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VIA EMAIL & HAND DELIVERY

November 22, 2017

Jonathan M. Sachs, Chair
Wayland Zoning Board of Appeals
Wayland Town Hall
41 Cochituate Road
Wayland, MA 01778-2614

RE: 113-119 Boston Post Road / Chapter 40B Comprehensive Permit Application

Dear Chairman Sachs and Members of the Board of Appeals:

This Firm represents Protect Wayland with respect to the Comprehensive Permit Application (the “Application”) filed with the Zoning Board of Appeals (the “Board”) by Eden Management, Inc. (the “Applicant”) pursuant to M.G.L. c. 40B, §§20-23.¹ The Applicant seeks approval of a 3-story, 60-unit, 89-bedroom² residential structure (the “Project”) on approximately 6.49 acres of land at 113, 115, 117 and 119 Boston Post Road (the “Property”).

We urge the Board to reject the Application and deny the Project a Comprehensive Permit for the reasons set forth below, and further detailed in the letters submitted herewith from Comprehensive Environmental, Inc. (“CEI”), Ecosystem Solutions, Inc. (“ESI”), and EBT Environmental Consultants, Inc. (“EBT”).

The Project’s design is utterly deficient, largely due to the Applicant’s decision to shoehorn an unreasonably large number of units into an environmentally sensitive site. As a result, the Project would cause significant environmental harm to unique and sensitive wetland Resource Areas, severely degrading valuable and rare wildlife habitat. It would also threaten the health and safety of residents and jeopardize the Town’s ability to meet its obligations to the U.S. Environmental Protection Agency under the NPDES Stormwater Program, as required by its General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (MS4s).

¹ Protect Wayland is a local grass-roots organization with a membership of approximately 225 Wayland residents.

² We note that the Application is inconsistent with respect to the number of bedrooms proposed for this Project. Section 9.0 of the Application states there are 89 bedrooms, while Section 5.0 reflects a total of 96 bedrooms (6 studios, 24 one bedrooms, 24 two bedrooms, and 6 three bedrooms).



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In short, the Project as proposed cannot be adequately conditioned to ensure protection of important local concerns relating to the environment and public health and safety. Many of the Applicant's requested waivers would only exacerbate these harms by removing important local safeguards intended to promote public health and safety and protect the environment.³

MASSACHUSETTS COMPREHENSIVE PERMIT ACT

The state Legislature's intent in developing the Comprehensive Permit Act, M.G.L. c. 40B, §§20-23, was "to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing' in the Commonwealth." *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 28-29 (2006). A rebuttable presumption that regional affordable housing need outweighs local concerns exists where a municipality's stock of low and moderate income housing is below ten percent. *Zoning Bd. of Appeals of Canton v. Housing Appeals Comm.*, 76 Mass.App.Ct. 467, 469-470 (2010).

This does not mean, however, that the Board must simply "rubber-stamp" its approval on any comprehensive permit application to come before it. To the contrary, the Board may "deny a Comprehensive Permit as not Consistent with Local Needs if the Board finds that there are no conditions that will adequately address Local Concerns." 760 CMR 56.05(8)(b)(3). The Legislature charged the Board to balance the need for affordable housing "against the statutorily authorized interests in the protection of the safety and health of the town's residents, development of improved site design and building design, and preservation of open space." *Zoning Bd. of Appeals of Canton*, 76 Mass.App.Ct. at 31.

The Board has significant other review powers as well, including downscaling the Project and denying waivers. The Board may review the Applicant's *pro forma* or other financial submittals to determine whether reducing the number of the Project's proposed dwelling units would render it uneconomic where reduction is "justified by a valid health, safety, environmental, design, open space, planning, or other local concern that directly results from the size of a project on a particular site" 760 CMR 56.05(6)(a)(4). The Board may also deny the Applicant's requests for waivers from local rules and regulations unless and until it has proven that application of those requirements would render the Project uneconomic.⁴ 760 CMR 56.05(6)(b).

Even if the municipality's stock of low and moderate income housing is below ten percent, denial of a comprehensive permit may be upheld "as 'reasonable and consistent with local needs' if the community's need for low or moderate income housing is outweighed by valid planning objections to the proposal based on considerations such as health, site, design, and the

³ The Applicant has submitted a 9-page list of waiver requests seeking to avoid compliance with many important local bylaws including Wayland's Stormwater and Land Disturbance Bylaw, Wetlands and Water Resources Bylaw (as well as general Bylaws dealing with enforcement, Riverfront Area, and Streams), Board of Health Regulations (including regulations regarding groundwater testing and septic system design and siting) and numerous provisions of the Zoning Bylaw.

⁴ The October 26, 2017 letter to the Board from the Wayland Planning Board details the process for considering whether to grant requested waivers.



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need to preserve open space.” *Hingham v. Department of Hous. & Community Dev.*, 451 Mass. 501, 504 n. 6 (2008) (quoting *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm.*, 15 Mass.App.Ct. 553, 557 (1983)).⁵ In other words, a board may “justify denying an application for a comprehensive permit by identifying a health or other local concern that (i) supports the denial, (ii) is not adequately addressed by compliance with State standards, and (iii) outweighs the regional housing need.” *Reynolds v. Zoning Bd. of Appeals of Stow*, 88 Mass. App. Ct. 339, 348 (2015).

For example, the Massachusetts Appeals Court rejected a decision by the Stow Zoning Board of Appeals to grant waivers from local waste disposal limitations set forth in its zoning bylaw. *Reynolds v. Zoning Bd. of Appeals of Stow*, 88 Mass. App. Ct. 339 (2015). The Court noted that “in many instances” a permit condition requiring compliance with state standards may be “sufficient to protect local concerns,” but cautioned that “[c]ompliance with State standards ... is not necessarily the end of the inquiry.” *Id.* at 348. In that case, evidence that the project’s septic system “would contaminate the groundwater such that unacceptable levels of nitrogen would reach an abutter’s well demonstrates that compliance with the State standards ... are insufficient to protect the groundwater from being contaminated by the proposed project.” *Id.* at 349-350. Consequently, the plaintiff succeeded in identifying “an important local health issue, maintaining clean groundwater servicing local private wells, that is not adequately protected by compliance with applicable State standards.” *Id.* at 350.

Therefore, the Board should not feel pressured into granting waivers from important local rules and regulations regarding public health, safety, or other local concerns, or granting a conditional approval of the Project based upon compliance with state standards. The Board is authorized to deny the Applicant’s waiver requests unless and until it is satisfied that those waivers are necessary to make the project economic.

If the Project as proposed cannot be adequately conditioned to address Local Concerns, the Board may deny a Comprehensive Permit or explore whether the number of dwelling units could be reduced without rendering the Project uneconomic.

THE PROJECT WOULD GENERATE EXTREME AND UNWARRANTED IMPACTS TO JURISDICTIONAL WETLANDS, RIVERFRONT AND WILDLIFE HABITAT

Pine Brook, a designated cold-water fishery, runs along the southern portion of the Property. Consequently, a majority of the Property lies within the 200-foot Riverfront Area associated with Pine Brook.⁶ Work within jurisdictional Riverfront Area is governed by the Rivers Protection Act and its implementing regulations, promulgated by the Massachusetts Department of Environmental Protection (“MassDEP”) and set forth at 310 CMR 10.58.

⁵ Here, as demonstrated in the Board’s record by submittals from Town officials and boards, the Town of Wayland has in recent years made significant progress toward achieving its ten percent minimum.

⁶ Riverfront Area is defined as “the area of land between a river’s mean annual high-water line measured horizontally outward from the river and a parallel line located 200 feet away ...” 310 CMR 10.58(2)(a).



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In addition, the Project must satisfy applicable performance standards for work in other jurisdictional wetland Resource Areas on the Property. 310 CMR 10.58(4)(a). At a minimum, the Property contains jurisdictional Bank, Land Under Water, and Bordering Land Subject to Flooding (“BLSF”, the boundary of which follows the FEMA flood zone on the Property) associated with Pine Brook.⁷

Pine Brook is a perennial stream of exceptionally high quality, and provides valuable and unique wildlife habitat, as established in the November 21, 2017 report prepared by EBT. The stream’s water quality and habitat value have been documented by state environmental agencies for decades. The Project would result in extensive, substantial degradation to these values, as discussed in the November 22, 2017 letter from ESI.⁸

Riverfront Area is considered critical to the protection of interests including private or public water supply, groundwater, flood control, storm damage prevention, protection of wildlife habitat, protection of fisheries, and pollution prevention. 310 CMR 10.58(1). The MassDEP regulations establish a presumption that Riverfront Area associated with Pine Brook is significant to protection of these interests. 310 CMR 10.58(3).

MassDEP’s regulations for Riverfront Area establish different standards and requirements for work in undeveloped Riverfront Area and redevelopment in previously developed Riverfront Areas. 310 CMR 10.58(4-5). Redevelopment is defined as “replacement, rehabilitation or expansion of existing structures, improvement of existing roads, or reuse of degraded or previously developed areas.” 310 CMR 10.58(5). “A previously developed riverfront area contains areas degraded prior to August 7, 1996 by impervious surfaces from existing structures or pavement, absence of topsoil, junkyards, or abandoned dumping grounds.” 310 CMR 10.58(5).

The Applicant apparently intends to argue that virtually all work associated with this Project qualifies as redevelopment within previously developed Riverfront Areas, but has not substantiated that position with mapping or other diagrams.⁹ Even assuming, *arguendo*, for the purposes of this letter only, that all work associated with this Project qualifies as redevelopment within previously developed Riverfront Areas, the Applicant would not have a legal right to construct the Project in the Riverfront Area.

⁷ The Applicant has not filed a Notice of Intent with the Wayland Conservation Commission, and has included very little information in its Application regarding the nature and extent of wetland Resource Areas on the Property, so there may be additional Resource Areas affected by the Project of which we are presently unaware.

⁸ As noted in CEI’s letter, although the Property is not within a NHESP priority habitat, Pine Brook flows directly into an NHESP protected habitat (adjacent to Sandy Burr County Country Club) for plants, amphibians, and birds.

⁹ The Applicant’s Stormwater Report attempts to establish that the Project would actually decrease impervious surface at the site, an assertion that appears to ignore or badly mischaracterize the Property’s existing conditions. In a November 6, 2017 memorandum to the Board, Wayland Conservation Administrator Linda Hanson has estimated that only about 5,000 square feet of the Property’s inner 100-foot Riverfront Area is degraded under existing conditions.



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A conservation commission, at its discretion, “may allow work to redevelop a previously developed riverfront area, provided the proposed work improves existing conditions.” 310 CMR 10.58(5).

The MassDEP regulations, 310 CMR 10.58(5), establish the following criteria for proposed redevelopment in previously degraded Riverfront:

- “At a minimum, proposed work shall result in an improvement over existing conditions of the capacity of the riverfront area to protect the interests identified in” the state Wetlands Protection Act;
- The Project must comply with and satisfy MassDEP’s stormwater management standards;
- “Proposed work shall not be located closer to the river than existing conditions or 100 feet, whichever is less, or not closer than existing conditions within 25 foot riverfront areas” (unless sufficient on-site or off-site restoration or mitigation is provided);
- “Proposed work, including expansion of existing structures, shall be located outside the riverfront area or toward the riverfront area boundary and away from the river” (unless sufficient on-site or off-site restoration or mitigation is provided); and
- “The area of proposed work shall not exceed the amount of degraded area, provided that the proposed work may alter up to 10% if the degraded area is less than 10% of the riverfront area” (unless sufficient on-site or off-site restoration or mitigation is provided).

The Project fails to satisfy any of these standards for redevelopment, which are less restrictive than those for work in undeveloped Riverfront.

First, there is nothing in the Application to suggest that the Project as proposed would improve the Riverfront Area’s existing conditions or its capacity to protect wildlife habitat, fisheries, groundwater, water supply, to prevent storm damage or pollution, or to provide flood control. To the contrary, the Project proposes extensive new alteration within jurisdictional Riverfront Area, including two septic leaching fields, building foundation, underground garage and foundation, the structure itself, infiltration basin, septic tanks, extensive regrading and a very large volume of fill necessary for septic system construction. Many trees would also be cut down. The “construction area” in the Application’s Site Plan is located within ten feet of Pine Brook in a number of areas and closes to within two feet at one point.

Second, as detailed in the November 22, 2017 letter from CEI, the Project’s stormwater management system is not adequately designed and fails to comply with state standards. Specifically, the Application does not reflect compliance with Massachusetts Stormwater Management Standards, including standards 4 (requiring treatment of runoff from all impervious surfaces for at least 80% TSS removal) and 6 (applicable to Critical Areas like cold-water fisheries). The design is flawed in other ways, including underestimating the volume of stormwater to be handled by failing to account for flows that originate off-site and for snow



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storage. Furthermore, the Stormwater Report skews the data in favor of the Applicant by overestimating existing flows and underestimating post-development flows. As a result, the Applicant has failed to properly mitigate the Project's stormwater impacts on and off of the site, including impacts to Pine Brook and the wildlife that relies upon it for habitat.¹⁰

Third, the Applicant proposes work closer to Pine Brook than existing conditions, and according to the site plan, the "construction area" would come within approximately 2 feet of Mean Annual High Water.

Fourth, the Project would greatly surpass the amount of existing degraded Riverfront Area, with alterations far in excess of 10% of the Property's Riverfront Area.

Finally, the Applicant has not proposed any restoration or mitigation (indeed, the Project design leaves no space for on-site restoration or mitigation), and is not entitled to benefit from the more lenient standards that apply where restoration or mitigation is part of a project.

It also appears that the Project fails to satisfy performance standards for work within, or in the Buffer Zone to, Bank, Land Under Water, and BLSF on the Property (as noted above, there may be other jurisdictional wetland Resource Areas on the Property).

It is critical that the precise boundary of BLSF be identified to address inconsistencies between the FEMA mapping and the Property's topography. Regardless, the Applicant must provide compensatory flood storage for "all flood storage volume that will be lost as the result of a proposed project within" BLSF where "said loss will cause an increase or will contribute incrementally to an increase in the horizontal extent and level of flood waters during peak flows." 310 CMR 10.57(4)(a)(1). The Project must not restrict flows as to cause an increase in flood storage or velocity, nor impair wildlife habitat functions. 310 CMR 10.57(4)(a)(2-3).

The Applicant has offered no evidence that any of these standards can or will be met for this Project. In light of the amount of fill required for the proposed septic system, size of foundations and underground garage, and other work proposed in BLSF, the Project will result in a significant loss of flood storage.

In our opinion, the Board would be warranted in issuing a denial of the Project based upon the irreparable harm that the Project as proposed would cause to the natural environment and related threats to public health and safety. At a minimum, the Board should deny the Applicant's request for waivers from local wetlands bylaw and stormwater regulations, and condition any approval on compliance with all state and local wetlands and stormwater laws and regulations.

¹⁰ As explained in CEI's letter, the ZBA should not grant a waiver of the application of the Stormwater and Land Disturbance Bylaw, which ensures that the Town of Wayland is able to comply with federal regulations. Specifically, the Town is required to regulate stormwater discharges pursuant to the US EPA NPDES Program General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (MS4s). Waiver of this Bylaw may impair the Town's ability to manage stormwater discharges in compliance with its federal permit; compliance with state law would not be sufficient to protect this important local concern.



THE PROJECT'S SEPTIC SYSTEM FAILS TO SATISFY STATE AND LOCAL DESIGN REQUIREMENTS AND IS TOO CLOSE TO PINE BROOK

MassDEP requires that the Project's septic system be designed to accommodate a flow of 110 gallons per day (gpd) for each bedroom. 310 CMR 15.203. As noted above, the Application contains conflicting information on whether the Project would include 89 or 96 bedrooms.¹¹ If 89 bedrooms is the correct number, the septic system must be designed to accommodate at least 9,790 gpd, based upon bedrooms alone (it seems likely that other aspects of the Project – such as the management office, conference rooms, work bar, multi-purpose room, and pet grooming facility – would push the total design flow over 10,000 gpd).

The Application indicates that the Project will generate approximately 4,450 gpd of wastewater requiring treatment, but no supporting information is provided to substantiate this number. The Applicant must provide an explanation for this number, which equates to a flow of only 50 gpd per bedroom, less than half of the 110 gpd required under Title 5.

The Applicant's proposed system is designed to accommodate a design flow of only 9,900 gpd, which would barely be large enough to accommodate 89 bedrooms alone, assuming that the Project generates no other wastewater.

Soil and percolation testing at the Property generated mixed results, reflecting a variety of soils and percolations rates. CEI pointed out fundamental mistakes in the forms included in the Application.¹² Soil testing was conducted during the winter months, outside of the time allowed by the Wayland Board of Health Regulations. Both CEI and the Board of Health have noted that there are insufficient deep test pits to support the system's design.

Furthermore, the Wayland Board of Health Regulations require a design flow of 165 gpd per bedroom. They also require a 100-foot setback from wetlands for a Project of this magnitude (over 1,000 gpd). The Project as designed would place the leaching areas (and associated work and features) approximately 59 feet from Pine Brook.

In other words, the Applicant has not performed the basic design work or provided the fundamental information necessary to establish that the proposed septic system has been properly sited pursuant to state and local law.

These regulations are particularly important in light of Pine Brook's unique characteristics and designation as an important cold water fishery providing habitat for native Eastern Brook Trout. Wastewater is relatively warm compared to naturally-occurring groundwater, and the proximity of the two large septic leaching areas to Pine Brook creates an

¹¹ If the Project is for 96 bedrooms, its septic system must be designed to accommodate at least 10,560 gpd, and would require the Applicant to obtain a Ground Water Discharge Permit from MassDEP pursuant to 314 CMR 5.00.

¹² The Applicant's forms indicate the test pit data is from Brookfield, Mass., and Figure 1 accompanying the test pit data shows more than one location for TP-8.



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unjustifiable risk to the stream's habitat value and water quality in general.¹³ Specifically, this increases the likelihood of phosphorous and nitrogen loading into Pine Brook, which may trigger algae growth, as discussed in the November 22, 2017 letter from ESI.¹⁴

In addition, introduction of a large volume of fill, creation of steep slopes, removal of large mature trees (which provide important shade to Pine Brook to maintain the low water temperature in the summer), and impairment of natural vegetation all in close proximity to Pine Brook will further threaten to raise the water temperature and otherwise degrade this valuable natural resource.

Consequently, we request that the Board deny the Project a Comprehensive Permit because there are no conditions that would adequately address these impacts on local health, safety and the environment.

Alternatively, we ask that the ZBA not grant a waiver of the application of Wayland's Board of Health Regulations requiring design based on a flow of 165 gpd per bedroom, and a 100-foot setback from Pine Brook, which are intended to protect public health and safety based upon local conditions and experience. The important local health and environmental issues presented by the proposed septic system design and location are not adequately protected by compliance with MassDEP's standards.

CONCLUSION

The Project's design threatens local interests including protection of public health and safety, the environment (including preservation of the important Pine Brook and protection of significant NHESP habitat downstream), and the Town's compliance with federal regulations and permits. Much of the Project's inability to comply with local and state laws stems directly from the size and scale of the Project relative to the Property's size and environmental constraints.

In our opinion, the Board should deny the Project a Comprehensive Permit because there are no conditions that would adequately address the Project's impacts on local health, safety and environmental concerns.

¹³ The Applicant has requested a waiver from the Wayland Board of Health Regulation relative to floor drains. The Project includes an underground garage, and the finished floor elevation appears to be lower than the seasonal high groundwater table. Contaminated runoff from the garage cannot be discharged to the septic system or the stormwater system. As noted in CEI's letter, the Board should not grant this waiver unless the Applicant provides documentation to verify the system design will provide an equivalent level of protection to the local standard, which is intended to protect public health and safety based on local conditions and experience.

¹⁴ This fact offers further support for the comment offered by Wayland Conservation Administrator Linda Hanson in her August 16, 2017 memorandum that "the proximity of the leaching field to the perennial stream will negatively impact the stream and the eastern brook trout habitat." It also provides further support for the comment provided by Wayland Director of Public Health Julia Junghanns in her August 17, 2017 memorandum to the Board that the "design flow for the project is too large for the property due to soil conditions, the high ground water table, and the environmental sensitivity of the area due to the close proximity to Pine Brook."

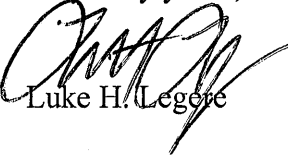


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At a minimum, the Board should deny the Applicant's request for waivers from local wetlands bylaw, Board of Health Regulations, and stormwater regulations, and should condition any approval on compliance with all state and local wetlands and stormwater laws and regulations. The Project introduces important local health and environmental issues that are not adequately protected by compliance with state standards.

Thank you for your attention to this matter. Please do not hesitate to contact me should you have any questions.

Very truly yours,



Luke H. Legere

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