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BY ELECTRONIC MAIL ONLY (MAntonellis@lancasterma.net)

Mr. Michael Antonellis
Planning Director
Community Development and Planning
701 Main Street, Suite 4
Lancaster, MA 01523

Re: George Hill Road - Water Booster Pump Station

Dear Mr. Antonellis,

On behalf of the Board of Appeals, you requested that I review and provide you with my evaluation of the legal arguments raised in two petitions appealing the Building Commissioner's written decisions not to take zoning enforcement action against the construction of a private water booster pump station (the "Pump Station") serving a flexible residential development on Hilltop Road approved by the Planning Board in January, 2016. Specifically, I refer to the appeal filed by Russell Williston (the "Williston Appeal"), and the appeal filed by Larry Shoer and Donald Chaisson (the "Chaisson Appeal"). I will address the claims made in each appeal separately below.

You have provided me copies of the Williston Appeal, the Chaisson Appeal, a flexible development special permit issued on January 11, 2016 referencing and approving a plan entitled: "Definitive Subdivision Plan off Hilltop Road, Lancaster, Massachusetts", by Whitman & Bingham Associates, dated October 6, 2015 (the "Subdivision Plan"), and a certificate of subdivision approval issued by the Planning Board on January 25, 2016 for the Subdivision Plan. You have further provided me with the Permitting Plan for the Hilltop Road Subdivision Booster Pump Station, dated November 2018.

As set forth below, in my opinion, the Building Commissioner acted within his authority and properly interpreted and applied the Zoning Bylaws when he declined to take zoning enforcement action against the construction of the Pump Station. The Building Commissioner properly determined, in my opinion, that the Pump Station met the applicable setback requirement. The Building Commissioner further correctly determined, in my opinion, that the flexible development special permit issued by the Planning Board in 2016 authorized construction of the Pump Station in its present location within open space depicted on the Subdivision Plan, and that no further permits were required under the Zoning Bylaws for that use.

Factual Background

On October 5, 2015 Poras Realty Trust and Wienardward II Realty Trust (the "Applicants") filed a special permit application seeking authorization, pursuant to Section 220-15 of the Zoning Bylaws, for a flexible residential development on two parcels located in the Residential Zoning District together consisting of 35.74 acres of land (the "Development"). As depicted on the Subdivision Plan filed with the special permit application, the Development consisted of thirteen reduced-area building lots on 16.29 acres, and one open space lot with an area of 19.45 acres (the "Open Space"). It appears that at or about that same time, the Applicants also filed an application for approval of the Subdivision Plan under the Subdivision Control Law, and the Planning Board heard both applications together.

Following a public hearing on the special permit and subdivision applications for the Development, on January 11, 2016 the Planning Board issued a decision granting the Applicants' special permit application (the "Special Permit"), and filed the decision with the Town Clerk on January 12, 2016. The Special Permit referenced and approved the Subdivision Plan as the "Flexible Development Plan". Sheet 8 of the Subdivision Plan depicts a "proposed booster pump/lift station to be designed by others . . . prior to the start of construction" located within the Open Space near its frontage on George Hill Road. The plan does not depict the exact location and dimensions of the pump station.

On January 25, 2016, the Planning Board issued a certificate of approval under the Subdivision Control Law approving the Subdivision Plan with conditions (the "Subdivision Approval"). Condition #11 of the Subdivision Approval required construction of a water supply system "sufficient to provide the subdivision with adequate water from the Town of Lancaster municipal water system," and provided that the system be designed and constructed in accordance with further conditions set forth in Addendum A. Paragraph #4 of Addendum A sets forth three options for the required water supply system, two of which require construction of a booster pump station to provide the requisite water pressure. While the options are listed in order of preference, it is clear from the context of the Subdivision Approval, in my opinion, that the permit holder was authorized to choose the appropriate option based on construction costs and legal access to land and utilities.

After construction of the Pump Station commenced, a group of citizens appeared before the Planning Board on November 25, 2019, and December 9, 2019, nearly four years after issuance of the Special Permit and Subdivision Approval, to express their concerns regarding the siting of the Pump Station. The Planning Board received information from the residents and directed them to the Building Commissioner for further action. On December 9, 2019 the Building Commissioner issued a building permit for the Pump Station. On or about December 12, 2019, the Building

Commissioner received two written requests to enforce the Zoning Bylaws relative to the Pump Station. The Building Commissioner responded to these requests by two separate written decisions dated December 17, 2019, in which he determined that no zoning or building violations existed, and declined to take any enforcement action. The Williston Appeal and Chaisson Appeal timely followed.

Williston Appeal

The Williston Appeal challenges the Building Commissioner's determination that the Pump Station is subject to the applicable side yard setback requirement, not a front yard setback requirement. In my opinion, the Building Commissioner acted within his discretion in determining that the frontage for the Open Space parcel on George Hill Road constituted a side or rear lot line, and correctly applied the setback requirements accordingly.

According to the information provided to me, the Pump Station is located 20.7 feet from the sideline of George Hill Road, a minor street in the Town. Pursuant to Section 220-11(A)(1), a lot in the Residential Zoning District that abuts a minor street is subject to a front yard setback of 30 feet from the street sideline, or 55 feet from the street centerline, whichever is more restrictive. Pursuant to Section 220-11(B)(4), the same lot is subject to side and rear yard setbacks of 20 feet. Thus, if the Pump Station were subject to the front yard setback, it would be in violation of Section 222-11(A)(1) by approximately 9.3 feet.

However, the Open Space has frontage on two streets: George Hill Road and Hilltop Road. When a lot has frontage on more than one street, courts look to the relevant definition section of the zoning bylaw to determine whether there is only one front yard, or if the front yard setback is to apply in each instance. See Bell v. Zoning Bd. of Appeals of Cohasset, 14 Mass.App.Ct. 97 (1982). Here, Section 220-3 defines "Lot Line, Front" as: "[a] property line dividing a lot from a street or way. On lots abutting more than one street, the front lot line shall be that so designated by a permit applicant or, if not, **as designated by the Building Inspector**." (Emphasis added).

In his December 17, 2019 decision, the Building Commissioner determined that "[t]he frontage for this subdivision is on Hilltop Road . . ." and that "[t]he water booster structure is located on the side lot line of the subdivision." This constituted the Building Commissioner's designation, in my opinion, of the frontage on Hilltop Road as the front lot line for the Open Space, thereby rendering the remaining lot lines, including the frontage on George Hill Road, side or rear lot lines. Accordingly, he correctly determined that the required setback for the Pump Station from George Hill Road was 20 feet. In my opinion, the Building Commissioner acted lawfully and within his discretion in making that designation, and there are no criteria within the Zoning Bylaws by which the Building Commissioner's decision in that regard may be challenged. Therefore, where the Pump

Station complies with the required side and rear yard setbacks, in my opinion, the Building Commissioner correctly declined to take the zoning enforcement action requested by Mr. Williston.

Chaisson Appeal

The Chaisson Appeal raises two substantive issue. First, it asserts by various arguments that the siting of the Pump Station violated Section 220-15, the Flexible Development Bylaw. Second, it challenges the Building Commissioner's determination that the Pump Station is not required to obtain a separate special permit from the Board of Appeals.

As to the first issue, in my opinion, the Chaisson Appeal constitutes an untimely challenge to the Special Permit, and thus the Board of Appeals lacks jurisdiction to hear and decide the question raised. Massachusetts appellate courts have held that a party with adequate notice of an order or decision must appeal that order within the time provided by law, and cannot sit on their rights while the recipient of a permit incurs substantial expenses, only to have the aggrieved person spring into action later and demand zoning enforcement. See Gallivan v. Zoning Bd. of Appeals of Wellesley, 71 Mass.App.Ct. 850, 857 (2008); see also G.L. c.40A, §17 (judicial review of special permit granting authority's decision shall be the exclusive remedy); Klein v. Planning Bd. of Wrentham, 31 Mass.App.Ct. 777, 778 (1992) (having failed to take a timely appeal from a decision granting a special permit with conditions, an aggrieved party may not later challenge the validity of those conditions or the authority of the special permit granting authority to impose those conditions).

Pursuant to G.L. c.40A, §17, a person aggrieved by a decision of a special permit granting authority may appeal that decision within 20 days of the date the decision is filed with the Town Clerk. Here, the Planning Board filed the Special Permit decision with the Town Clerk on January 12, 2016, and the time to appeal that decision and the interpretation and application of the Zoning Bylaws made therein expired on February 1, 2016. No appeal was filed during that time and thus the matters decided by the issuance of the Special Permit are now closed to further appeal. Those matters include, in my opinion, the siting of the Pump Station within the Open Space, the approximate location of which is clearly depicted on the Subdivision Plan approved under the Special Permit.

As to the second issue, in my opinion, the Building Commissioner correctly found that the Pump Station was an accessory structure to the Development approved pursuant to the Special Permit, and accordingly did not require further approvals for this structure as a separate use of land under the Zoning Bylaws. Accessory structures and uses are those customarily associated with and incidental to a permitted use, and are allowed as part of that use unless the Zoning Bylaws expressly provide otherwise. A private pump station whose sole purpose is to provide potable water to a residential development is plainly a part of and accessory to that residential use. Here, the Special

Permit issued pursuant to the Zoning Bylaws explicitly allows for the use of a pump station to provide water to the Development, thereby confirming the Pump Station as part of and accessory to the permitted use.

The Chaisson Appeal asserts that the Pump Station nonetheless requires a special permit from the Board of Appeals as a separate, distinct use of property. The Appeal does not, however, identify the location of that requirement in the Zoning Bylaws. The Use Regulation Schedule (Section 220-8) sets forth principal uses of property allowed in the Town, and regulates certain accessory uses. Because the Pump Station is accessory to the Development, it does not, in my opinion, constitute a separate, principal use of property that must be set forth in the Schedule as an allowed use. Nor is it one of the types of residential accessory uses regulated in the Schedule. Thus, in my opinion, the Special Permit is sufficient to authorize its construction and use, and the Building Commissioner was correct in so finding.

If you have further questions, please do not hesitate to contact me.

Very truly yours,

Jonathan D. Eichman

JDE/smm
cc: Board of Selectmen (by electronic mail only)

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