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VIA HAND DELIVERY

November 27, 2017

Boxborough Planning Board
29 Middle Road
Boxborough, MA 01719

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PLANNING BOARD
TOWN OF BOXBOROUGH

RE: 700, 750 & 800 Massachusetts Avenue – Site Plan Approval, and Alternate Access Special Permit Application for Applicant Boxborough Town Center, LLC

Dear Chair and Members of the Board:

This Firm represents the group Citizens to Save Our Town Center with respect to the proposed development of the above referenced parcels. They retained us to review the plans, supporting documents, and other salient materials of this Site Plan Application (“Application”). Here are our initial findings and legal observations.

Our main conclusion and request to the Board is to deny this project as proposed for multiple, independent free-standing legal grounds, each of which is sufficient to justify an outright disapproval.

In our opinion, this project is poorly planned and weakly justified. It presents questionable assumptions and a size and density out of scale and out of character of the community. It’s outside the letter and spirit of both the Zoning that the Applicant asserts is frozen by grandfather protection, and the Zoning they are trying to avoid.

I. The Planning Board has Authority to Deny this Application

A planning board may deny site plan approval for a use by right if it doesn’t comply with the standards and criteria of the bylaw. *Goren v. Town of Weston*, 2006 WL 2382744. Further, Boxborough Regulations on Site Plan Approval provide that an appeal of a site plan decision by the Boxborough Planning Board will go directly to court under G.L. c. 40A, § 17.¹

The Planning Board should deny this Application for the (at least) nine independent reasons articulated in this letter, many of which are direct violations of the Boxborough Zoning Bylaw. These include, but are not limited to illegal application and expansion of the 2012 zoning

¹ See Town of Boxborough Site Plan Approval Rules and Regulations, Adopted October 16, 1990, most recent amendment April 11, 2011: “Appeal of a Planning Board decision may be in accordance with MGL Ch. 40A s. 17.”

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freeze, improper setbacks and lack of special permits for water sources, unsafe egress, and the unsubstantiated assumption that Applicant has three legal points of access.

II. Freeze of 2012 Zoning Bylaw Does Not Apply to All Parcels in Site Plan

While Applicant acquired a zoning freeze for the land subject to the December 9, 2013 Definitive Subdivision Plan, this proposed Application includes additional parcels which are not subject to the freeze.² Namely, Parcels A, B, C, and Access Easement C, as shown on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017, are not subject to the 2012 Boxborough Zoning Bylaw (“2012 Bylaw”). This raises serious questions about the legality of the proposed wells, frontage, and easement access the Applicant is trumpeting as valid.

A. No Accessory Structures Or Uses Can Be On Lots Not Subject To The Zoning Freeze

No accessory structures or access to the proposed development can be on land outside the proposed subdivision plan. The structures, frontage, and access points located on Parcels A, C, and Access Easement C³, are prohibited under the Current Zoning Bylaw (“Current Bylaw”) because they are accessory uses to a development which would otherwise be prohibited on those parcels without a Special Permit.

B. Applicant Needs Special Permits to use Wells Located on the Lot Line of Parcel A

The wells on the lot line of Parcel A are not approvable by Site Plan Approval for two reasons. First, the wells do not satisfy setbacks for structures in the Town Center District as outlined in the 2012 Bylaw, and second, because Parcel A is not subject to the 2012 Zoning freeze, accessory uses to ‘two-family dwellings, reserved exclusively for elderly occupancy’ are prohibited without a Special Permit.

Under both the 2012 and Current Bylaw § 2101, an “accessory structure” is a “detached... structure, subordinate to the principal building or use and located on the same lot therewith, the use of which is customarily incidental to the principal building or use.”⁴ A well satisfies the definition of structure as described in 2012 and Current Bylaw § 2108.

The two wells on the lot line of Parcel A are the only water supply source for the proposed development.⁵ Therefore, the two wells on the lot line of Parcel A are accessory structures for the enclave of two-family dwellings, reserved exclusively for elderly occupancy.

²The Definitive subdivision plan filed on December 9, 2013, merged seven parcels into two—those parcels were: 103.1; 122; 125; 126; 127.1; 128; 131.1. The Site Plan Application and subsequent drafts of plans include five parcels—the two parcels created during the subdivision approval, and then three additional parcels, marked on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017.

³ As shown on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017.

⁴ Both the 2012 and Current Zoning Bylaw contain identical provisions.

⁵ See Sheet 2 of 30 of the Site Plan last revised on August 30, 2017; BRP WS-15 Report for Boxborough Town Center, LLC prepared by GeoHydroCycle, Inc., dated January 5, 2017.



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Under Article V of the 2012 Bylaw, § 5001, “No structure shall be...used...except in conformity with the requirements of this section.”⁶ The minimum side setback for a structure in the Town Center District is 20 feet.⁷ The two wells, as accessory structures, do not meet setback requirements for Town Center.

In addition to the defect that the wells don’t meet setbacks of the frozen zoning, the wells straddle an “unfrozen lot.” Parcel A is in the Town Center District and subject to the current Zoning Bylaw. Since Parcel A is subject to current zoning, two-family dwellings reserved exclusively for elderly occupancy and accessory structures are only allowed by Special Permit.

Incidentally, in our experience, it’s bad policy and practice to allow drinking water wells on a property line—even if they’re already there. Among other reasons, the impacts to underground extend off premises; ownership may not be merged as planned; ownership may be split in the future without board review and approval; the Town’s enforcement in the future would be complicated; and so would legal liability of or to the facilities and unit owners if things go wrong.

III. Project Egress is Illusory so Project Should be Denied

There are ample specifics to justify denial of the Site Plan on these particular defects, using documented reasons in the record.

A. Project Egress Does Not Meet Site Plan Standard for Public Safety

The proposed Application does not meet the standard required by the 2012 Bylaw § 8001. The purpose of site plan approval is to promote public health, safety, and welfare. The proposed project, on its face and in its details, does the opposite.

The lack of safe egress to and from the proposed site *facilitates* danger to public health, safety and welfare. The letters and attestations from the Boxborough Fire Department and Police Department provide strong grounds for denial of this Application due to its failure to meet the first hurdle to site plan approval.

For example, the September 5, 2017 draft plan of the proposed project includes three potential access points: Massachusetts Avenue, Priest Lane, and Stow Road. Massachusetts Avenue is proposed to be the main entrance, while Priest Lane and Stow Road are proposed as gated emergency access points.

The Boxborough Police Chief and Boxborough Fire Chief have repeatedly voiced serious concerns about the proposed main entrance off of Massachusetts Avenue. *See June 7, 2013 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Police Department, September 28, 2017 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Fire Department.*

⁶ *Id.*

⁷ *Id.*



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Both Departments likewise have reiterated concerns about the additional access points to Stow Road and Priest Lane, in that both access points pose unanswered questions about how emergency traffic will be mitigated. *See June 7, 2013 Letter from Boxborough Police Department* (access to this parcel “poses a serious risk to motoring public.”); *January 19, 2017 Letter from Boxborough Police Department* (reiterating 2013 concerns); *September 28, 2017 Letter from Boxborough Police Department* (“serious roadway improvements will be necessary” to make proposed main entrance a safe and feasible access point.); *January 19, 2017 Letter from Boxborough Fire Department* (proposed means of access “could have significant consequences to life and property.”) To date, these concerns have not been addressed by the Applicant.

B. Access to Stow Road is Infeasible

i. Access Easement Cannot Provide Legal Access to Development

The Applicant seeks to use an Access Easement granted on April 14, 1995 as a means of egress to the proposed development. The easement contemplates “a right of way for access and egress...” across land in the Agricultural Residential District. Since the Access Easement is on land not subject to the December 9, 2013 Definitive Subdivision Plan, it is not “frozen.” Under the Current Bylaw, § 4003 (1), ‘two-family dwellings, reserved exclusively for elderly occupancy’ and their accessory uses and structures are prohibited in the Agricultural Residential District without a Special Permit.

In addition, as discussed above, the development as proposed unnecessarily endangers the public safety because it does not have adequate egress points. The concerns about endangering the public due to lack of adequate access were voiced under the assumption that the access easement to Stow Road could be used. However, as discussed above, land in the Agricultural Residential District cannot be used to support ‘two-family dwellings, reserved exclusively for elderly occupancy’ because that is a prohibited without a Special Permit.

ii. Access Easement Cannot Qualify for Special Permit for Alternative Access

The Access Easement contemplated by the Site Plan Application does not qualify for a Special Permit for Alternative Access, and is a second reason why it cannot serve as an access point to the proposed development. Both the 2012 and Current Bylaw § 4800 require an applicant to request “to access a lot through a portion of the same lot which is not the legal frontage for said lot.” It is clear that the access easement is not on the same lot or lots where the development is proposed. This is one singular reason that renders the access easement unqualified for such a Special Permit.

There are multiple criteria that the Access Easement does not satisfy for a Special Permit for Alternative Access to Stow Road. Pursuant to both the 2012 and Current Bylaw §4800⁸, the Planning Board may grant a Special Permit for Alternate Access only to ways that the Planning

⁸ Both Bylaw provisions are identical, but each is mentioned in this analysis because part of the contemplated access is subject to the Zoning Freeze.



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Board has determined provide adequate access for fire, police, and emergency vehicles; whether the proposed driveway provides for a safer alternative than a driveway through the legal frontage; and whether, in the opinion of the Planning Board, the issuance of a Special Permit will not allow the creation of more building lots that would be allowed without the Special Permit.

First, as discussed above, there is ample evidence in the record from both the Boxborough Fire Department and Police Department that access by Stow Road does not provide adequate access for fire, police, and emergency vehicles to the proposed development, defeating the requirement of Bylaw §4800 (1). This alone is enough for the Planning Board to deny the Special Permit.

Second, the Special Permit is for alternative access to a development—not additional access. While Stow Road may be less busy and dangerous than a curb cut onto Massachusetts Avenue, the Applicant is still proposing that the hazardous Mass Ave entrance be the main entrance to the development.

The purpose of the Special Permit and this criterion is defeated by the Applicant seeking to add more egress points without reducing the danger of any of them, defeating the requirement of Bylaw §4800 (4). This too, is enough for the Planning Board to deny the Special Permit.

Third, there is ample evidence in the record that this Special Permit would allow for the creation of more buildings in the development than would be allowed without the Special Permit. Public safety officials stated that the number of proposed dwellings in this Site Plan Application cannot be safely accommodated with the access as proposed. *See June 7, 2013 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Police Department, September 28, 2017 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Fire Department.* These letters assume that Stow Road could be an additional access point.

Therefore, the Applicant also doesn't meet the criterion for a Special Permit for Alternative Access articulated in Bylaw § 4800 (6). This is a third, independent reason for the Planning Board to deny the Special Permit.

With one less available access point, the danger of this proposed Site Plan Application increases. This is another, independent reason that provides grounds for denial of this Application.

C. Priest Lane Egress is Illusory

The proposed egress to Priest Lane does not qualify for a Special Permit for Alternative Access, which further reduces potential emergency access to this development and increases the danger it poses to residents, visitors, and the neighborhood in general.

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As discussed above, under 2012 Bylaw §4800⁹, the Planning Board may grant a Special Permit for Alternate Access only to ways that the Planning Board has determined provide adequate access for fire, police, and emergency vehicles; if the proposed driveway provides for a safer alternative than a driveway through the legal frontage; and whether, in the opinion of the Planning Board, the issuance of a special permit will not allow the creation of more building lots that would be allowed without the special permit.

Access via Priest Lane runs counter to each of these mandatory criteria in the Bylaw. Each potential Bylaw violation is its own independent reason, supported in the record, for denial of this Application.

D. Unsafe Access to This Land has Been Proven Before

The Boxborough Police Chief and Fire Chief in this record provided adequate and appropriate grounds for denial of this Application on the record, based on unsafe and hazardous means of egress. As illustrated above, this proposed project actually lacks the second and third legal access points as contemplated by the Fire and Police Chiefs.

The Planning Board has solid grounds to deny this Application with three access points—it has even more justification for denying this Application since it only has one legal access point, which does not meet the public health, safety, and welfare criteria of the Boxborough Site Plan Approval standards.

It is worth noting that this is not the first time a project of this scope has been proposed on this land. In an August 12, 2012 letter to the Planning Board, then Chair of the Boxborough Board of Selectmen outlined “grave concerns” about a proposed 40B development on this same site. They noted that the project, which was for 88 units, proposed a main access and one gated access. The Chair asserted that such egress accommodations “poses a significant public safety issue”.

This proposed project includes more units than the 2012 40B proposal, and with no change in location of the main access. Further, while the current site plan projects two additional access points, there is potential that neither of them are a legal options. This proposed project is bigger, and more poorly planned than the other projects that did not come to fruition.

Overall, of the three proposed egress points, one is illegal (Stow Road), one is infeasible (Priest Lane), and one is unsafe (Mass Ave.). Without proper egress, this proposed project imposes unnecessary danger to the town, neighborhood, and potential residents. There are fatal flaws with each access point, rendering the proposed project infeasible at the scale and location proposed.

IV. Site Plan Application Harms Interests Protected by Wetlands Bylaw

⁹ 2012 Bylaw, as this parcel is subject to the Zoning Freeze.



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A zoning freeze achieved under G.L. c. 40A, § 6 does not freeze *non-zoning* bylaws. This is very important: It means that the Boxborough Wetlands Bylaws and regulations are not frozen, and apply in full force to the Wetland Resource Areas of the proposed project, including the surrounding upland.

Boxborough enacted its own Home Rule Wetland Bylaw, so this project will be subject to both the state Wetlands Protection Act and the Town Bylaws. The proposed project would take place in local Town Resource Areas that are more extensive than the state Wetlands Protection Act. This project has not shown it will not harm the environmental interests of the Town's Isolated Wetlands and Adjacent Land Resource Areas. Essentially, the state Buffer Zone is fully protectable under your local Bylaw.

One of the purposes of Site Plan Approval is to "ensure new developments are designed to protect and enhance the...environmental qualities of the Town..." This project does not protect or enhance the environmental qualities in town. It's a maximum build development which strategically dances around Resource Areas such as isolated wetlands, includes at least one wetland crossing, and appears to discharge stormwater into Adjacent Land Resource Areas.¹⁰

V. Proposed Development Does Not Have Adequate Water Supply

As discussed in section I (B) of this letter, the Applicant does not have authority to use accessory structures that do not meet set back requirements, nor accessory structures for 'two-family dwellings, reserved exclusively for elderly occupancy' on land not zoned for such use.

Therefore, in our opinion, there is currently no legal access to a water supply for this development. Bylaw § 8007 (7) requires that all Site Plan Applications must have "adequate facilities...for water supply."

This is a serious defect and for it the Planning Board should deny this proposal.

VI. Conclusion

The Board could and should deny the pending Site Plan Application for each and all of the above reasons.

Sincerely,



Gregor I. McGregor

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¹⁰ Sheet 6 of 30 on Site Plan revised August 30, 2017.

