

Town of Sterling  
Earth Removal Board  
Meeting Minutes 09/06/2018

Call to order by Chairman Mike Rivers at 6:00pm.

Members Present: Mike Rivers-Chairman, Russ Philpot, David Mosleoverhy.

Members Absent: Delores Rich, John Kilcoyne (arrived at 6:30)

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.

Permit Renewal for Mrs. Ann DesMarais of 4 Pine Hill Lane, Princeton, MA Et. Al. to remove earthen materials from property located at "Off Leominster Rd." (Map/Lot 71-2, 71/1 & 71/23) in Sterling, MA. Rivers spoke with Mrs. Desmarais. She said that she may have some changes to the permit next year, but no current changes. There have been no known complaints and has paid the renewal fee. Mosley made a motion to renew the permit under the same terms for one year, Philpot seconded, all in favor.

**Public Hearing, 38 Clinton Road**

There was a delay in the public hearing, as a quorum was unavailable. John Kilcoyne hadn't arrived yet, Dee Rich was abstaining, and David Mosley couldn't be a voting member because he had not been present at the first portion of the hearing.

Rivers explained that there would be a continuation of 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. Rivers read the following notice;

The Sterling Earth Removal Board will hold a public hearing on Wednesday, August 29, 2018 at 6:10 pm in Room 205 of the Maryellen Butterick Municipal Building, 1 Park St., Sterling, MA to consider

a request for a one (1) year Earth Removal Permit made by Brian Foley representing TCF Holdings LLC of 383 Redemption Rock Trail, Sterling, MA and LCM Realty Trust of 11 Taft Road, Sterling MA to remove up to eight thousand five hundred (8,500) yards of soil, ledge, and fractured rock materials from property located at 38 Clinton Road (Route 62) in Sterling MA which consists of Sterling Assessor's Parcel ID's 58-4, 58-51, 58-52, 58-53, and 58-54. A copy of the Permit Application and Engineering Plans are available for public review in the Town Clerks office during normal work hours.

Rivers called a short recess until Kilcoyne arrived at approximately 6:35, when Philpot made a motion to resume the public hearing, seconded by Mosley, all in favor.

The applicant's engineer Paul Grasewicz showed the revised engineering plans which included changes to accommodate the movement of water flow to the center parcels between the two house lots and minimize runoff onto the abutting properties. Rivers asked what size storm the design would accommodate. Grazewicz said any size storm would be contained. Philpot and Rivers both read portions of the most recent letter received from town Engineer Scott Miller. Rivers asked Foley about the vegetation and loam requirements. Foley expressed concerns about being able to re-vegetate the site. Rivers pointed out that despite a wetter than average year, they had been unable to get grass growing well despite additional watering and fertilizing. Rivers also pointed out that the entire site had been heavily vegetated prior to the applicant beginning excavation. Scott Miller stated that he felt that organic matter would have to be added to give vegetation something to grow in. Miller reminded that the requirement for six inches of loam came from the town's standard conditions. Philpot felt we should stick with the six inch requirement wherever physically possible. He pointed out that loam settles after being put down. Rivers pointed out that the six inch condition hasn't been waived in the past, and if Foley wants it waived now, he needs to demonstrate a valid need. Mosley pointed out that Millers letter stated that areas that are 2:1 or less should meet the 6 inch standard, and other areas should be at the recommendation of the geotechnical engineer. Scarsella questioned whether the existing topsoil counted toward the 6 inches and thought 6 inches was "overkill". Foley said they had a loam stockpile at the top of the ridge. Rivers pointed out that most of the lot did not have anywhere near six inches of topsoil and the ground was mostly rocky. Rivers pointed out that every other applicant had agreed to the condition and it was important to treat everyone the same unless there was a valid reason to waiver. Philpot pointed out that the only area that was well vegetated was the small strip adjacent to the road because that is the only area that hasn't been stripped. Philpot said that when he visited the site last summer there was almost no vegetation in the excavated areas. The board unanimously agreed that the standard should be adhered to. Foley asked how to document the requirement. Rivers said he would anticipate the geotechnical engineer coming back to the board in the fall with a comprehensive study of the site, including a drawing showing exactly what areas will be loamed and seeded to the specification and documenting why other areas couldn't meet it. Rivers asked about Foley's timeframe. Foley said the hydroseed would have to be put down by the middle of October, but they were still working with the

Planning Board on the ANR approval. Rivers asked why they needed an ANR to loam and seed. Question was not answered. Philpot reminded Foley of his past statement that both excavator and rock pick would be available on site. Philpot said we've been dealing with this too long, and he doesn't want to be sitting here in early June and having the applicants say they haven't been able to finish excavation and need more time. Foley confirmed they would have an aggressive schedule and use a rock hammer. Rivers asked again about the timeframe. Foley said they might not start until spring and the permit was for a year. Kilcoyne said we were looking for a plan, and if we had that, it might be ok if they didn't start working until March. Philpot pointed out that Foley had contradicted what he said last week that he was ready to start and had contractors lined up and ready to go. Foley said that construction was subject to delays. Kilcoyne felt that putting all work off for 7 or 8 months would be wrong. Foley offered many reasons and excuses for past and future delays. Kilcoyne felt we couldn't issue a permit until we had the geotechnical engineers report. Rivers asked Foley why they couldn't take core samples or use some other method to determine the underlying rock. Foley said the engineer told him he just need to be on site during all excavation so that he could observe the rock conditions as excavation happened. Foley confirmed the engineer would be on site at all times that excavation occurred. Philpot asked again what the schedule would be if a permit were granted tonight, as the work was being done by the applicants and subcontractors who were already lined up. Foley said the subcontractors weren't available anymore as he stated last week. Mr. Scarsella said that the delays were caused by the board "cease and desisting left and right". Rivers pointed out that the delays were caused by the applicants. A year ago, a cease and desist was issued with a small list of conditions to be met to lift it. The applicant chose to file litigation rather than meet the conditions. As a result of the permit application and the information requested at these two hearing meetings, the conditions have now essentially been met. While the board is sensitive to their timeframe, it isn't the board's fault they lost a year. Town Counsel asked whether a plan for loam could be provided "sooner rather than later" so that the permit could be granted. Counsel recommended conditions with set timetables. Kilcoyne said we could grant a permit with additional conditions and timetables for milestones and updates. Kilcoyne wants monthly reports. It was agreed that we would get detailed progress reports from the engineers within thirty (30) days of the start of excavation and every thirty (30) days thereafter. Rivers said we need a plan from the engineer showing what needed to be loamed and hydroseeded before that work began. Mosley said we also need a final plan as soon as possible and asked if anything would be done about the access driveways to minimize materials going into the roadway. Foley said the two existing access points would be used, and they have compacted bases. They are also using haybales and wattles as needed.

Rivers reviewed the agreed standard conditions from the previous meeting. Condition 5 about excavation lower than the property line without abutters permission wasn't decided. Foley asked for a waiver from the condition as the excavation has already occurred before the permit application was filed. Philpot questioned this. Rivers pointed out that it was unlikely that they applicants could gain such permission, as virtually all the abutters have expressed verbal and written opposition to the project at various time in the years since the project began. Town Counsel questioned whether Condition 5

was legally enforceable, as it potentially gives other property owners the right to inhibit development on an abutter. Philpot said that recognizing the topography and shape of the land, it would be an impossibility to meet the condition in this case. Mosley said while he understands the need for the condition, in this case he was ok with waiving it. Kilcoyne agreed and the board agreed to waive Condition 5.

With regard to the final permit conditions, Philpot wanted conditions placed that the final slopes would not exceed those shown on the most recent closeout plan. After much discussion Grazewicz said the final grades wouldn't be greater than those shown on the plan and the board agreed to this condition.

Rivers read a draft set of Additional Conditions;

***Permit is granted for construction of slopes in accordance with attached plans. Applicant has agreed to engage the services of a geotechnical engineer to study site, to recommend appropriate methods of excavation, and to recommend means for stabilizing site, including recommendations for seeding or re-seeding areas, to minimize potential impacts of earth removal at 38 Clinton Road upon abutting and adjacent properties. Within four (4) weeks of the commencement of any excavation or earth removal, Applicant shall deliver to the Earth Removal Board a Report of Assessment and Recommendations of said geotechnical engineer. After this initial report, the Applicant and Geotechnical Engineer shall also provide the ERB with status update reports not less than every thirty (30) days. These reports shall include any revised conditions or recommendations for the site. The Earth Removal Board may elect to have these reports reviewed by Haley and Ward or another geotechnical engineer. Applicant shall be bound by whatever recommendations his geotechnical engineer recommends as to methods of excavation and stabilizing site, which shall be incorporated into the Earth Removal permit by reference. Upon reviewing the geotechnical report, the Earth Removal Board may, at a public meeting following notice to the Applicant, impose additional reasonable conditions as may be recommended by the Board's engineer.***

There was additional discussion. Mr. Scarsella said it wasn't reasonable to get a report 30 days after excavation began. Philpot and Mosley elaborated on what the board was expecting. Rivers said that if they or their engineers decided that the plan needed to change, they would come to us and explain the needed change and we would act on the change request.

**Condition 17: No certificate of occupancy shall be issued for any structure on the site until the Earth Removal Board has approved the closeout of this permit.**

The board said this condition would include a site walk, an as-built plan, and a report from our Engineer.

Town Counsel asked about the loam requirements. Rivers explained that they would be looking for the loam report from their geological engineer to approve before

hydroseeding occurred, and any changes to that report needed to be approved by the ERB.

There was further discussion about the hours of operation. Neighbors expressed that they would just like to get the nuisance over with as soon as possible. The standard hours would apply, but would be strictly enforced. No running equipment before hours.

Storage of Petroleum Products-Rivers reminded Foley that he still had to turn in his Fuel Storage Permit as required.

Traffic Conditions-Philpot read point 6 from 8/28 Engineers review letter recommending traffic details at some points in time. Chairman of the Board of Selectman (BOS) Richard Lane asked to speak. Rivers pointed out that if 2 of the 3 Selectmen deliberated on this topic, it would be an Open Meeting Law Violation, as the ERB has learned that the BOS has held multiple meetings to deliberate on this project. The BOS did not file a meeting notice to allow such deliberation during the ERB hearing. Town Counsel said that a person could speak as an individual, as long as they identify themselves and speak only as an individual and not as a member of the board. Lane stated the following; *"The Police Chief has made public comment on this already, he has been at meetings, he has commented that he will determine when details will be necessary. He is our Chief of Public Safety, he is aware of what is going on, and if a detail is needed, he will make sure a detail is there, but this has been discussed publicly before"*. Rivers asked at which meeting(s) those comments were made, to which Lane replied that he had made those statements at the "All Boards" meeting regarding 38 Clinton Road, before Rivers was involved. Kilcoyne said that based on Lane's statement, he would defer to Police Chief Gary Chamberland.

Philpot asked that Foley notify the Board before they started operations, Foley offered as 48 hour notice.

Fencing Requirements-Rivers said that due to the fact that there is a house behind the applicants property and a steep cliff, he's like to see the fence go at least to the left corner of the property. Foley said he wanted to see the geotechnical recommendations first. It was agreed that at a minimum the fence would meet the criteria on the plan.

Foley asked what would happen to the permit if he dropped dead. Rivers explained that as the contractor, the permit would end and the new contractor would have to come back for a new permit.

The board decided that Rivers would write up the permit with all the agreed conditions and send it to Town Counsel for review, and send a copy to the other members. Foley asked when it would be received, Rivers said that technically, the permit was active at the time of the vote (tonight) and they didn't need to wait for the written copy to begin work under the agreed conditions. Rivers hoped that the final copy could hopefully be sent within a week.

There was discussion on whether the applicant should be responsible for paying the town's engineering costs as happens with other boards. Town Counsel asked whether the applicant was open to this.

Foley noted that they were racking up expenses and that it was the Board of Selectmen that hired Haley and Ward. Philpot noted that the Selectman had taken this action on their own without any foreknowledge of the ERB. Town Counsel noted that the ERB had no budget for Engineering, perhaps the applicant could be asked to pay half the fees. Rivers noted that nothing the ERB had requested thus far was extraordinary or outside the scope of a normal construction project and there was a precedent among other boards. Counsel pointed out that in most of those cases there was a state statute that governed the fees, and there wasn't any statute for the ERB other than the town bylaw. Rivers pointed out that we are in uncharted territory, as no one else has ever asked for similar waivers, so we have latitude under what terms to offer such waivers of normal conditions. Philpot concurred that most of these waivers were safety related. BOS Chairman Lane asked to speak again. Rivers asked if his comments were as a member of the public.

Lane "As a member of the public, I will say that I believe the Selectmen, if the Earth Removal Board would so desire, would uh...

Rivers "So you're speaking as a Selectman now?"

Lane, "No, ugghh, I would defer to Counsel"

Town Counsel "He's not deliberating with Mr. Kilcoyne, at the moment.

Lane "And as the Chair of the Select board, I control the agenda, and I can assure you that if the Earth Removal Board wants to continue to have Haley and Ward that will be on an agenda so that it can be discussed.

Rivers "Which it hasn't been to date?"

Lane "Which it hasn't been to date?"

Rivers " I don't know, I've looked at your agendas, and I've never seen that discussion, and somehow he got hired. I don't know when it happened, or how it happened, so I don't know.

Rivers "So will the Board of Selectmen ask that he reimburse the town the fees?"

Lane "No"

Kilcoyne "That was entirely a request of the Board of Selectmen, Mr. Chairman. And he can provide us with some expertise, and it was kind of helpful. I think it was kind of a surprise, tied in with the discussion today....I don't know.

Rivers "So as a taxpayer, is it fair to the taxpayers for us to pay for it when every other applicant for every other type of construction permit pays that cost.

Kilcoyne "Ok, so I asked before, what is the precedent. Have we asked that engineering fees be paid before?"

Rivers "We've never had the situation because we've never had anyone ask for waivers like this".

Kilcoyne "Ok, so there's no precedent".

Mosley "On this board"

Philpot "There's also no precedent for us going from a 1:2 slope to a 2:1".

Kilcoyne "I hear you"

Philpot "That's my big concern".

Kilcoyne "Well I think we're relying on the Engineers for that one, that its going to be stable and safe, are we not?"

Philpot "Well, yes and no, that's why we have peer review, and they don't always agree. I've been through it a number of times. Anyway, let's move forward".

Rivers "So what is the decision?"

Kilcoyne "I'd like to make a motion to approve the permit on the conditions you're writing up, excluding the fee".

Philpot seconded, roll call vote, Philpot aye, Kilcoyne aye, Rivers aye, Mosley abstained.

Rivers asked for a motion to lift the cease and desist ordered in September 2017, Philpot made the motion, Kilcoyne seconded, all in favor.

Kilcoyne made a motion to adjourn, Mosley seconded all in favor.

#### Referenced Documents:

- 1) Meeting Notice
- 2) Permit Application
- 3) 8/28/18 Letter from Scott Miller – Haley & Ward Engineering
- 4) 9/6/18 Letter from Scott Miller – Haley & Ward Engineering
- 5) Draft conditions from Town Counsel