

Town of Sterling
Earth Removal Board
Meeting Minutes 08/29/2018

Call to order by Chairman Mike Rivers at 6:03pm.

Members Present: Mike Rivers-Chairman, John Kilcoyne-Vice Chairman, Russ Philpot, Delores Rich.

Members Absent: David Mosley

Others in Attendance: Carolyn Murray-Town Counsel, Scott Miller from Haley and Ward Engineering (Town Engineer), Richard Lane, Chairman of Board of Selectmen, Ross Perry -Town Administrator, Brian Foley-Applicant, John Scarsella-Applicant, Paul Grasewicz-Graz Engineering for Applicant (Graz) and other persons.

Pledge of Allegiance recited by all.

The Chairman announced that all ERB meetings are subject to audio recording. Those recording the meeting include John Scarsella, The Holden Landmark reporter, and Mike Rivers.

Approval of Agenda by board.

Rivers explained that there would be a public permit hearing for 38 Clinton Road and that there is current litigation related to the property. There is a current lawsuit against the Board and three members individually (Rivers, Philpot, and Rich). All three individuals have made disclosures of potential conflicts of interest, which have been approved by their respective appointing authorities. Rivers noted that Dee Rich has abstained from all action related to 38 Clinton Road during her tenure on the board. Philpot made a motion to enact the "Rule of Necessity" so that the Board could perform its legal duties despite a majority of the members having a potential conflict of interest. Town Counsel noted that the use of the Rule of Necessity wasn't required due to approval of the conflict of interest forms but it was optional. Kilcoyne seconded the motion, all voted in favor.

Rivers explained that the Board might need to go into Executive Session during the hearing due to the ongoing litigation and potential settlement agreement.

Public Hearing, 38 Clinton Road

All abutters notices were reviewed and appeared to be in order. Rivers asked Town Administrator to confirm that all Town Boards were notified as required by bylaw, which he did. Perry attested that he had also notified the Mass DCR.

At 6:10 Rivers called the Public Hearing to Order by roll call vote, Rivers aye, Philpot

aye, Kilcoyne aye, Rich-Abstains from participating.

Applicant Brian Foley explained the project and the permit request. The project is going to be changed from four single family house lots to two duplexes. Rivers asked why the permit application still includes the four single family septic systems and the drawings now had only two septic systems for the duplexes. Foley stated that the closeout plan with the two duplexes were what was being constructed if the permit was approved. Rivers asked if the septic system permits had been obtained for the new designs. Foley stated they had not yet submitted them for permitting.

Rivers explained that there are sixteen standard conditions on the permit applications, which have been essentially unchanged since the Earth Removal Bylaw was approved, and that Foley hadn't answered a number of the conditions on his permit. The Board then reviewed the sixteen conditions.

Condition 1-Variance. A question was by an audience member as to why a variance wasn't required. Rivers deferred to Town Counsel, who indicated that the determination that a variance wasn't required was part of the lawsuit settlement. She further explained that the determination was because the construction of residential homes was a temporary use rather than a more permanent use such as a commercial earth removal operation. In this case, the earth removal would be incidental to the use of residential construction.

Condition 2-Hours of Operation-After discussion it was agreed that the applicant would adhere to the standard hours of operation.

Condition 3-Noise, Dust, etc. Foley had mistakenly checked "no" that they couldn't comply, after discussion they agreed to comply.

Condition 4-Traffic & Congestion, Applicant will comply.

Condition 5-Excavation within 200 feet of property line without abutter permission. Foley said that in theory his answer would be yes. Rivers pointed out that excavation has been done lower than the property line without permission of the abutters, but that much of the excavation that wouldn't comply had already been done before the permit was granted. Foley agreed, but said that he would not be able to get permission from some of the abutters. It was noted that Condition 5 has never been waived on previous permits.

Condition 6-Slope Grades and Loam/Reseeding. Rivers noted that based on the proposed drawings, the applicant would not meet the required slope ratios. Foley said it would be difficult to grow loam on exposed rock face. Rivers noted that on the past approved septic plans Graz Engineering required the use of a licensed geological engineer and asked whether the new plans would have the same requirement. Foley said the current closeout plan doesn't have that requirement. Philpot asked whether Graz was waiving that requirement. Graz stated that he still wanted to reserve the right to require a Geotechnical Engineer due to the site conditions. Philpot asked what the

proposed finished grades are. Graz said he expected 1:2 instead of the 2:1 (twice as steep). Philpot questioned Foley as to what Foley meant by "surgical earth removal. Foley said a regular excavator with a rock hammer as needed. After discussion Foley said that both types of equipment would be on site for the duration of excavation. Rivers asked Scott Miller for his opinion. Miller expressed concerns about a rock overhang from previous excavation. He reiterated his concerns in a letter he previously sent the board that there should be a geotechnical engineer involved for the duration of the project so that a stable base can be created for the stated residential purposes. Rivers said he'd like to hear from the Geotechnical engineer about both parts of Condition 6, the slope ratios and the extent of loam and seeding. An abutter Robert Gibson expressed concerns about a pond and marsh in the rear of the applicants property. He was concerned about fractures and whether the pond might be drained. Philpot said he didn't think that any engineer in the world could offer guarantees about what might happen to the pond. Rivers explained the wetlands process with regard to Earth Removal permits, Kilcoyne and Philpot concurred that the applicants appeared to be in compliance and further restriction would be beyond our legal purview. Rivers again reinforced that the slope ratio requirement has never been waived and to do so would be unprecedented. Foley offered that if the board agreed to waive the condition they would properly address the seeding and loam requirements including abiding by any recommendations of the engineers. Kilcoyne thanked Miller for his letter and asked him whether the loam requirements helped with slope stabilization. Miller replied in the affirmative. Rivers expressed safety concerns about the rock slope and asked about fencing and what standards it might be built to. Graz said that the Mass Building code would apply. Philpot said we can't enforce the building code. Foley offered partial fencing above the steepest areas. Rivers offered the example of a 5 year old living in one of the proposed homes. Graz said that he would be including fencing on his septic plans. It was agreed that the fencing would run from the right rear corner to the line separating lots 4 & 5, plus to protect anywhere with a slope of 2:1 or steeper. Scarcella offered they would put fencing starting on lot 1. Rivers said he'd like to see a drawing showing where they proposed to put fencing.

Condition 7 Wetlands, again Foley had checked "no" in error, they agreed to comply.

Condition 8 Compliance with all laws, yes

Condition 9 Storage of Petroleum Products-Again, checked as no. Foley said the fuel company fills the vehicles and portable tanks. Foley said they had a permit from the Sterling Fire Department. Foley was asked to provide a copy of the permit and he agreed.

Condition 10. Permit Valid only for Original Applicant. Checked no, Foley was concerned that the trustee of the real estate trust could change. Foley said he would be the contractor of record and the board agreed that a trustee of the owner could change, as long as the trust itself and the contractor remained the same for the duration of the permit.

Condition 11 – Overnight Equipment Storage, Allowed, Rivers noted that this was commonly waived to allow overnight parking.

Condition 12 Excavation within 8 feet of Groundwater- Wasn't answered on application, Graz said there was groundwater at less than that already. Seasonal high ground water has been found at 6 feet. Rivers asked when perc tests and deep holes were done. Foley said 2015, before any earth removal. Foley said any further excavation would be in compliance. Abutter Dee Rich expressed concerns about excessive runoff on her property which have started and gotten worse since excavation at 38 Clinton Rd began. Rich said that the runoff floods out her septic field. Kilcoyne asked if this started before the excavation, Rich said no, it was all since the earth removal began. Philpot read from Scott Millers letter recommending further drainage. Rivers asked if the two middle lots which are now going to be unused for building could be used for some type of detention basin to divert rainwater away from the abutting properties. Graz agreed that was a viable option and would design something for review by Haley and Ward. Abutter Bob Keriotas said he had observed rocks, mud, and boulders flowing into the roadway from the applicant's property since they began working. He also complained of noise and dust complaints which have gone on year after year. He said the neighbors had tried to resolve with the applicant without success. Rivers asked Graz when they first determined grade on site, Graz said 2014 before any excavation.

Condition 13 -Elevation not lower than Chocksett or Leominster Rd-not pertinent to project

Condition 14-No excavation lower than the present elevation of the haul road- not applicable to a residential project.

Condition 15-Work limited to 2 acres, Noting that the entire project was only two house lots, Rivers asked whether Foley expected to close out the removal permit before any houses or lots were sold. Foley said no. Rivers said the board was trying to understand the schedule and scope of project. Philpot pointed out that if a lot(s) was sold, they would have to come for a new permit due to Condition 10. Rivers asked if they would consider the permit closed out once the septic systems were built. Foley couldn't answer. Philpot said it was up to the applicant to tell us when they expected to be finished. After much divergent discussion, Foley said he expected 9 to 10 calendar months of work after approval. Philpot confirmed that by the end of spring the permit work would be closed out and finished. Foley agreed.

Condition 16-No usable topsoil would be removed from site-Foley agreed

Rivers discussed the bottom of the permit to make sure Foley was in agreement that the members of the board had the authority to enter the property at any time to inspect, Foley agreed to this.

The board discussed further conditions. At the recommendation of Town Counsel, the board could postpone the meeting to a date certain to allow the Applicant to gather

further information needed. Rivers asked applicants how long it would take them to come up with a plan to retain a geological engineer and get supplemental information including some site grades to Scott Miller. Mr. Graz said several weeks. Foley complained that delays would cause harm to the project's four (4) month construction schedule. They already have foundation crews and subcontractors scheduled. Their next step is to get a building permit after they get their Planning Board ANR approval. Rivers told Foley that they weren't prohibited from working on the site, just removing material from the premises. Foley wanted board to give approval tonight and then give them 30 days to gather the information later. The board felt this was unreasonable.

Bob Gibson read portions of his letter to the Board aloud and said that many of his questions had been answered tonight and thanked the Board.

1. At 8:01 Rivers asked for a motion to Executive Session to meet with Town Counsel for about ten minutes. Philpot made the motion, Kilcoyne seconded, under M.G.L. c. 30A, §21(a), Reason 3, To discuss strategy with respect to litigation if an open meeting may have a detrimental effect on the litigating position of the public body and the chair so declares with respect to the following matter: LCM Realty Trust, et al. v. Town of Sterling Earth Removal Board, et al., Worcester Superior Court Civil Action No. 17 CV1839D relative to 38 Clinton Road. Roll call vote Rivers aye, Kilcoyne aye, Philpot aye. The Board left the room for Executive Session.

At 8:08 the board returned to Open Session.

Rivers said that the Board was willing to continue to a date certain to be provided by the applicant in as short as a week, at which time a permit would be granted if the requested information was provided. Foley said there was a litigation deadline a week out, but couldn't elaborate on any details. Foley asked for a few minutes to confer with his engineer and partner.

A motion was made by Philpot to suspend the hearing for 5 minutes to hear a renewal application from Robert Berube. Seconded by Kilcoyne, all in favor. Dee Rich returned to the board. Rivers said that Mr. Berube had send in his renewal fee, and that he (Rivers) had visited the site. There have been no complaints regarding the project and Rivers noted that as a farm, the conditions of the permit were slightly different due to the Right to Farm bylaw. Philpot noted that there was a Conservation Restriction that the DCR was fine with when the permit was originally granted. Kilcoyne made a motion to renew the permit for one year with the same conditions. Philpot seconded, all in favor.

Philpot made a motion to resume the hearing, seconded by Kilcoyne, Rivers aye, Kilcoyne aye, Philpot aye, Rich abstained. The hearing was resumed.

It was agreed that the board would continue the hearing one week until 6:00 pm. 9/6, and at that time, or sooner, the applicant would provide the following;

- a) A Fencing Plan

b) A Drainage Plan

c) The applicant will hire a Geotechnical Engineer and present a plan to the board including the scope and timing of what work was expected of them.

Foley agreed to these terms and promised to work cooperatively with board to address any issues that might arise.

Philpot made a motion to continue the hearing until 6:00 pm, September 6, 2018, Kilcoyne seconded, all in favor.

Referenced Documents:

- 1) Meeting Notice
- 2) Letter from Scott Miller – Haley & Ward Engineering
- 3) Letter from Abutters Gibson and Smith