

November 23, 2020

11 Foster Street  
Wenham, MA 01984

***By hand and by email***

Ms. Margaret Hoffman &  
Members of the Planning Board  
Town of Wenham  
138 Main Street  
Wenham MA 01984

RE: *Letter of November 13, 2020 from James Decoulos to the Planning Board, concerning 60 Arbor Street, and Town's consultant's response.*

Dear Ms. Hoffman (and Members of the Planning Board):

This letter is submitted – for consideration at the next continuance date -- in response to the material submitted by the 60 Arbor Street applicants, and the Town's peer reviewer, during the two days before the Board's Tuesday November 17, 2020 continuation of the public hearing on this project. That date was delayed from November 12, 2020 due to an error in posting the meeting. Even still, the applicants' response to the Town's peer reviewer arrived to the abutters only the day before the hearing, so that response did not get to the Planning Board until the day of the hearing. The abutters were not notified of either new piece of information, despite the clearly stated opposition from all of the direct abutters, sustained over a six month period, and despite our consistent participation in good faith in the multiple evenings over which this hearing has been continued.

This latest example of last-minute filings back and forth, following multiple previous such exchanges, significantly impedes abutters' ability fully to participate in the public process over this project, which threatens to directly affect their properties and property values. Particularly during a global pandemic, during which Town Hall is open only limited hours, it is completely unreasonable to require members of the public to anticipate when the applicants will submit new material, and then to physically go into Town Hall to look at submittals at the last minute. The staff's response at this last meeting, to a request by an abutter to be notified of new material – namely, that such material will be posted on-line, is a welcome development, but does not fully answer the question why after six months of hearings, the applicants' plans are not complete or in conformance with the requirements of the Zoning By-Laws and the Subdivision Rules and Regulations.

As Ann stated at the hearing, and as the peer reviewer's letter – and even the applicants' response – demonstrate, this project is still not in conformance with the requirements of the Town's Zoning By-Laws or the Subdivision Rules and Regulations. The applicants' response to the earlier peer review consists of promises that are not backed up by anything on the physical plans that form the basis

for the decision and will instruct a future owner. Additionally, the plans are not complete. The applicants still have not applied for the Special Permit which is required for grading and clearing of the more than half an acre of land that his most recent letter states will be altered. It is not likely that placing a four-bedroom house on the lot would not result in such significant land disturbance – perhaps even more than they are asserting. And yet the plans do not include any delineation – never mind a clear and enforceable one – of the building limits or grading limits to be respected. No delineation or recognition of the many large trees on the steeply sloped and wooded natural feature on the proposed new lot is provided *at all*.

Given the applicants’ history of beginning the process of stripping and grading this property without a permit (see attached 2014 Cease and Desist letter to the Town), the abutters are understandably and reasonably concerned about this. We have said this to the Board, in the hearings, now we are saying it again in writing. This is not a matter of simple dotting of i’s and crossing of t’s as was suggested at the November meeting.

In particular, we are concerned that the applicants will use an approval of this plan, if granted without a Special Permit for grading, or limitations on natural features and/or tree removal, or limits on significant topographical contour changes, as a shield against any future attempts to limit such activity. We have an entirely reasonable concern that in such a situation, the applicants would claim that this Board’s approval of such a plan means that they never did need a Special Permit, enabling a building permit and unlimited grading activity on the new lot which directly abuts and indeed, holds up our property. Such a situation would undeniably result in the reduction in value of our property. This question needs to be directly explored and resolved. We are at a loss to understand why it has not resolved to date.

We will outline each of this plan’s current specific deficiencies in turn below.

1. *Failure to meet ZBL section 9.0 Additional Performance Standards.*

Zoning By-Law section 9.1 states that no activity is to be permitted in any zoning district unless it is in conformance with section 9’s requirements. And section 9.3 Erosion Control, subpart 3) reads as follows:

3) no area or areas totaling 0.5 acres or more on any parcel...shall have existing vegetation clear-stripped or be filled six inches or more so as to destroy existing vegetation ... unless ... necessarily incidental to construction on the premises under a currently valid building permit, or unless a special permit is approved by the Planning Board [on conditions].”

And subpart 5) requires a performance bond for any such cleared and graded areas.

*Our Objection:* More than half an acre of clearcutting and tree removal is contemplated, requiring special permit from the Planning Board. In the applicants’ most recent response to the Peer Reviewer’s questions, it is clearly stated that 35,000 square feet of land area (over 0.75 acre) is to be cleared. Where? The plans do not provide any limitation on this. And it is also obvious even from a cursory review of the plans that in order to create a level lot on which to build a 4 bedroom house, more than six

inches of fill will be required, in an area which now contains existing vegetation. And yet the applicants have not sought a Special Permit for that clearing and de-vegetation, nor has the Board requested such an application, as the Zoning By-Law requires.

Again, given the applicants' history, it is entirely reasonable for us as abutters, to be concerned that what the applicants want is to use this Board's approval as a shield, and to move forward by arguing that so long as there is an approved plan, they can get a building permit, and once a building permit is in hand, there is no restriction on the clear stripping or vegetation removal "incidental" to construction of the 4-bedroom house. But that is not how the Subdivision Rules and Regulations and the Zoning By-Laws are written to work together. As written, the Zoning By-Laws clearly require that before the applicants can have an approved definitive subdivision, a Special Permit is required from the Board for the more than half an acre of grading activity and more than 5 feet of contour readjustment they are proposing. And the Subdivision Rules and Regulations, at Section 2.7.1, require that the Zoning By-Laws must be complied with before an approval can lawfully be made, unless a variance is granted by the Zoning Board of Appeals.

2. *Failure to meet ZBL section 10.1 Soil Stripping, Earth Removal and Grading.*

Zoning By-Law section 10.1.2 Grading and Redistribution of Earth, states that:

The grading and redistribution of earth on the site is prohibited without a Special Permit issued by the Planning Board except under the following conditions:

- 1) Where alteration of the existing topographical contours is less than five (5) feet and less than 500 cubic yards of earth is to be redistributed, or when necessarily incidental to the construction at the site for which a building permit has been issued and when such incidental grading involves redistribution of less than one thousand (1000) cubic yards of earth; [and]
- 2) Where grading will be made only above a grade substantially level with adjoining lots; and
- 3) When made in such a manner as (a) not to cause depression in which rain and other water may collect and (b) to avoid any detrimental increase in drainage onto adjoining lots.

*Our Objections:* As written, all three of the component parts must be satisfied, for a project to be exempted from the general requirement for a Special Permit to be obtained for the amount of grading and redistribution of earth that the applicants are proposing. But the applicants have not satisfied *any* of the three required components of the exception, nor have they applied to the Planning Board for a Special Permit, which would need to be granted in satisfaction of the requirements of 10.1.3, including a hearing, and the Board is empowered in that process to condition the permit and require the posting of a bond.

First, the placement of a four-bedroom house on this property in the area indicated on the plans clearly will require more than 5 feet of contour displacement – the house footprint as shown itself spans

a 5 foot contour. And the 35,000 square feet (0.82 acres) of grading and de-vegetation the applicants do admit must occur would allow for only 2.59 feet of contour change to occur, in order to satisfy the exception. And no building permit has yet been issued, nor can it until this plan is approved. Thus subpart 1) is not complied with. As noted above, it seems to us that the applicants are hoping for the Planning Board to unwittingly grant an approval without any limitations on grading or clearing, whether by Special Permit or otherwise, so that a building permit can be pulled against that approval, setting up the argument that any grading and redistribution the builder claims is “necessarily incidental” to the construction has tacitly been approved by the Board. But the Zoning By-Laws must be complied with before a subdivision can be approved – and the Zoning By-Law requires a Special Permit for this activity.

Second, the grading contemplated is demonstrably not “above a grade substantially level with adjoining lots.” Thus, subpart 2) is not complied with.

Third, the plans show the creation of an extremely steep slope (50% according to the peer reviewer) off to the northern side of the proposed cul de sac, and within a foot or two of the boundary between the proposed new lot and Congdon/Richardson property, clearly creating a situation in which “detrimental increase in drainage onto adjoining lots” may be created. Thus, subpart 3) is not complied with.

Again, the application meets none of the requirements for an exception to the general rule that an applicant must receive a Special Permit to do the amount of grading and redistribution of earth contemplated by this plan. This is not an insignificant thing. Section 10.1.3.5 makes that clear: Failure to apply for a Special Permit (before moving ahead with earth removal or grading), or failure to comply with a Special Permit if one is granted subjects the violator to fines of \$300.00 per day, with each day of violation being a separate offense. As the applicants already have engaged in stripping and redistribution of earth without a permit, we are quite reasonably concerned about the applicants’ intentions now.

3. *Failure to Meet Various Provisions of the Subdivision Rules and Regulations concerning the preservation of natural features, and large trees and natural vegetation.*

As mentioned in a previous letter to the Board, the fact that Wenham has no long range plan makes the policies and directives outlined in the Subdivision Rules and Regulations, and the Zoning By-Laws, the best – and really the only – statement of the Town’s values related to development.

The Subdivision Rules and Regulations contain many provisions that direct that all reasonable care be taken to preserve natural areas, topographic features, large trees, and natural vegetation. For example, in the General provisions, at section 2.8, the Planning Board is directed “to be concerned with the requirements of the community and the best use of the land being subdivided. *Particular attention will be given to [among other things] retention of major site features ... and land uses which preserve the rural character of the Town.*”

These concerns are found throughout the Rules and Regulations as requirements to make clear where major site features and large trees exist, and to promote their preservation – or clearly indicate that they are not being preserved. For example, Subdivision Rules and Regulations section 3.3.3.6 requires a definitive subdivision plan to show “[m]ajor features of the land, such as existing ... large trees or wooded areas.... *All features to be retained, demolished or moved shall be so noted.*” [emphasis in original].

Section 4.5 *Protection of Natural Features*, further makes this goal explicit:

Due regard shall be shown for all natural features, such as trees, wooded areas, water courses .... which if preserved will add attractiveness and value to the subdivision. Any clearing, backfilling, cutting, thinning or other disturbance to trees twelve inches (12”) or over in diameter measured 4 feet above finished ground level located within the minimum front setback distance *or other natural vegetation* shall be prohibited unless deemed both proper by the Board.... Any such proposed clearing shall be shown on the plan....

*Our Objection:* Despite repeated requests to do so, the applicants entirely fail to show the extent to which existing large trees and natural features exist on the new lot. Nor have the applicants made clear on the plan any limitation on vegetation stripping, or any boundary on grading or clearing activity. And despite being requested to do so, the applicants have not provided the location of all large tree specimens on the new lot. Instead the applicants read this provision in a very limited way, as applying only to large trees in the minimum setback distance – not as applying to “other natural vegetation” on the new lot. That cramped reading is in total opposition to the Town’s stated concern with retention of large trees and natural features, and with minimizing earth removal and grading. Moreover, the applicants’ repeated description, as “trash trees,” of the large (over 50 foot high) hardwoods growing on the existing natural feature (the hill behind our home) making up half of the new lot, seems both intentionally misleading and dismissive of the goal of the Subdivision Rules and Regulations that such natural features and existing vegetation should be preserved.

#### 4. *Failure of the Board to Comply with the Board’s own Administrative Rules and Regulations.*

The Planning Board has published Administrative Rules and Regulations, that, among other things, assert that the Board may dismiss an application if it is not complete, or if the submissions required under the Zoning By-Laws are not made, Admin. Rules Art. III § 6, rather than engaging in the practice of opening a public hearing and continuing it for months on end, with an incomplete and inadequate set of information to form the basis for required public comment. The applicants began this process by submitting a proposal that was indistinguishable from one that had been turned down by the Zoning Board of Appeals, litigated in the courts, and which they had lost. The Board opened a hearing on that plan, seeking revisions. The applicants sought a laundry list of waivers from important requirements of the Zoning By-Laws, and to this date, despite repeated peer reviews, the application still is incomplete.

The Board's Administrative Rules and Regulations further state that in considering applications for development requiring a Special Permit (which, as outlined above, this project clearly does),

...the following criteria ... should be clearly identified and factually supported, in addition to any criteria set forth in any other applicable provision of the Zoning By-Law: Written determination that the adverse effects of the proposed use will not outweigh its beneficial impacts to the Town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site. In addition to any specific factors that may be set forth in this By-Law, the determination shall include consideration of each of the following:

- 1) Community needs which are served by the proposal;
- 2) Traffic flow and safety, including parking and loading;
- 3) Adequacy of utilities and other services;
- 4) Neighborhood character and social structures;
- 5) Impacts on the natural environment;
- 6) Potential fiscal and economic impact, including impact on town services, tax base, and employment.”

Admin Rules Art IV. §6. Should the applicants apply for a Special Permit, based on the plans as they exist today, we would argue that subparts 1), 2), 4), and 5) are demonstrably not met.

We do not enjoy being at odds with our neighbor. But we have no choice, in order to preserve the use and enjoyment of our own property and its value, against threat. The project requires a Special Permit, and the Board should ensure that it is obtained, limiting the grading and earth removal on this site, before approving the project. At the very least, if the Board insists on improperly approving the 60 Arbor Street subdivision plan *without* an accompanying Special Permit for grading and tree removal, this Board must require the face of the plans themselves to include a written commitment to limited stripping and grading activity, and that the limits of such activity be delineated clearly so as to ensure the preservation of the natural features and large trees that form the southeastern half of the new lot.

Sincerely,

//s// Eric A. Lustig & Ann Brewster Weeks

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Enclosure

11 Foster Street, Wenham MA 01984  
April 15, 2014

BY HAND Delivery, copies by e-mail

Mr. Charles Brett, Building Inspector  
Town of Wenham  
Wenham Town Hall 2d floor  
138 Main Street  
Wenham, MA 01984

RE: Concerns About Grading Without Special Permit(s) at 60 Arbor Street, Wenham – Map 13 Lots 84 & 142 – M.G.L. Ch. 40A §7 Request to Enforce Zoning By-Laws of the Town of Wenham Against Mr. Jeffrey Hamilton and/or any Agents of Mr. Jeffrey Hamilton.

Dear Mr. Brett:

We recently received a notice of the April 17, 2014 public hearing concerning Mr. Hamilton's request to further subdivide the land at 60 Arbor Street, Wenham, Map 13 (hereinafter, "60 Arbor Street") from the previously approved two lots (Lots 84 & 142) to three smaller lots. One of us will attend the public hearing. However, our inspection of the plan and conversation with the Town Planner reveals a number of deficiencies in it, including Mr. Hamilton's failure to apply for a number of Special Permits required under the Town of Wenham's Zoning By-Laws (2012) ("Zoning By-Laws"), and other Town ordinances. We are detailing those deficiencies in a separate letter we are filing today with the Town Planner and Planning Board.

However, we must also express our concern to you as the town officer charged with enforcement of the Zoning By-Laws, that Mr. Hamilton and/or his agents already are engaged in tree and earth removal and grading, on what is now the second lot, that does not appear to us to be incident to work being done on the existing house. And, based on our conversations at Town Hall, we believe he is doing so without the approvals he is required to have. This activity has occurred off and on since last summer, and as recently as two weeks ago. Just last week there was a very large piece of machinery for removing trees and earth grading located on the site.

Our serious concerns about the extent of grading now planned for the new subdivision (in brief, the plan shows the existing land being stripped of the mature trees now growing on it, and a 30-40 foot high esker being almost entirely removed), cause us to request, pursuant to M.G.L. Ch. 40A §7, that you enforce all of the Zoning By-Laws against Mr. Hamilton and/or his agents at the 60 Arbor Street property, going forward. In particular, it appears to us that he has not met Zoning By-Law section 9.3 ("Erosion Control") or 10.1.3 ("Soil Stripping, Earth Removal and Grading"), nor has he met the Town's separate Earth Removal ByLaw (Chapter XII), for the work he has done to date, and certainly not for the work he plans.

We live at 11 Foster Street, Wenham, which we own. Our property directly abuts 60 Arbor Street, along the rear boundary. Our home sits atop that esker hill, our brownwater septic fields sit between our home and the esker, and we are extremely concerned that the structural integrity of and drainage patterns from our property will be negatively affected by the topographic changes, earth removal and grading planned by Mr. Hamilton. We are therefore “persons who are aggrieved” under the Zoning Laws of the Commonwealth of Massachusetts.

We must ask you to respond to this letter in writing within fourteen (14) days of your receipt of our request, per M.G.L. Ch. 40A §7, and notify us of your intended action or refusal to act, and the reasons for your decision. We look forward to hearing from you.

Thank you very much,

//s// Ann B. Weeks  
//s// Eric A. Lustig  
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Copies:

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