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May 12, 2021

Via Email

Richard S. Novak, Chairman
Sherborn Zoning Board of Appeals
19 Washington Street
Sherborn, MA 01770

Re: Coolidge Crossing Comprehensive Permit Application
Property at 84-86 Coolidge Street, Sherborn, MA
Response to May 11, 2021 comment letter (Weidemier/Thompson)

Dear Chairman Novak and Members of the Board,

The Applicant is in receipt of the recently submitted comment letter of Jean Weidemier and Jack Thompson, dated May 11, 2021 and the proposed conditioning that the drafters have requested the Board to include within a Comprehensive Permit decision. As more fully set forth below, several of these requests have previously been addressed within the public hearing process; the Applicant is hereby responding directly to each of the proposed conditioning.

1. Restrictions Upon the Emergency Access Road.

A. Baystone Sherborn has agreed that the fire lane to the rear of the property (i.e., beyond Building 3 and its associated parking area) will be restricted to emergency vehicular access. Accordingly, it is amenable to a condition within the Comprehensive Permit consistent with such restriction. Neither the Applicant nor the Zoning Board has the authority to impose a restriction on the property behind 84-86 Coolidge Street and as such, the proposed conditioning to restrict access beyond Baystone Sherborn's property would be inappropriate and invalid.

B. The commenters have further requested the Zoning Board condition issuance of a building permit until a gateway has been installed and secured at Gray Road and at the rear of the Applicant's property. As stated above, the Board cannot impose a condition requiring a gateway at Gray Road as part of the permitting of the Coolidge Crossing project. The Applicant has agreed to install a gate at the rear of its property. The timing of the installation as suggested in the May 11 comment letter, i.e., prior to issuance of a building permit, does not appear necessary given that the Comprehensive Permit would be conditioned in any event to prohibit vehicular use, excepting emergency vehicles.

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2. State Permits/Approvals

The May 11 comment letter requests the Zoning Board to condition the permit approval approvals from a number of identified boards and agencies, some of which are not generally responsible for issuance of permits or approvals (e.g., MWRA Advisory Board/MWRA Board of Directors). The Applicant cannot agree to such language as it would only create confusion in the future.

The comment letter likewise has asked the Zoning Board to condition the Comprehensive Permit and any interbasin transfers such that there be a condition requiring that water and sewer access be extended along Meadowbrook Road contemporaneously with the installation of water and sewer down Coolidge Street. This proposed condition is misplaced on several fronts.

First, the Zoning Board is not authorized to grant or to condition the water and sewer lines, extending from Framingham and Natick, respectively.

Second, the advancement of these water and sewer lines will be undertaken by Pulte, in connection with the state regulatory bodies overseeing such approval as well as the involved municipalities (Framingham, Natick and Sherborn); Baystone Sherborn will tie-into the water and sewer lines, but it is not the entity advancing the construction of the same. The Zoning Board does not have jurisdiction to condition Pulte's permitting actions.

Third, as previously agreed upon by the Applicant, Baystone Sherborn is amenable to an appropriately worded condition in the Comprehensive Permit requiring that applicable state and federal permits and approvals have been received for the project. Typical conditional language is proposed as follows: "The Project shall comply with all applicable state and federal regulations."

Fourth, we are not aware of any discussion among Natick and Sherborn as to the extension of sewer lines; instead, as had been represented by Sherborn Select Board Member, George Morrill, during these public hearings, the Town of Sherborn is seeking to include provisions for possible water line access to the Meadowbrook Road residents in the future should a property owner's well become non-viable. Once again, this is a matter that is subject to the intermunicipal agreements concerning the water lines and is not a matter with which the Zoning Board has jurisdiction in such state/regional matter. The Zoning Board has no authority under Chapter 40B to effectively require the creation of public water and sewer for third parties.

3. Suggestion That Blasting Require Peer Review To Analyze Impacts of Blasting on the General Chemical Plume/Manganese Represents an Improper Condition Subsequent.

The May 11 comment letter recommends that post-comprehensive peer review advance to study impacts of any blasting that may be necessary with respect to the General Chemical plume and/or impacts of manganese on wetlands/local wells. Such post-permit review is not appropriate. While this Board is permitted to designate individuals or municipal departments with appropriate expertise to review various aspects of the project plans for consistency with the comprehensive permit, such as final plans to issue as consistent with the Board's decision, the Board cannot reserve subsequent review for other matters that otherwise would have been addressed within the public hearing. Post-permit peer studies and peer review are known as "improper conditions subsequent" as they require new test results or submissions for peer review after the hearing process has concluded. See Attitash Views, LLC v. Amesbury, No. 2006-17, slip op. at 12 (Mass Housing Appeals Committee, 2007).

As discussed with the Board, the Applicant is proposing that the Coolidge Crossing structures be built slab-on-grade with no basements, and as such the Applicant anticipates little, if any, ledge removal to construct the buildings. Any ledge removal necessary for the installation of on-site infrastructure would also be limited in scope and shallow, if even necessary. The process of blasting is highly regulated in Massachusetts. Blasting contractors are licensed through the Massachusetts Department of Fire Services (DFS) under the Executive Office of Public Safety and Security. The local Fire Department typically issues a Permit to Blast for any blasting work, upon meeting the applicable conditions of 527 CMR 1.00, which includes a requirement for conducting preblast surveys. In accordance with 527 CMR 1.65.9.15 Preblast Inspection Surveys, a preblast inspection survey must be offered when blasting within 250 feet of a structure not owned or controlled by the project, as measured from the closest borehole to the structure. To the extent required for the project, any rock blasting will be performed by a licensed blasting professional, who shall first obtain all required permits from the Sherborn Fire Department. All blasting and removal of debris shall be performed in accordance with state regulations and applicable fire department requirements.

4. Requested Deferment of Construction Until Remediation of General Chemical

The Applicant affirms its previous consent that no construction for the Coolidge Crossing will begin prior to September 2021. While it is understood that the partial remediation work associated with the General Chemical facility, which is scheduled to begin in June 2021, will advance over the summer months, it would be inappropriate for the Zoning Board to restrict construction of the Coolidge Crossing project, or infrastructure related thereto, to the completion of remediation of General Chemical being advanced on behalf of the Massachusetts DEP. Not only is there no established connection between the two sites, but more to the point, there is no existing regulation or bylaw applicable to this request. The Meadowbrook Road commenters instead seek the Zoning Board to impose a requirement on this affordable housing project that is not, nor ever has been, imposed on any other residential project in Sherborn. Chapter 40B prohibits such disparate treatment. As made clear by the Supreme Judicial Court in Zoning Board of Appeals v. Amesbury Housing Appeals Comm., 457 Mass. 748 (2010), "the local zoning board's powers to impose conditions is not all encompassing but is limited to the types of conditions that the various local boards in whose stead the local zoning board acts might impose…" The request made in the May 11 letter that the Zoning Board condition the permit to defer construction until remediation is completed associated with a Chapter 21E site located in Framingham would unduly broaden the Zoning Board's conditioning authority.

5. Request for Permanent Bond Posted by Baystone Sherborn and Pulte Homes.

As stated previously, the Zoning Board has no jurisdiction to impose any conditions upon the 104 Coolidge Street property, which is being advanced as an EA project by a third-party, Pulte Homes.

With respect to the request that the Zoning Board impose a permanent bond on the Applicant, the Housing Appeals Committee has previously confirmed that a Board's imposition of a bond is only permitted if – and when – the bylaws clearly authorize a bond to be imposed. See Wayfinders, Inc. and Fuller Future, LLC v. Ludlow Zoning Board of Appeals, No. 2017-13 (Mass. Housing Appeals Committee, March 2021). Here, the May 11 comment letter suggests that a bond be imposed to protect the Meadowbrook neighborhood from an increase to the water table and/or flooding from Meadowbrook Pond/destruction of property. The commenters cite to no local regulation to support the Board's authority to impose a bond, much less a "permanent bond."

Pursuant to the Chapter 40B regulations at 760 CMR 56.05(5)(b)(4), a fee may only be imposed in compliance with applicable law and the Board's rules. Further, per Section 56.05(5)(a), the Board "should not impose unreasonable or unnecessary time or cost burdens on an Applicant." The request for a permanent bond is both an unnecessary time (i.e., perpetuity) and cost burden that is not supported by any local requirement or regulations. As recently held by the Housing Appeals Committee, "[i]n order to impose a performance guarantee, the Board is required to identify … the local bylaw or regulation that authorizes charging such a fee in this context." Weiss Farm Apartments, LLC v. Town of Stoneham Zoning Board of Appeals, No. 2014-10 (Housing Appeals Committee, March 2021). The request for a permanent bond is much like the performance guarantee at issue in the Weiss Farm matter; where there is no local bylaw or regulation to authorize the imposition of such bond, the Board has not authority to condition a permit subject to such posting of a bond.

Conclusion

We look forward to reviewing these matters this evening with the Zoning Board. It is our intention that all substantive review will be concluded by this evening and that at the close of tonight's hearing, we can coordinate with the Board as to the drafting of proposed findings and conditions for this application.

Regards,
/s/ *Stephanie A. Kiefer*
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