

July 7, 2020

BY ELECTRONIC MAIL

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

RE: Definitive Subdivision Plan Application – 60 Arbor Street – Jeffrey and Susan Hamilton
 (“Applicants”)

Dear Ms. Hoffman and Members of the Planning Board:

We four undersigned families are abutters to the 60 Arbor Street definitive subdivision proposal, and we offer these comments from that perspective. We oppose approval of the plan.

The application in its substance is very little different from the plan this Board denied on October 13, 2016, a decision later upheld on summary judgment, in *Jeffery R Hamilton, et al. v. David Geikie & Other Members of the Wenham Planning Board*, Essex County Sup. Ct. Docket ID No. 1677CV01626 (May 16, 2019) (copy of slip opinion attached). In that case, the Court stated that the Planning Board was well within its authority to deny the Applicants’ plan on the basis that the proposed layout did not satisfy the Zoning By-Laws, particularly related to lot frontage and streets, and that the applicant had not shown that it would be either in the public interest, or serve the purposes of the Town’s development ordinances, to permit its development. *Hamilton v. Wenham Planning Board*, slip. Op. at 5-7. Nor is this plan different in substance from the plan for which the Applicants went to the Zoning Board of Appeals for variances of the Zoning By-Law requirements for lot frontage, and from the Paper Streets prohibition, and were denied by unanimous vote, on September 11, 2018 (copy of the ZBA Minutes 9.11.18 attached, at 2), for want of a showing of hardship to justify the requested variances, and out of concern over setting unwanted precedent. *Id.* at 3.

Now, just as it was then, the Applicants’ plan is deficient in that it fails to meet a number of the requirements of the Town of Wenham Zoning By-Law and the Town’s Rules and Regulations Governing the Subdivision of Land. The Applicants recognize some of the problems, by requesting seven “waivers” from Zoning By-Law requirements. Yet, even should all the waivers the Applicants have requested be granted (and they should not be for reasons explained below), the proposed plan still fails to meet a number of Zoning By-Laws requirements. This Board should not approve the proposed plan, as it is not in compliance with Wenham’s land development rules, and, additionally, because the Applicants have made no showing that their proposal is in the public interest, or would otherwise further the policy purposes behind our town’s Zoning and Subdivision rules. Indeed, approving this plan will lead to other applications for waivers of fundamental elements of Wenham’s development rules, on the basis (however unjustified) of “precedent.”

1. Streets, Paper Streets, and Insufficient Lot Frontage.

First, as was the case with all of the previous plans,¹ the Applicant simply does not have a property with dimensions sufficient to meet the frontage requirements of the Zoning By-Laws, absent the proposal of a Paper Street, or “private way,” around which the Applicants seek to claim the 170 feet of lot frontage on a street, as required by Zoning By-Law sections 5.1 and 2.2 (defining frontage). Paper Streets, however, are prohibited in Wenham. Zoning By-Law § 5.2.1. And, as six of the seven requested waivers pertain to street requirements, it is clear that the Applicant proposes something that is not really a street at all, under our Zoning By-Laws, but rather would function as a common driveway serving both the existing house and a new house to be built further from the road. Indeed, the Applicants’ current driveway overlaps the accessway they have proposed. *Compare* sheet C-1 (showing driveway) *with* sheet C-4 (showing the intention for the new accessway to include the area now taken up by the existing driveway and a new cut off the proposed accessway to serve the existing house). The pretense of the street proposal is simply a fiction put forward in an attempt to establish lot frontage which the Applicants do not have. In fact, what is being proposed actually to be built is a shared driveway.

But, the Applicants do not meet the requirements even to request permission for a shared or “common” driveway, and they do not seek the required Special Permit for one. The common driveway requirements, found in the Zoning By-Law at section 5.2.6.5, include that each lot must have the required frontage of 170 feet, which must be on a “street.” Nor do the Applicants have sufficient acreage to propose and seek a Special Permit from this Board for a hammerhead lot, under Zoning By-Law section 5.2.2.1, as that would require the newly created lot to be at least 120,000 square feet in area, a size the 60 Arbor Street property does not permit.

Because they do not have the required frontage, or lot sizes, and because they have been turned down by the Zoning Board of Appeals, for variances, and therefore cannot go back to that Board until after September 11, 2020, the Applicants instead now again turn to the Planning Board seeking approval of a work-around of the Town’s Zoning By-Law, as was the case with the earlier insufficient plan turned down by this Board. The Applicants again propose (on sheet C-2, which is erroneously entitled ‘By-Right Subdivision’) a “Paper Street,” on which they seek to define the 170 feet of lot frontage required by the Zoning By-Law. This is misleading not only because there is no intention actually to build the street (as is obvious from sheet C-4 and the waivers requested), but because the subdivision of this property is not “by right” even if the cul-de-sac were to be built. Because the applicant also requests waivers from the Zoning By-Law related to trees, and the plan otherwise fails to meet other requirements, as discussed below, all of which would require Planning Board approval at a minimum (if not more process), there is no subdivision available “by right” for this property.

At the Zoning Board of Appeals hearing in 2018, on essentially the same project, Joe Maloney of 12 Foster Street noted that he had reviewed the notice when the property was for sale and had

¹ The Applicants also sought approval for a 3-lot subdivision, in 2014, and that Proposal also was denied by the Planning Board. For that reason we request the Planning Board research the veracity of Sheet C-1, which purports to show that the Existing Conditions at the site include three lots at 60 Arbor Street.

learned that the lot for sale was not further buildable (beyond the existing residence). ZBA Minutes at 2. Chalmers Congdon, a direct abutter, confirmed that was his understanding as well, based on a review at the time he bought his house at 70 Arbor Street. *Id.* Although the minutes do not reflect it, Eric Lustig, another direct abutter, recalls that that point was confirmed at the time by one of the ZBA members, after reviewing the plat online.

The bottom line is that just as was the case when the Applicants were denied by this Board in 2016, and by the ZBA in 2018, the Applicants do not propose to build either the public cul-de-sac street, or a “private way” that meets the Zoning By-Law and Subdivision Rules and Regulations requirements for such a street. The number of waivers they seek from even the private street requirements, put the lie to the notion that what is actually sought is a street at all. This proposed accessway is clearly intended to function as a shared or common private driveway, even though the Applicants, as noted above, have neither sufficient frontage, nor sufficient acreage, even to seek Special Permits for the development of a common drive, or in the alternative, for the creation of a hammerhead lot.

2. *Trees and Natural Features.*

Second, the proposed plan seeks a waiver from the Subdivision Rules and Regulations requirement that they claim requires documentation of large trees on the property. But in fact, the section they seek a waiver for requires broadly that the Board (and by extension, the Applicants) show “due regard for all natural features, such as trees, wooded areas, ... which if preserved will add attractiveness and value....” Subdivision Rules and Regulations § 4.5.1. In other words, the requirement of that section of the rules is not merely to document the existence of such trees, it is a *prohibition on the removal* of such trees, or other natural vegetation, “unless deemed proper by the Board and not in conflict or contradiction to the intent of section 4.9.1 [regarding street trees on sidewalks].” *Id.*

And in fact, the hill behind the existing house contains many such large caliper mature hardwood trees, although that is not at all obvious from the materials presented to the Planning Board. The large hill on the property is, geologically speaking, an esker, which along with the kettle formation² at the front of the property (see sheet C-1 existing conditions) are geologic features of some natural interest. They also form part of the wildlife habitat and corridor running from the Wenham Swamp through Wenham and Hamilton to the Hamilton well heads area behind Rust Street – we see wildlife coming from the 60 Arbor property through the wooded area and then through the Foster Street neighborhood, with some regularity. Granting a waiver of the requirement to document and preserve to the extent possible large trees and natural areas of interest essentially greenlights the removal of those trees, without more. It would require the Planning Board to ignore its responsibility in reviewing all subdivisions, to give “particular attention to...arrangement of lots, open areas, ... [and] retention of site features ... which preserve the rural character of the Town.” Subdivision Rules and Regulations § 2.8.1.

² While the plans identify the kettle as a freshwater wetland, the required 100 foot wetland buffer is not shown.

Additionally, while the applicant has included a “proposed grading plan” (sheet C-4), and that minimal plan does not show removal of the hill, neither does it show any grading to accommodate the construction of the proposed residence, which suggests it is at least incomplete, if not inaccurate. Nor have the Applicants made clear what their intentions are in any discernable note on the proposed plan, with respect to removal of any part of the hill, by themselves, or by any subsequent purchaser of the newly created lot. This is of some concern to the Weeks-Lustig family, as the hill in question is directly behind our 11 Foster Street property, and effectively holds up the hill on which our home sits, along with the rest of the west side of the neighborhood, some 50 feet above 60 Arbor Street at the top of Foster Street. It is notable that although the plans contain the names and addresses of all of the abutters within 500 feet of the proposal, the Applicants have never reached out personally to us to let us know their intentions with respect to this development.

The Applicants should at the very least be required to state clearly their intentions with respect to grading and earth removal, and the Board must condition any approval (although no approval is justified) on the maintenance of the existing significant topography on the lots, to conform with the requirements of Zoning By-Law section 9.3 Erosion Control, and to retain “hillside areas...with vegetative cover.”

3. Incomplete Peer Review.

Finally, the peer review of the earlier version of this 2020 submission for the 60 Arbor Street subdivision, by EBI Consulting, dated April 13, 2020 (copy attached), noted 16 separate deficiencies in the plans then submitted, and in it, the engineers noted that they had stopped their initial review, as they were of the opinion that the proposed subdivision simply did not meet the Town of Wenham’s Subdivision Rules and Regulations. We have not seen any update or completion of that peer review, indicating any changed opinion on this version of the plans.

4. Conclusion.

In summary, the Applicants propose here essentially the same concept put forward in the plan which the Planning Board turned down in 2016 – a shared driveway for a second lot, where the resulting lot does not have sufficient street frontage, nor can the Applicants otherwise obtain adequate street frontage, except via a prohibited Paper Street. Nor can the Applicants meet the requirements for what they clearly intend to develop, which is a shared or common driveway for the two resulting lots. Nor do they meet the hammerhead lot requirements, which would waive their frontage insufficiencies.

The Planning Board should deny this proposed subdivision. It is an attempt to avoid the Town’s Zoning By-Laws and Subdivision Rules and Regulations. It asks the Planning Board to abdicate its responsibilities under section 2.7.1 of the subdivision rules, to ensure that subdivisions conform to the Zoning By-Law requirements, unless a variance has been obtained by the Zoning Board of Appeals, on a showing of need, which the Applicants were unable to obtain. Nor have the Applicants made any showing of a public purpose to be served by the Board’s grant of waivers to the requirements of the development rules, and indeed, one can imagine just the

opposite – if this plan were approved, we would see multiple additional efforts to get around the requirements for development in Wenham.

Sincerely,

/s/ Ann Weeks and Eric Lustig
11 Foster Street, Wenham

/s/ Tracy and Marc Liphardt
58 Arbor Street, Wenham

/s/ Amy Richardson and Chalmers Congdon
70 Arbor Street, Wenham

/s/ Kristen Moloney
12 Foster Street, Wenham

Attachments: Hamilton v. Board, Slip Op. May 2019
Wenham ZBA Minutes, Meeting of Sept. 11, 2018
Preliminary review of EBI Consulting, April 13, 2020