July 27, 2020

By EMAIL: grzenda.m@westonma.gov

Weston Conservation Commission
P.O. Box 378
Weston, MA. 02493

Dear Members of the Weston Conservation Commission,

I am writing to you today as a concerned Weston resident regarding a matter of great import to the Town of Weston (the "Town"). The developers of the 40B project at 518 South Avenue, the Hanover Company and Jonathan Buchman (the "Developers"), have submitted a Notice of Intent ("NOI") to the Weston Conservation Commission ("ConCom") to conduct extensive work in sensitive wetlands areas. This 40B project is currently the subject of pending litigation between the Town and the Developers. In addition, the status of the stream on the property is the subject of an appeal before the Massachusetts Superior Court. The Developers are attempting to subvert the required approval process for 40B projects by requesting that ConCom grant an Order of Conditions for a project that has not been presented to the Weston Zoning Board of Appeals (the "ZBA") for either the granting or denial of a Comprehensive Permit. On its face, it belies common sense that ConCom would be required to open extensive hearings now to consider environmental waivers for a 40B project which: 1) has not been presented to the ZBA for a Comprehensive Permit and 2) may be denied or altered substantially during the hearing process when and if the project is presented to the ZBA.

A review of the relevant regulations makes it clear that the Developer's NOI submittal is premature and deficient on its face, and ConCom is not required to open hearings on this NOI at this time. The NOI regulations state specifically that the applicant must have applied for or obtained all permits required for the project before the NOI application is considered complete. The regulations specifically state what this means for a 40B project: "When an applicant for a comprehensive permit (under M.G.L. c. 40B, sections 20 through 23) from a board of appeals has received a determination from the board granting or denying the permit, and in the case of a denial, has appealed to the Housing Appeals Committee…, said applicant shall be deemed to have applied for all permits obtainable at the time of filing." 310 CMR 10.05(4)(e). In this case, the ZBA has not granted or denied the Comprehensive Permit. During the ZBA hearing on August 19, 2019, the ZBA reserved its rights under the 1.5% land use safe harbor. The ZBA then asked the Developers if they wished to proceed with the presentation of their project before the ZBA. The Developers declined to present their project and the ZBA took no further action on their application and specifically did not grant or deny their Comprehensive Permit at that time. In addition, the Developers' NOI does not contain the NDZ Waiver Form which is specifically required as part of the NOI application. Although ConCom is authorized to consider an NDZ Waiver, the Developers refused to submit the form, claiming the Town's ZBA can waive the NDZ under c. 40B. But the ZBA has not granted this NDZ waiver. Therefore, the Developers' NOI fails on its face to comply with two of the stated requirements for an NOI application.

The regulations further provide that the appropriate authority to determine whether an NOI meets the legal requirements for submission is either the Town's ZBA or its Town Counsel. The regulations state: "A ruling by the municipal agency within whose jurisdiction the issuance of the permit, variance or approval lies, or by the town counsel or city solicitor, concerning the applicability or obtainability of such permit, variance or approval shall be accepted by the issuing authority." 310 CMR 10.05(4)(f). The

intent of this regulation is to relieve ConCom of making legal determinations on the obtainability of permits before an NOI application, and as such, ConCom must consult Town Counsel and/or the ZBA to determine the validity of this NOI. If ConCom should decide to proceed with substantive hearings on the NOI at this time, it will effectively waive these procedural precursors for the NOI, and the Developers will have achieved their goal of sidestepping these requirements. ConCom should not waive these important procedural requirements for this project.

The purpose of these procedural regulations is to assure that a project is ripe for consideration before it is presented to ConCom. This project is not ripe for consideration by ConCom because the ZBA has made no determination to either grant or deny the Comprehensive Permit. In fact, the ZBA has taken no action with respect to this Developers' application for a Comprehensive Permit. Clearly the plain language of this regulation is to prevent just this type of situation where a 40B project is presented to ConCom for waivers before the project has been reviewed by the ZBA and the Town's residents. It also goes against common sense that a project which has not been reviewed by the ZBA and, in fact, is the subject of litigation between the Town and the Developers, should be granted an Order of Conditions for construction. This is putting the cart before the horse as this project may be denied outright or altered substantially during the hearing process for a Comprehensive Permit. A commonsense interpretation of these regulations precludes this result and the submission of this NOI by the Developers at this time is simply a ploy to obtain the environmental waivers required to build this environmentally destructive project before the project can come under close scrutiny by the ZBA and Town residents. The Developers are under the mistaken impression that Town residents are not paying attention to this project during the pandemic and I implore you not to give in to the Developers' nefarious tactics.

I understand that Concom may be fearful that by not opening hearings on this NOI within 21 days of the receipt of the NOI (or the later date agreed upon with the Developers), the Massachusetts Department of Environmental Protection ("DEP") will intercede and enter its own Order of Conditions for this project. However, DEP must comply with its own regulations as outlined above. Additionally, the State of Massachusetts is currently under a declared State of Emergency. This State of Emergency precludes any constructive approval. There are other additional reasons that ConCom is NOT required to proceed with these hearings at this time and they have been outlined in the letters to ConCom dated July 10, and July 27, 2020, from attorney Dennis Murphy of Hill Law. Hill Law represents 12 abutters and town residents in this matter.

As stewards of our Town, I urge you to seek advice of Town Counsel before mistakenly opening these hearings to the great detriment of the Town and its residents. It is not difficult to see through the Developers' tactics in this matter. Based on the NOI regulations, you have the legal authority to reject this NOI on its face and for the sake of the Town's future, I implore you to do so.

Respectfully yours,

Lise Revers
4 Deer Path Lane
Weston, MA. 02493

Cc: Members of the Select Board
Leon Gaumond, Town Manager

HILL LAW

July 27, 2020

BY EMAIL: grzenda.m@westonma.gov

Weston Conservation Commission
P.O. Box 378
Weston, MA 02493

Re: Notice of Intent dated June 30, 2020 filed by Hanover Weston for 518 South Avenue

Dear Members of the Commission:

As you may recall, this Firm represents neighbors and abutters to the proposed development project referenced above.[1] This follows up to my letter of July 13, 2020, and responds to Attorney Ward's letter dated July 15, which incorrectly claims DEP regulations require this Notice of Intent ("NOI") hearing to go forward. Under the Wetlands Protection Act ("Act"), an applicant must normally apply for and obtain all approvals required for the subject project under local bylaws. Regulations adopted by the Department of Environmental Protection ("DEP") clarify this prerequisite. Specifically, 310 CMR 10.05(4)(e) states that "[t]he requirement under M.G.L. c. 131, § 40 to obtain or apply for all obtainable permits, variances and approvals required by local by-law with respect to the proposed activity shall mean only those which are feasible to obtain at the time the Notice of Intent is filed."

However, the regulations treat Chapter 40B projects differently, and dispense with the need to make a "feasibility" determination. As applied to Chapter 40B projects, 310 CMR 10.05(4)(e) states:

> When an applicant for a comprehensive permit (under M.G.L. c. 40B, §§ 20 through 23) from a board of appeals has received a determination from the board granting or denying the permit and, in the case of a denial, has appealed to the Housing Appeals Committee…, said applicant shall be deemed to have applied for all permits obtainable at the time of filing.

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[1] Lise Revers, 4 Deer Path Lane, Louis and Rebecca Mercuri, 502 South Avenue, Richard and Barbara Gilman, 15 Winter Street, Fernanda and Martin Boulet, 367 Wellesley Street, Warren and Joan Heilbronner, 3 Briar Lane, John and Victoria Gifford, 68 Nobscot Road, and Julie Hyde, 487 Wellesley Street, Weston, MA

The purpose of this provision is to harmonize the "local approvals" prerequisite with the unique framework of Chapter 40B, where local approvals are subsumed within the Chapter 40B process. The DEP determined that this would be best handled by requiring developers to at least get an up or down vote by the local zoning board on bylaw waivers first, before filing an NOI.

Not only do the regulations dictate this outcome, but good, practical reasons also show why the NOI should await a "determination from the [ZBA] granting or denying the [comprehensive] permit." Often, through the course of permitting and sometimes litigation, projects can change in size, scope and scale. Or even just in particulars, such as the placement of an infiltration basin. That was the case in a similar instance where simultaneous permitting occurred under both zoning and wetlands.

In Bedford, Massachusetts, an applicant elected to proceed with an NOI for a 186-unit 40B project in six buildings before the comprehensive permit became final. The comprehensive permit was appealed to the Housing Appeals Committee, and then to Superior Court. The final comprehensive permit was reduced by thirty units and approved for 156 units in five buildings. In the NOI appeal, even though the project shrank, DEP vacated the superseding order of conditions for the wetland permit because it differed from the final comprehensive permit:

> [T]he fact that the 2008 Project may have less environmental impact than the Wetlands Project does not mean that the 2008 Project complies with the Wetlands Protection Act or that [developer] Princeton should be allowed to "switch" projects after a final wetlands permit has been issued.

In re Princeton Development, Inc., OADR Dkt. No. DEP-07-47, 2008 MA ENV LEXIS 17, at *17 (Sept. 19, 2008).

Finally, Attorney Ward stated in his letter that "a comprehensive permit is not feasibly obtainable" due to the ZBA's invocation of the safe harbor, and therefore the NOI is ripe. As discussed above, whether permits and approvals are "feasible" is immaterial when the project is subject to Chapter 40B permitting. The regulation draws a line in the sand – only when the comprehensive permit has been granted or denied by the ZBA may the NOI be filed. 310 CMR 10.05(4)(e).[2]

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[2] Even if the feasibility of obtaining a comprehensive permit were relevant, it would be up to the ZBA or Town Counsel to make that determination, not the Applicant. 310 CMR 10.05(4)(f) ("A ruling by the municipal agency within whose jurisdiction the issuance of the permit, variance or approval lies, or by the town counsel or city solicitor, concerning the applicability or obtainability of such permit, variance or approval shall be accepted by the issuing authority.")

That process has not yet happened here. On the first night of the Weston Zoning Board of Appeals' ("ZBA") public hearing last year, the ZBA invoked a "safe harbor" under Chapter 40B, which the Applicant elected to appeal rather than continue with the public hearing. Contrary to Attorney Ward's implication, this initial ruling by the ZBA was not a denial, but rather merely notice to the applicant, Hanover Weston, that the ZBA considered the Town to be in "safe harbor" status, which notice is required to be made within 15 days of the opening of the ZBA's hearing under 760 CMR 56.03(8).

Importantly, invoking safe harbor is not the equivalent of a denial. The ZBA may still issue a comprehensive permit after invoking safe harbor - the difference is in what standard of review the ZBA applies to the application. If the ZBA's safe harbor determination is upheld by the Housing Appeals Committee, the outcome is not a denial of the comprehensive permit; rather, the case will be remanded back to the ZBA for further proceedings in accordance with 40B regulations. See, 760 CMR 56.03(8); *In re Bourne ZBA and Chase Developers, Inc.*, HAC No. 2008-11 (June 8, 2009), 2009 MA Housing App. LEXIS 3, at *13.

In summary, DEP's regulations clearly preclude the filing of an NOI at this stage of the permitting of the comprehensive permit application, and the question of whether obtaining the comprehensive permit is "feasible" is irrelevant. The Commission should obtain its own opinion of counsel on this question, and it may be prudent to request an advisory opinion from DEP as well. However, even DEP cannot depart from its own regulatory requirement.

Very truly yours,

Dennis A. Murphy

cc: James Ward, Esq.
Jonathan D. Witten, Esq., Town Counsel
Clients