

Town of Norfolk
Zoning Board of Appeals
One Liberty Lane
Norfolk, MA 02056

April 4, 2018

Zoning Board Members	Others
Christopher Wider –Chairman ----- Present	Devin Howe - Associate Member ----- Present
Michael Kulesza –Vice Chairman --- Absent	Medora Champagne – Assoc. Member --- Present
Donald Hanssen – Clerk ----- Present	Amy Brady – Administrative Asst. ----- Present
Joseph Sebastiano – Clerk ----- Present	Robert Bullock – Zoning Enforcement Officer
Robert Luciano – Full Member ----- Present	David DeLuca – Town Counsel

The duly posted meeting of the Zoning Board of Appeals convened at 7:00 P.M. in Room 124 of the Norfolk Town Hall. Mr. Wider announced that the meeting was being audio and video recorded.

PUBLIC HEARINGS:

144 Seekonk Street, Appeal (cont'd from 3/7/18)

Mr. Wider noted that a request had been received from the applicant’s attorney to commence the continued public hearing at 8:00 P.M. due to a scheduling conflict.

Mr. Hanssen made a motion to postpone until 8:00 P.M.; Mr. Sebastiano seconded the motion; the vote on the motion was unanimous.

At 8:04 the hearing resumed.

Present was Patrick Garner, Wetland Scientist; Ted O’Harte, appellant; Christopher Agostino, attorney for appellant; Steve O’Connell, Andrews Survey & Engineering [ASE].

Documents presented an referred to were a letter from the Building Inspector, dated August 21, 2017, to the Appellant, Ted O’Harte, Regarding 144 Seekonk Street (Stop Work Order); letter from Patrick Garner to the Norfolk Zoning Board of Appeals [ZBA], dated February 19, 2018, Subject: Peer Review, 144 Seekonk Street; letter from Atty. Agostino to the ZBA, dated December 21, 2017, Regarding: Norfolk Comprehensive Permit Development – 144 Seekonk Street; letter from Atty. Agostino to the ZBA, dated January 16, 2018, Regarding: 144 Seekonk Street Stop Work Order – Patrick C. Garner Request for Information.

Mr. Wider recognized Bob Bullock, requesting on overview of actions to date. Mr. Bullock said he got a call in August, 2017, from an abutter to the property at 144 Seekonk Street, stating that she felt work was being done on her property. Mr. Bullock walked the property with Mr. O’Harte, and found that the stakes were not on the person’s property, but he did notice the appearance of a lot of excavation work being done, in excess of what would normally be required for allowed testing. He noted that gravel was placed to form a roadway of sorts, and he noted also that some work appeared to be in the vicinity of wetlands. At that time, Mr. Bullock sent a Stop Work Order letter to Mr. O’Harte, requesting him to contact the DPW to prevent runoff from the work that had been done; Mr. O’Harte cooperated. Atty. DeLuca added that his understanding is that the bylaw, D.1. cited by Mr. Bullock, clearly states what is permissible for purposes of engineering, etc.

Atty. Agostino stated that his understanding is that since this is a 40B project, local bylaws would not apply, and he discussed various options for bringing closure to the case. Mr. Wider said that although the applicant has received a Project Eligibility Letter from Mass Housing, the 40B hearing has not commenced, and local bylaws do still apply. Atty. Agostino argued to the contrary.

Mr. Wider recognized Mr. Garner, who began by stating that his mandate was originally to review an ALTA/NSPS survey, which ultimately ended up not being provided by the applicant, so at the request of the ZBA, he did a review more limited in scope. He looked at 2' contour topography, characterization of underbrush vegetation, cart path locations, evidence of earth moving and excavation activities, and evaluated wetlands on site, whether delineated or not. Using the ASE plans originally provided with the site plan, and the ANRAD plan. His conclusion was that he agreed with the Building Inspector, in that there was broad and "unusual" earthwork done on the site. For instance, cart paths were widened, roads were graded; work that was not necessary for testing. Most of the Title V holes were backfilled properly, with a few instances where they were not. Mr. Garner noted that the trails into the site are about 2,500'. Figure 2 of Mr. Garner's peer review letter shows a trail widened and excavated down 1-1/2' to 2' at about 350'-400' feet into the site, which he observed would not be necessary to get heavy equipment in to do testing. Mr. Garner continued through the Figures in his letter, noting areas of excavation. Regarding Figure 7, Mr. Garner noted work that appeared to have been done, perhaps for deep hole testing, but perhaps not. It had rained extensively several days before, and this low point in the site contained all the water. His opinion as a wetland scientist is that had the grading not taken place, he probably would have found a wetland meadow, or an isolated vegetated wetland in that location. He stated it would be unusual to do deep hole testing lower than the ground water level. Figure 9 notes a 5'+ cut that would not have been necessary for testing at about 1,000' into the site. Mr. Garner noted that at approximately 3,500' into the site, there is an area of standing water that is upgradient of an intermittent stream that appears to have been cut off by the excavation.

Mr. Garner stated that one of the factors the Commission had asked him to look at was the wetland area delineation. He noted that the wetlands in Norfolk are covered by both the Commonwealth (DEP) regulations (Wetlands Protection Act) and the more extensive town bylaw. The town bylaw does call out ephemeral, intermittent or perennial, and any land subject to flooding or inundation by surface- or groundwater, and Mr. Garner noted that it appears a town-regulated intermittent stream was left off of the plan, and that the source of it appears to have been cut off. Mr. Garner also noted another resource area left off the plan, which he thought might have once connected to the area that was shown on the plan.

Mr. Wider opened the hearing to questions from the Board. Hearing none, Mr. Wider recognized Atty. Agostino, who stated that the applicant had requested to be present at Mr. Garner's site visit, and that the applicant may have been able to explain some aspects that Mr. Garner thought were "unusual." Atty. Agostino stated that Mr. Garner had not made any reference to prior clearing vs. present clearing, and the applicant's stance was that most of the clearing was prior to his current site work. Atty. Agostino said that his understanding in reading the written report was that site work was likely connected with deep hole testing. He said that the allegation is that a major portion of the site was cleared; he said it was, but it was cleared in 2005/2006. Atty. Agostino continued that the rest of the report regards wetlands, and the Conservation Commission is on record saying that there is no violation of the Wetlands Protection Act, state or local, as a result of the testing done on the site. Referring back to the allegation in the Zoning Enforcement Officer's letter that there has been extensive clearing on site, Atty. Agostino stated that aerial photography since the recent work, is relatively the same as aerial photography from 2006, and showed photographs from his letter of 1/17/18. Atty. Agostino said that after receiving his eligibility letter in August, 2016, Mr. O'Harte went on site to do testing. He stated that there was no review of historic clearing in Mr. Garner's letter. Atty. Agostino proceeded to outline the steps he thought the Board could take.

In response, Mr. Garner said that he was not informed that he needed to contact the applicant before visiting the site; he further stated that he did not think any of his observations would have changed had they been there. He said that he had reviewed Mr. Agostino's letter and photographs, but did not think them relevant for comment, because in his experience, vegetation comes back very quickly, and there would have been a green canopy by now. In his opinion, the clearing he did see that had occurred, had occurred in the last 6-9 months. He clarified that he did not say the recent work was more extensive than previous work, but it had been done recently. Mr. Garner said that he could not respond to the statement that the Conservation Commission had said there had been no violation of local bylaws, because the wetlands were not flagged.

Mr. O'Connell said that Janet DeLonga, Norfolk's Conservation Agent, had stated at two meetings that local bylaws were not violated. Mr. Wider asked Ms. Brady to provide minutes of those meetings to the Board. In response to Mr. Garner's comment that the wetlands were not delineated, Mr. O'Connell said they were in fact delineated, well before the start of the testing, and before the application for the 40B was made to the state.

Mr. Garner respectfully disagreed, and said the application that was made to the Conservation Commission was only to affirm the State protected wetlands. He referred back to the portion of his report that showed the intermittent stream and wetland pocket that were not delineated.

When asked for further comment, Mr. Bullock stated that you can see the leaves on the trees that are down in his photographs.

Mr. Wider opened the meeting to questions from the Board. Mr. Howe asked if Atty. Agostino had any idea as to the percentage of clearing that was done previously vs. currently. Atty. Agostino said that there was widening of "2 feet here, 2 feet there," but the subject of the violation was the "major portion of the site" that was cleared. Mr. O'Connell added that existing conditions had been filed showing the current trail in black, and where it was widened, in red. Mr. Wider said that the subject of the violation was as stated in D.1.a.1. of the Norfolk Zoning Bylaws, that "Limited clearing and excavation is permitted to obtain necessary survey and engineering data or other activities required to secure necessary permits." He said there are machines that can traverse the topography, and there was no need to clear trees to do this testing. He also said that a water truck was not necessary, as a sufficient amount of water for testing can be brought in on a backhoe. Mr. Wider said that any delays in bringing closure to this hearing, could have been avoided had the applicant complied with the bylaw, once served the letter from the Zoning Enforcement Officer.

Atty. Agostino received a phone call stating that the town was looking for tens of thousands of dollars in fines from Mr. O'Harte, and that Mr. O'Harte has spent tens of thousands of dollars answering the allegations. He stated that Mr. O'Harte did stop work immediately upon receipt of the letter, and did the immediate remedial work required.

Mr. Wider opened the hearing up to the public. Lorraine Sweeney, 14 Stop River Road, stated that she has been an abutter to the property for 23 years, and walked the property frequently; she said that none of the trails looked like they do now, they were wide enough for cart paths, dogs, dirt bikes, etc. Ms. Sweeney stated that she has filed an appeal to DEP on the ANRAD finding of the Conservation Commission, and said that she can definitively state that local bylaws were not discussed at the meetings. She stated that Janet DeLonga said the Commission was asked to review a single resource area, and that is what they did. Subsequent to the filing of the appeal to the ANRAD, Ms. Sweeney participated in a sitewalk with DEP, the applicant, and the engineer, where she asked if that was the only area looked at. She said she was informed by Mr. O'Connell that since this is a 40B filing, they did not look at the local resources. Ms. Sweeney also indicated that there is disagreement between Mr. O'Connell and Ms. DeLonga as to the area looked at is the only state regulated area. DEP said they would determine that at a late site walk in the spring. Ms. Sweeney also stated that the Existing Conditions plan filed with the Conservation Commission in August did not show the construction roads.

Mr. Howe asked what equipment was used to widen the cart paths, and Mr. O'Connell responded that Mr. O'Harte had rented a small track excavator. Mr. O'Harte said that he was under the impression that there was an extensive amount of ledge on the property, so after receiving the Project Eligibility Letter, he had wanted to determine how extensive the ledge was.

Dr. Carpenter, 120 Seekonk Street, said that he had observed a very large excavator digging a very large hole. Mr. Hanssen suggested getting a receipt from the applicant for the equipment rental. Mr. Wider said that the question was whether more excavation than was necessary had been done, regardless of whether with large equipment or small equipment. He had heard it was a CAT 7300, but if the applicant wanted to submit a receipt in the next couple of days, it would be taken in as testimony. Mr. Garner added it was his experience that in a job like this, an applicant would want the biggest machine possible for efficiency, but that wouldn't justify the widening.

Mr. Hansen referred back to the drawing showing where photos had been taken, and an area near Photos 4 & 5 where he had remarked upon what looked like extensive filling. He asked Mr. O'Harte about it, and was told they needed to fill it in order to access it further. Mr. Garner did not recall an area of significant fill.

Deborah Gersha, 143 Seekonk Street, said that a lot of work was done in the summertime, and the equipment was onsite for many hours per day. Ms. Gersha stated that she witnessed the front of the property being cleared into a "parking lot" before permits were issued, which is what created tension in the neighborhood.

Atty. Agostino reiterated that his goal is to find a way for the applicant to be able to move forward. He reiterated what he perceives as ways for the Board to respond.

Atty. DeLuca said section 14 of MGL 40 gives the Board the authority to affirm the appeal, deny the appeal, or to modify the appeal. Atty. DeLuca stated that although a 40B may overcome local regulations, it is not a fact at the moment, and the local bylaws are still controlling the site.

Ms. Sweeney stated her opinion that an area that used to extend from the delineated state wetland, and is classified as a town protected resource by Mr. Garner, has been forever changed with the recent construction, and said that soil testing on the abutter's property would be necessary to prove that. Mr. Wider asked if DEP would be looking at that, and Ms. Sweeney said they would only look at state resources. Mr. Garner said the wetland in question is intact, but it was hard to tell if there was a hydrological connection to the state delineated area due to the road that was created; if a connection could be proved, it would make that area Bordering Vegetated Wetland (BVW) which would be protected under state regulations.

With no more discussion forthcoming, Mr. Wider said that he would entertain a motion to close the hearing.

Mr. Sebastiano made a motion to close the public hearing for 144 Seekonk Street; Mr. Luciano seconded the motion; the vote on the motion was unanimous.

82 North Street, Appeal (cont'd from 3/29/18)

Present were Ruth Bremilst, appellant; Rachel Palumbo, sister of appellant; Ron Palumbo, son of appellant

Ms. Champagne read the public notice into the record. Mr. Wider recognized Mr. Bullock, who gave an overview of the case. Mr. Bullock said the business has been closed for approximately 6 years; the water was shut off approximately 4 years ago. Mr. Bullock appeared in District Court with regard to the buildings in disrepair, and they were subsequently taken down; a few green houses, garage, storefront. Donation boxes still remain, but there has been no business operating there, so it cannot be grandfathered; it is requested that the property be cleaned up and brought back to a residential status. Atty. DeLuca confirmed that they were before the District Court with regard to an enforcement order; it was determined as a result, that the donation boxes were an accessory to the business, but did not constitute a business in and of themselves.

Ms. Palumbo said she represented the estate of her mother, Mary Bremilst, as executor. Mrs. Palumbo passed away last June. There was a preexisting nonconforming lot prior to zone determination; parents were there since 1948. Ms. Palumbo stated that more recently, they encountered a lot of competition, and her father, who was the maintenance man, passed away. In 2004, Mr. Bullock had some concerns for them to comply with, such as 3' aisles and exit signs. In 2008, Mrs. Bremilst fell; it came to light that she was a hoarder, and the family was told to clean the property before she could return home. After being home for an unspecified period, she went to live with Ms. Palumbo in Franklin. The first price quote they received for demolition of 5 greenhouses and a garage was \$30,000.00. Her son, Ronald, began to do the demolition with some friends. They tried to sell 2.5 acres to the Town of Norfolk, but a Constructive

Lien prevented that. Asbestos was found at some point; a new quote for demolition in the amount of \$17,000 was received. Ms. Palumbo stated that they were not aware that they lost their zoning during this time. She said they wanted to bring their "legacy" back in a different capacity, such as a community garden or farm stand with flowers, using temporary tents and the like, in an effort to keep the nonconforming zoning. Ms. Palumbo said the donation boxes have been there since 2004, and they have been told it is "one of the best spots" for collection; there was also a firewood box which benefitted the Wounded Warriors project. Her mother was living at Ms. Palumbo's house while the water was turned off. Rachel Bremilst noted 503C work she has done with florals, as well as demonstrations for other organizations. Ms. Palumbo said that all of the business accounts are still open, they still have a Facebook page, and they still have the original phone number from 1948, under the family business name. Ms. Palumbo concluded by asking the Board to show leniency, and let them prove that they can continue to be a small business of benefit to the community. Ms. Palumbo said that the magistrate, Mr. Pini, assured them they would not lose their zoning.

Mr. Wider asked if he understood correctly that Ms. Palumbo was not denying that the business had been out of operation for a period of more than two years; Ms. Palumbo said that, in accordance with Mr. Bullock's orders, they couldn't have people on the property, and so would do the occasional funeral or prom, and meet people offsite or in the parking lot. Mr. Wider said that, questions of legacy aside, the property no longer meets the test of being a business. Ms. Palumbo said that if the Board finds that "84 North Street" is a continuing business, then that is actually "82 North St." Mr. Wider said that the hearing for 84 North Street was continued and will be decided at a later date, and does not impact this hearing. Ron Palumbo asked the question again, and then referred to Atty. DeLuca who said that lots of facts had been heard regarding the identity of the property, which is not this Board's responsibility; the ZBA's job is to look at the business activities on the business – did they exist, do they continue to exist, and do they have the right to exist. Although both businesses (82 & 84) operate on the same site, the ZBA has to judge them separately. M. Palumbo said she learned that the business had been zoned as Commercial, not residential, and was being returned to Residential. Mr. Luciano also asked, if it were found that the "84 North Street" business had been operating continuously, would "82" then have a right to continue their business. Atty. DeLuca responded that the businesses are totally separate, and the florist business had still been shut down for more than 2 years.

Mr. Sebastiano made a motion to close the public hearing for 82 North Street; Mr. Luciano seconded the motion; the vote on the motion was unanimous.

60 River Road (cont'd from 3/7/18)

Mr. Hanssen made a motion to continue the public hearing for 60 River Road to April 18, at 8:00 P.M. at the King Philip Middle School; Mr. Sebastiano seconded the motion; the vote on the motion was unanimous.

113 North Street (cont'd from 3/7/18)

Mr. Sebastiano made a motion to withdraw without prejudice, the application for a Special Permit for 60 River Road; Mr. Luciano seconded the motion; the vote on the motion was unanimous.

APPOINTMENT:

At 7:35 P.M., the Board recognized Deborah and John Robbins, here for a scheduled appointment. Ms. Robbins stated that she lives at 75 Main Street, which is classified by the Assessor's records as a two-family house. Her grandfather built it in 1926 as a single family home; her parents got married 6/1/52, at which time the grandparents converted the upstairs bedrooms into an apartment, so her parents could live there. When they moved out in 1956 or '57, it was rented out to others. She brought pictures and said that there are separate ovens with propane tanks in the 2 living areas of the house. Ms. Robbins has lived there for 30 years with her father, who recently passed away. They would now like to market the house

as a two family, and were advised by the Building Commissioner to appear before the ZBA to have a Special Permit issued classifying it as a two-family, under D.2.c.2 of the Norfolk Zoning Bylaws. Ms. Robbins was advised as to the proper procedure for filing for a Special Permit.

APPROVE MINUTES:

January 24, 2018

It was noted that the bottom of Page 2 of 6 read "John Semes, Robin." Ms. Brady will verify and correct as necessary.

Mr. Hanssen made a motion to accept the minutes of January 24, 2018, as amended; Mr. Sebastiano seconded the motion; the vote on the motion was unanimous.

March 1, 2018

It was remarked that Ms. Brady was marked as absent, but was present; this will be corrected. It was remarked that Mr. Kulesza was marked as present, but was absent; this was later determined to not be the case.

Mr. Sebastiano made a motion to accept the minutes of March 1, 2018 as amended; Mr. Luciano seconded the motion; the vote on the motion was unanimous.

March 7, 2018

It was remarked that Ms. Brady was marked as absent, but was present; this will be corrected.

Mr. Sebastiano made a motion to accept the minutes of March 7, 2018 as amended; Mr. Hanssen seconded the motion; the vote on the motion was unanimous.

DELIBERATIONS:

Mr. Wider announced that due to the late hour, and the fact that the Vice-Chairman had been called away unexpectedly on business, deliberations of 123 Seekonk Street will take place on April 12, 2018.

Mr. Hanssen made a motion to adjourn the meeting; Mr. Sebastiano seconded the motion; the vote on the motion was unanimous.

The meeting was adjourned at 10:00 P.M



Mr. Joseph Sebastiano, Clerk, or
Mr. Donald M. Hanssen, Clerk

In accordance with the requirements of G.L. 30 § 22, approval of these minutes by the Board constitutes its certification of the date, time and place of the meeting, the members present and absent, the matters discussed, and the action taken by the Board with regard to those matters (if any). Any other information contained in these minutes is included for context only. Notes memorializing deliberation or discussion of any matter are in the summary form and may include inaccuracies or omissions. Where proof of the content of a statement is required, a tape recording or transcript should be consulted, if available.