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MASSACHUSETTS AND NEW HAMPSHIRE

September 24, 2020

Jeffrey Rhuda, Manager  
Symes Development and Permitting, LLC  
50 Dodge Street  
Beverly, MA 01915

Re: Definitive Subdivision Application as to land at 1440-1450 Main Street, Concord, MA

Dear Mr. Rhuda:

You have asked me to respond to certain matters raised in the September 8, 2020 report ("Report") regarding the subject subdivision as submitted to the Concord Planning Board by the Concord Town Planner. I address three items in that report.

**LOTS E AND F:**

The September 8, 2020 report from the Town Planner regarding the definitive subdivision for 1440-1450 Main Street suggests that lots E and F are within and are a part of the subdivision. See page 2 of 12. The applicant takes issue with including such abutting lots within the subdivision.

Lots E and F are not dependent on any subdivision approvals for their legal existence as separate, buildable lots. Each lot conforms to the Concord Zoning Bylaw dimensional requirements. They are free-standing lots existing on a plan approved by the Board and endorsed on its behalf. Those independent lots are shown as such on the plan recorded at the Middlesex South District Registry as Plan 313 of 2020. Those lots have frontage on and access off of Main Street. The shape of those lots does not change as a result of the subject subdivision. Those lots would not be subject to a subdivision covenant. The fact that temporary grading easements will be provided over those lots for the benefit of the subdivision does not make those lots part of the subdivision for approval or calculations. If the Board wants to impose as a condition in subdivision approval that those temporary grading easements are subject to the reasonable approval of the Board that would be acceptable.

The fact that access for Lots E and F can optionally be off of a new roadway does not make the use or existence of Lots E and F dependent upon the subdivision or a part of it. If the subdivision is not built, the access and utility connections for Lots E and F will remain off of Main Street.

### **UNSUITABLE LAND - EARTH REMOVAL:**

Page 9 of the Town Planner's September 8<sup>th</sup> report references section 6.2.2 *Unsuitable Land* of the of the Concord Planning Board's Subdivision Rules and Regulations and suggests that due to the volume of earth to be trucked from the site to adjust site grades (being altered in part to conform to the Town's rules and regulations), the Board can determine that the site itself is "unsuitable land" and can deny the subdivision. We disagree with that proposition. That would be a misapplication of the clear purpose of section 6.2.2.<sup>1</sup> The land is suitable for the intended development. There is no "feature" of the land that makes it unsuitable for use for residential purposes.

Section 6.2.2 is clearly intended to deal with the land itself being unsuitable for development, not the development tasks being considered "unsuitable". To invoke section 6.2.2, the land itself must be unfit because of the risk of "*flooding, improper drainage or adverse drainage, adverse topography, poor soils, bedrock, location of utility easements, or other features which the Board has reason to believe would be harmful to the safety, health and general welfare of the present or future inhabitants of the subdivision and/or its surrounding area...*" The language is clearly intended to deal with the land and the subsequent use of the land being unsuitable, and not to prevent the development process. Former Board member Matt Johnson was correct when he stated that the section 6.2.2. does not deal with trucking away earth.

Denying a subdivision due to temporary construction traffic on a state route (Route 62), which has capacity to handle that traffic is beyond the scope of the Subdivision Control Law. A specific purpose of state numbered routes and highways is for vehicular traffic and safe trucking for commerce.

The Subdivision Control Law is intended to control the division of land and the providing of services and access for that divided land. It is not about construction activities, other than as to meeting applicable development design standards to assure access and services<sup>2</sup>. It is about the end results; that is, the condition of the land and access and services once divided. The Concord

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<sup>1</sup> In the Massachusetts Department of Housing and Community book entitled *An Overview of the Subdivision Control Law*, there is an admonition that some "well-intentioned but overzealous planning boards attempted to use their powers of approving or disapproving plans of proposed subdivisions to enforce conditions intended for the good of the public, but not related to the design and construction of ways within the subdivision." To avoid overreaching, section was added to define and express the limitations as to the purpose and jurisdiction of the Subdivision Control Law.

<sup>2</sup> The stated purpose is "... by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein...and ensuring sanitary conditions in subdivisions..." [M.G. Laws Chapter 41§81M]

Subdivision Rules and Regulations do not deal with the methodology of development. It is about design standards and the completed subdivision.

The Town has a comprehensive earth removal bylaw that is intended to deal with the question of earth removal. That bylaw is administered by the Zoning Board of Appeals and is not part of subdivision control. This subdivision is not violative of that bylaw.

Irrespective of the above comments, the applicant is providing the Planning Board with detailed information about its earth removal and transportation plan over the State highway.

#### **AFFORDABLE LAND SET-ASIDE:**

Pages 9 and 10 of the Town Planner's report reference section 6.21 of the Concord Planning Board's Subdivision Rules and Regulations dealing with the reservation of land for housing purposes. The report states that the applicant needs a waiver from that provision. The applicant respectfully disagrees and asserts that requirements of setting aside land for affordable housing are beyond the scope of review allowed under the Subdivision Control Law. The Law allows a Board to establish rules to temporarily set aside an area for a potential "*park or parks suitably located for playground or recreation purposes or for providing light and air and not unreasonable in area.*"<sup>3</sup> No greater set-aside right is contained in the Subdivision Control Law. A general bylaw cannot expand the scope of the limitations contained in the Subdivision Control Law. To do so in the context of the Subdivision Control Law is overreaching. Local subdivision rules and regulations cannot expand authority beyond that stated in the Subdivision Control Law.<sup>4</sup>

Sincerely,



O. Bradley Latham

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<sup>3</sup> MGL 41 s. 81U "Before approval of a plan by a planning board, said board shall also in proper cases require the plan to show a park or parks suitably located for playground or recreation purposes or for providing light and air and not unreasonable in area in relation to the area of the land being subdivided and the prospective uses of such land, and if so determined said board shall by appropriate endorsement on the plan require that no building may be erected on such park or parks for a period of not more than three years without its approval."

<sup>4</sup> MGL 41 s. 81Q "...reasonable rules and regulations relative to subdivision control not inconsistent with the subdivision control law or with any other provisions of a statute or of any valid ordinance or by-law of the city or town. Such rules and regulations may prescribe the size, form, contents, style and number of copies of plans and the procedure for the submission and approval thereof, and shall be such as to enable the person submitting the plan to comply with the requirements of the register of deeds for the recording of the same, and to assure the board of a copy for its files; and shall set forth the requirements of the board with respect to the location, construction, width and grades of the proposed ways shown on a plan and the installation of municipal services therein, which requirements shall be established in such manner as to carry out the purposes of the subdivision control law as set forth in section eighty-one M."