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September 1, 2022

Mr. Mark Gouker
Chair, Board of Trustees
Woodlands at Belmont Hill, II

Sent via electronic mail: gouker.mark@gmail.com

Dear Mr. Gouker,

As Chair of the Board of Trustees of Woodlands at Belmont Hill II (collectively, the "Trustees"), you have asked me to require McLean to take certain mitigation measures, based mainly on the 2001 Design and Site Plan Approval ("2001 DSPA") for Zone 3 issued to American Retirement Corporation. For the reasons that follow, I find no zoning violation and decline to order enforcement.

Brief Review of Zone 3 Approvals

Belmont's 1999 Special Town Meeting adopted § 6A of the Belmont Zoning Bylaw ("Bylaw") to govern the McLean property. Section 6A created six McLean-specific subdistrict types. The land at issue here falls in a Senior Living Subdistrict, Zone 3, as well as an Open Space Subdistrict. Section 6A requires "Design and Site Plan Review" for "[a]ny activity requiring a Building Permit in any Subdistrict, and any proposed construction of a vehicular access way across land in the Open Space Subdistrict..." Bylaw § 6A.4.

On December 3, 2001, the Belmont Planning Board granted the 2001 DSPA to American Retirement Corporation to construct a 482-unit senior housing development in Zone 3 ("ARC Project"). 2001 DSPA at 1. Several of the findings and conditions in the 2001 DSPA spoke to stormwater management.

First, the Board adopted a proposed Stormwater Pollution Prevention Plan. *See* 2001 DSPA Findings (f)(d), (g); Condition 6a. The Stormwater Pollution Prevention Plan clearly stated: "[t]he Plan addresses full-build conditions and construction activities."

Second, the Board addressed drainage from the Upham Bowl area. McLean planned to construct a detention area in Upham Bowl as part of the ARC Project. The Upham Bowl detention area would "discharge into the stormwater management facilities operated and maintained by ARC" in Zone 3. 2001 DSPA Ex. B. A memorandum from the Town's engineering consultants acknowledged that, although "not part of Zone 3, [the Upham Bowl detention area] is an integral

McLean Zoning Response Letter

Page 2

part of the overall stormwater management system....” The 2001 DSPA anticipated that Upham Bowl drainage would “be addressed in a separate Agreement between the Town and McLean,” 2001 DSPA at 10. As far as I am aware, no such agreement was ever negotiated or executed.

In late 2005, the ARC Project had not yet been built. At that time, VHB wrote to notify the Town that McLean was “moving ahead with the design and construction of Olmsted Drive,” although there were no current plans to construct the ARC Project. VHB Letter 1 (Aug. 10, 2005) at 1. VHB proposed that Olmsted Drive would adhere to relevant portions of the 2001 DSPA Approval. *Id.* at 2-4. For stormwater management in particular, VHB stated that, consistent with the Stormwater Pollution Prevention Plan, it would implement erosion and sedimentation controls adjacent and downslope from the road, and that it would inspect for erosion weekly. It also promised to construct “temporary detention facilities . . . in currently open areas of the site to maintain the design stormwater runoff rates as approved in” the 2001 DSPA Approval. *Id.* at 2-3. On October 7, 2005, VHB sent two more letters restating its commitments in the August 10, 2005 letter, and proposing additional stormwater mitigation measures for the “interim build condition.” VHB Letter 2 (Oct. 7, 2005) at 2-3; VHB Letter 3 (Oct. 7, 2005) at 1.

The ARC Project was never built.

Although the August VHB letter stated that there were no current plans to construct any other part of the Zone 3 (or 4) developments, an email to me from June 2006 reflects that VHB or McLean expected to “start marketing for ARC (off Olmsted Drive) shortly (or already have) but will not start construction until 60% of the units are sold.”

In 2022, the Planning Board granted the Northland Residential Corporation a Design and Site Plan Approval (“2022 DSPA”) to build 152 units in Zone 3 (“NRC Project”). 2022 DSPA at 1. The 2022 DSPA approved proposed stormwater management infrastructure in Zone 3. The 2022 DSPA acknowledged that stormwater drainage from Upham Bowl “was an issue of significant discussion during the public hearings.” It ultimately found that there was no evidence “to support a finding that the existing ... facilities outside Zone 3 are inadequate”

Zoning Enforcement Requests

You asked that the Town require McLean to “complete the following[:]

- (a) design and construct the Upham Bowl Stormwater Detention improvements, including providing current hydraulic calculations of all flows into Upham Bowl, (inclusive of the outfall adjacent to the Chapel),
- (b) to complete an engineering review of the Olmsted Drive Stormwater Management System, which should include addressing all of the current ‘as-built’ connections to the piping system including but not limited to, (i) Meadows Lane, (ii) South Cottage Road,

- (iii) Waverly Woods, (iv) Lower Olmsted Drive, and (v) the currently anticipated Zone 3 discharge flows; the objective being to confirm that Structure 11 is adequate to effectively manage all of the flow it receives and that the necessary detention and treatment standard is being met.
- (c) to remove the paved area between the Hospital's MRI Facility and Olmsted Drive and Construct the walkway consistent with the approved Construction Plans and hydraulic calculations (area to be loamed and seeded), and
- (d) that the Hospital propose a methodology or condition to address either now or in the future how the Zone 4 temporary discharge will be brought into Zoning conformance.”

Ruling

General Response

Based on the history and records that I have described above, I find that the 2005 construction of Olmsted Drive was carried out in the good faith belief that the ARC Project would eventually be completed, and that it was therefore authorized by the 2001 DSPA.¹ The ARC Project was subsequently abandoned. The 2001 DSPA as written does not contain any explicit requirements that I can enforce that pertain to the project if it was begun but abandoned after only one small element of the project infrastructure was built. The proper forum to determine what measures, if any, should have been required of the developer in the event of partial completion is the Planning Board, not my office. The Zoning Act (Chapter 40A) does not give me the authority to modify or add conditions to the 2001 DSPA under the guise of enforcement.

Had the construction of Olmsted Drive without necessary stormwater mitigation measures caused significant harm to surrounding or downgradient properties, and had such harm been brought to my attention in a timely fashion, I could have referred the matter to the Planning Board to clarify or amend the 2001 DSPA to address those problems. Under those circumstances, such an amendment might well have produced specific requirements, enforceable by my office, to mitigate those impacts. However, I am not aware of any such impacts, and I

¹ Because Olmsted Drive crosses an Open Space District, the construction of Olmsted Drive required design and site plan review. “Any proposed construction of a vehicular access way across land in the Open Space Subdistrict, shall require [Design and Site Plan Review] pursuant to this Section 6A.4....” Bylaw § 6A.4.

And because Section 6A of the Bylaw makes no provision for a design and site plan approval to lapse, the 2001 DSPA was still in effect in 2005. Also, as of 2006 VHB or McLean expected to “start marketing for ARC (off Olmsted Drive) shortly....”

Given that (1) construction of Olmsted Drive required Design and Site Plan Review, (2) the 2001 DSPA had not lapsed in 2005, and (3) McLean appears to have constructed Olmstead Drive in the good faith belief that the rest of the ARC Project would be completed, I conclude that Olmsted Drive was constructed pursuant to the 2001 DSPA.

also defer to the Planning Board's finding in the 2022 DSPA that no such impacts occurred and no additional mitigation is required.

In any event, because no enforcement action was pursued before Northland applied to the Planning Board for a new project with a new plan, these issues were re-addressed in the proper forum (the Planning Board) in the 2022 DSPA. I view the 2022 DSPA as superseding the 2001 DSPA with respect to the partial buildout under the latter (2001) approval.

With that general response, I will address your requests (a) through (d) in turn.

Upham Bowl Stormwater Detention improvements

The 2001 DSPA stated that the Upham Bowl stormwater detention area would be addressed in an agreement between McLean and the Town. No such agreement was ever negotiated or executed in the intervening two decades.

In fact, the 2001 DSPA envisioned the Upham Bowl stormwater detention area as part of the stormwater mitigation system for the fully-built ARC project. The Stormwater Pollution Prevention plan adopted in the 2001 DSPA was designed to "address[] full-build conditions and construction activities," rather than any stormwater impacts from the construction of Olmsted Drive alone. *See also* 2001 DSPA Ex. C at 6 (referring to "installation of the proposed systems in accordance with the SWPPP"). The 2001 DSPA did not require any particular stormwater mitigation for the interim-build conditions that currently exist (i.e., Olmsted Drive constructed, the rest of the ARC Project not constructed, and no construction ongoing).

It particularly did not require the Upham Bowl stormwater detention area. That area was part of the complete plan for stormwater management in the full-build conditions. This is reflected in the Town's engineering consultants' statement that the Upham Bowl stormwater detention area "is an integral part of the overall stormwater management system." The "overall" stormwater management system consisted of systems designed to address a project that, again, was never built. In fact, the Upham Bowl stormwater detention area was meant to discharge to the full-build Zone 3 stormwater facilities, which do not exist.

Moreover, the ARC Project has since been replaced by the NRC Project. In granting the 2022 DSPA for the NRC Project, the Planning Board considered what mitigation measures were necessary in and around Upham Bowl. The 2022 DSPA reflects that drainage from Upham Bowl "was an issue of significant discussion during the public hearings." The Planning Board nonetheless concluded that there was no evidence that existing facilities are inadequate, either for

existing conditions or for the conditions that will result after the NRC Project and its associated mitigation measures are built.²

In short, you are asking me to conclude that McLean violated zoning because it did not construct a particular mitigation measure that [1] was supposed to be reduced to an agreement twenty years ago and was not, [2] was designed as part of a larger system for a larger project which was never built, and [3] that the Planning Board has since decided is not necessary to address either existing conditions or the stormwater impacts of the NRC Project, which replaced the ARC Project. There is an insufficient legal and factual basis for the enforcement action you have requested me to take. Accordingly, I find no violation.³

Engineering Review of the Olmsted Drive Stormwater Management System

You have not identified any provision of any of the governing zoning decisions requiring McLean to complete such a study, and I am not aware of any. Accordingly, I find no violation.

Removing the Paved Area Between the Hospital's MRI Facility and Olmsted Drive

VHB's 2005 statement that it would remove this impermeable surface is not enforceable. As you contend, Olmsted Drive was constructed pursuant to the 2001 DSPA. Removing this impermeable surface was not a mitigation measure required by the 2001 DSPA. The Planning Board never approved an amendment of the 2001 DSPA, as would be required to make a new mitigation measure mandatory. Bylaw § 6A.4. Accordingly, I find no violation.

Bringing the Temporary Outfall into "Conformance"

Your complaint that "these oversights are violations of the Site Plan Approval conditions related to Stormwater Management within each Zone" seems to refer to the requirement of Bylaw § 6A.5(d) that "stormwater management solutions shall be kept local within each Zone." However, that requirement serves a specific goal: "minimiz[ing] accumulation and the need for larger structures." *Id.* As far as I am aware, the temporary outfall is not causing accumulation or driving a need for larger mitigation structures. Also, Olmsted Drive itself crosses multiple zones. Given that, it is not surprising or improper that some of its stormwater infrastructure also

² Although the Planning Board attempted to limit its finding to be "solely for purposes of this DSPR," I view the 2022 DSPA to be dispositive of any issues related to work performed under the authority of the 2001 DSPA.

³ To the extent that requiring McLean to "provid[e] current hydraulic calculations of all flows into Upham Bowl" is a separate and independent zoning enforcement request, I find no violation. You have not identified any authority, and I am not aware of any, requiring McLean to provide such calculations.

McLean Zoning Response Letter

Page 6

crosses multiple zones. The 2001 DSPA itself reflects that the stormwater management system would only “generally” keep stormwater in its own zone. Accordingly, I find no violation.

Conclusion

For the foregoing reasons, I decline to order any of the requested zoning enforcement.

In accordance with Chapter 40A, Sections 8 and 15 of the Massachusetts General Laws, any party aggrieved by this determination has the right to appeal my determination to the Zoning Board of Appeals. Any such appeal must be made within thirty (30) days of receipt of this letter.

Sincerely,



Glenn R. Clancy, P.E., C.B.O.
Inspector of Buildings
Zoning Enforcement Officer