must still be present when the future inhabitants live there. That is not the case here, as to grading is being adjusted in advance.</p> <p>The temporary construction traffic is on public roadways designed for such traffic. If there is adequate roadway design and capacity, traffic volume is not a basis to deny a subdivision. Denying a subdivision in order to prevent traffic on a public way is not a function of the Subdivision Control Law.</p>
<p>... adequate measures are formulated by the subdivider ...</p>	<p>Adjusting the grades eliminates the “adverse topography”.</p> <p>As to adequate measures relating to construction, Symes has submitted an adequate truck traffic and safety plan.</p>
<p>eliminate any short-term or long-term impacts created by development of the unsuitable land.</p>	<p>This language states that if a site condition is unsuitable, the plan must include the elimination of the unsuitable condition. If the claim is made that the adverse topography is what makes the land unsuitable, regrading the site eliminates the short-term and long-term impacts from that condition. The language is clearly intended to deal with the land and the subsequent use of the land being unsuitable, and not to prevent the development process. In our opinion, former</p>

	<p>Board member Matt Johnson was correct when he stated that the section 6.2.2. does not deal with trucking away earth.</p> <p>If the Board concludes that there is “adverse topography” and then prohibits the applicant and owner from addressing that condition, the Board has effectively deprived the applicant and owner of a solution and its as-of-right uses, which results in a confiscation.</p> <p>Denying subdivision approval due to the volume of construction traffic on an adequate State roadway is inappropriate. The authority to prohibit truck traffic from a municipal roadway requires MA DOT approval. That is essentially what the effect would be from a denial based on construction truck traffic. See MASS DOT Standard Municipal Traffic Code, Section 10A-9. The State Code requires that if heavy truck traffic is banned, an alternate truck route must be provided. That is the standard as to road under Town control. Here, we are dealing with a State roadway.</p> <p>Notwithstanding statutory limitations on scope of review under the subdivision Control Law, Symes recognizes the concerns being voiced regarding truck traffic during school transportation hours and has worked with the Concord Police Department to craft a safe trucking plan. The applicant has submitted a truck scheduling and safety plan. The applicant shall use best practice mitigation measures during the construction process.</p> <p>Symes has agreed to have a police detail while earth is being trucked from the site.</p>
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Irrespective of any interpretation of section 6.2.2, Symes has submitted a plan that shows adequate measures to address the earth removal traffic.