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VIA EMAIL & HAND DELIVERY

February 27, 2018

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:

As you know, 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. The Applicant seeks approval of a 4-story, 60-unit, 89-bedroom¹ 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 prior submittals and the letter filed herewith from hydrologist Scott W. Horsley. At a minimum, the Board should deny the Applicant’s request for waivers from local the wetlands bylaw and regulations, Board of Health regulations, and stormwater regulations, and should condition any approval on compliance with all state and local laws and regulations governing wetlands, stormwater and wastewater.

At the outset, we wish to thank the Board for its efforts to extend the public hearing on this Application to allow sufficient time for the Board, its peer-review consultants, Wayland Town departments and officials, and residents to properly review and comment on the Project. As discussed in our January 25, 2018 letter to the Board, a full two months of the 180-day public hearing period were lost by the Applicant’s belated decision to redesign the Project four months after filing the Application.²

¹ As noted previously, 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).

² The Applicant announced at the Board’s November 29, 2017 hearing that the Project’s design was being revised. Nearly a month later, the Applicant produced only a few PowerPoint slides at the Board’s December 20, 2017 hearing. In mid-January, the Applicant finally produced plans, architectural renderings and a short letter from its traffic engineer (along with a stormwater management report and a report on Riverfront Area impacts that were not made available to Protect Wayland until roughly forty-eight hours before the Board’s January 25 hearing). The new Project design presents significant changes, including: a completely new apartment complex with four floors instead



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Crucial pieces of information are still missing, including a hydrogeological study and information regarding the FEMA flood zone. This information was requested and promised many months ago.³

Incredibly, the Applicant thus far has been unwilling to agree or even negotiate the Board's reasonable request to extend the public hearing to allow sufficient time to review this new design and receive key information that is still owed. The governing regulations establish a presumption that applicants will timely file relevant information, and support an extension of the public hearing period where that is not the case. Specifically, 760 CMR 56.05(3) states that the hearing "shall not extend beyond 180 days from the date of opening the hearing, presuming that the Applicant has made timely submissions of materials in response to reasonable requests of the Board that are consistent with its powers under 760 CMR 56.05"

Where the Applicant delivered a new Project design six months after filing its Application, and has still not produced critical information that was requested months ago, the Board has no choice other than to extend the 180-day public hearing window to complete its review of the Application.

If the Applicant refuses to agree to a reasonable and adequate extension, the Board should deny the Project a Comprehensive Permit for lack of information, in addition to the substantive reasons discussed below.

Turning to the new Project design, it retains virtually all of the fatal defects present in the original proposal, due to the Applicant's refusal to reduce the number of units on this 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 children at YMCA Camp Chickami. The Project cannot be conditioned to protect these important local concerns, and the Applicant's requested waivers would remove important local safeguards intended to promote those interests.

MASSACHUSETTS COMPREHENSIVE PERMIT ACT

As discussed in our November 22, 2017 letter, the Comprehensive Permit Act, M.G.L. c. 40B, §§20-23, creates 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,

of three (it would be tallest building in Wayland), located approximately 40 feet closer to Route 20; more impervious outdoor parking; two full-service driveways rather than one; a new layout for two large septic fields and retaining wall next to Pine Brook; a new stormwater management plan; and new flood zone impacts.

³ The Board of Health requested that a hydrogeological study be performed at the Property in its October 24, 2017 memorandum. During the November 14, 2017 "workgroup session" with Town Officials, consultants, and other interested parties, the Applicant indicated that the hydrogeological study would be ready in early January. The Wayland Conservation Agent raised questions regarding proposed work in the floodplain in her August 16, 2017 memorandum to the Board.



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469–470 (2010). 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.” *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 31 (2006).⁴

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).⁵

If the Project cannot be adequately conditioned to address Local Concerns (or if the Applicant continues to withhold information necessary to make that determination), the Board may deny a Comprehensive Permit or explore whether the number of dwelling units could be reduced without rendering the Project uneconomic.⁶

The Board is also empowered to deny requested waivers from local rules and regulations to ensure protection of Local Concerns unless and until the Applicant has proven that conforming to those requirements would render the Project uneconomic. 760 CMR 56.05(6)(b).

THE PROJECT’S SEPTIC AND STORMWATER SYSTEMS FAIL TO SATISFY STATE AND LOCAL STANDARDS AND WOULD POLLUTE PINE BROOK

The Applicant has failed to demonstrate that the Project would comply with state septic and stormwater standards – let alone local standards – as detailed in the letters from Mr. Horsley and the West Suburban YCMA.⁷ The Application and supporting materials lack basic

⁴ Denial of a comprehensive permit may even be upheld where a municipality’s stock of low and moderate income housing is below ten percent “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 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 rejecting a decision by the Stow Zoning Board of Appeals to grant waivers from its local zoning bylaw’s waste disposal limitations, the Massachusetts Appeals Court in *Reynolds* recognized that “[c]ompliance with State standards ... is not necessarily the end of the inquiry.” 88 Mass. App. Ct. at 348. There, evidence that the project’s septic system would contaminate groundwater and cause dangerous levels of nitrogen to reach a neighbor’s well constituted “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 349-350.

⁶ 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).

⁷ The February 8, 2018 letter from Tetra Tech likewise states that “[n]o information has been provided that documents the proposed soil disposal system meets applicable local or state regulations. There is no way to determine if the system as shown on the plans complies with required regulations.”



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information and do not address the hydrologic issues that this Project presents, which are crucial components in this analysis.

Specifically, the Project's stormwater infiltration system is designed to greatly increase the volume of stormwater recharged to groundwater at the Property, doubling or tripling the volume of water recharged under existing conditions.⁸ The Applicant's test pits reveal ledge and an existing seasonal high water table that is only 3-4 feet below grade within the proposed construction area. The significant increase in proposed post-construction recharge rate would raise groundwater levels at the Property. Furthermore, this increase in stormwater recharge does not even account for the wastewater discharge of approximately 10,000 gpd from the proposed septic system.⁹

This substantial raising of groundwater levels must be factored into the Project's hydrogeologic evaluation as a new, post-construction "base condition" for the Property upon which the groundwater mounding analysis must be added. State standards for separation from groundwater are barely satisfied under existing conditions; it is difficult to imagine that the Project could satisfy state standards when elevated groundwater levels are considered.¹⁰

As noted in the February 26, 2018 letter from the West Suburban YMCA, it is also unclear whether a large drainage pipe is planned for the bottom of the infiltration basin, effectively eliminating or sharply reducing infiltration and routing untreated stormwater directly into Pine Brook. In addition, West Suburban YMCA has identified a long list of shortcomings associated with the Project's stormwater design and underlying data, including the standard number of test pits have not been dug at the proposed site of the infiltration basin to determine the potential rate of infiltration.

With respect to local standards, Wayland Board of Health Regulations require a design flow of 165 gpd per bedroom, which is not satisfied here.¹¹ They also require a setback of at least 100 feet (and likely significantly more) from wetlands for this Project. The Project as

⁸ The Massachusetts Department of Environmental Protection ("MassDEP") Stormwater Standard 3 requires that "... the annual recharge from the post-development site shall approximate the annual recharge from pre-development conditions"

⁹ The Applicant has provided virtually no information to support the septic system design. As discussed in our November 22, 2017 letter, 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. If the Project proposes 89 bedrooms, the septic system must be designed to accommodate at least 9,790 gpd, based upon bedrooms alone (this does not account for other aspects of the Project, such as the management office, conference rooms, work bar, multi-purpose room, and pet grooming facility). 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, assuming that the Project generates no other wastewater. The Application indicates that the Project will generate approximately 4,450 gpd of wastewater requiring treatment. 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.

¹⁰ State standards require a minimum vertical separation of four (4) feet above the high water table (the maximum groundwater elevation) for septic systems, and two (2) feet above the high water table for stormwater infiltration systems.

¹¹ For this 89-bedroom Project, a design flow of 165 gpd per bedroom would require a total capacity of 14,685 gpd.



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designed would place the leaching areas (and associated work and features) approximately 50 feet from wetlands adjacent and connected to Pine Brook.¹²

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 or designed pursuant to state and local law.

If constructed, the Project would irreparably harm Pine Brook, severely degrade its habitat value, and threaten the health and safety of Wayland residents and children at YMCA Camp Chickami. The Project's proposed leaching field is located approximately 50 feet from wetlands adjacent to Pine Brook, and groundwater flowing below the proposed septic system discharges to Pine Brook.

As discussed in Mr. Horsley's letter, wastewater discharges contain significant loads of nutrients which can cause eutrophication of surface waters (particularly from phosphorus in fresh water), as well as pathogens (including bacteria and viruses). Eutrophication commonly causes significant declines in habitat quality as a result of depleted oxygen levels, algae blooms, and macrophyte growth, and can result in "impaired waters" conditions under the Clean Water Act and the Massachusetts Surface Water Quality Standards at 314 CMR 4.00. Viruses, meanwhile, are capable of traveling distances of 200 feet or more in groundwater, and ingestion of small amounts can cause infection and serious diseases in humans.

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.

At a minimum, 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 and adjacent wetlands, which are intended to protect public health and safety based upon local conditions and experience. As discussed in Mr. Horsley's letter, the increased setbacks and comprehensive hydrogeological evaluation required by the local Board of Health Regulations are necessary for the protection of the Pine Brook, its unique and important habitat values, and public health and safety for downstream uses such as Camp Chickami. The local health and environmental issues presented by the proposed septic system design and location are not adequately protected by compliance with basic MassDEP standards.¹³

¹² 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.

¹³ These local 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 unjustifiable risk to the stream's habitat value and water quality in general. Specifically, this increases the likelihood of phosphorous loading into Pine Brook, which may trigger algae growth, as discussed in Mr. Horsley's letter and the November 22, 2017 letter from Ecosystem Solutions, Inc.



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**THE PROJECT WOULD SEVERELY HARM JURISDICTIONAL
WETLANDS, RIVERFRONT AND WILDLIFE HABITAT**

As discussed in great detail in our November 22, 2017 letter, a majority of the Property lies within the 200-foot Riverfront Area associated with Pine Brook, a designated cold-water fishery running along the southern portion of the site.¹⁴ Work within jurisdictional Riverfront Area is governed by the Rivers Protection Act and MassDEP's implementing regulations at 310 CMR 10.58.¹⁵

MassDEP's Riverfront Area regulations establish one set of standards and requirements for work in undeveloped Riverfront Area, and another (less restrictive) set for 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. 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 the available information says otherwise. In a November 6, 2017 memorandum to the Board, and again in a January 12, 2018 memorandum, Wayland Conservation Administrator Linda Hanson estimated that only about 5,000 square feet of the Property's inner 100-foot Riverfront Area is degraded under existing conditions, far less than the 0.5 acres (21,780 square feet) claimed by the Applicant.¹⁶

As discussed at length in our November 22, 2017 letter, even if all work associated with this Project did qualify as redevelopment within previously developed Riverfront Areas (which it does not), the Project fails to satisfy any of the less restrictive standards. The new Project design has not changed this fact.¹⁷

¹⁴ 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).

¹⁵ The Project must satisfy applicable performance standards for work in other jurisdictional wetland Resource Areas on the Property as well, which include Bank, Land Under Water, and Bordering Land Subject to Flooding ("BLSF") associated with Pine Brook. 310 CMR 10.58(4)(a).

¹⁶ Ms. Hanson, in her more recent memorandum, also points out that the Applicant wrongly claims that existing gravel areas are impervious; if calculated correctly, the Project would result in an increase of approximately 0.50 acres of impervious surface.

¹⁷ Specifically, the Project: does not 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; fails to comply with MassDEP Stormwater Management Standards; proposes work closer to Pine Brook than existing conditions; would greatly surpass the amount of existing degraded Riverfront Area, with alterations far in excess of 10% of the Property's Riverfront Area; and proposes no restoration or mitigation.



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Furthermore, the Applicant has offered no evidence that the Project satisfies performance standards for work within, or in the Buffer Zone to, Bank, Land Under Water, and BLSF on the Property. The Applicant has still not identified the precise boundary of BLSF (which follows the FEMA flood zone) at the Property, which is important to address inconsistencies between the FEMA mapping and the Property's topography.¹⁸

Pine Brook is a perennial stream of remarkably 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, and it was named the #1 stream for native Eastern Brook Trout in the entire Boston metrowest region by Mass Fisheries & Wildlife. The Project would result in extensive, substantial degradation to these values, as discussed in prior submittals and Mr. Horsley's letter.

We ask that the Board issue 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.

CONCLUSION

The Project's design threatens the local interests of protecting public health, safety, and the natural environment, including Pine Brook. 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.

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, wastewater, 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.

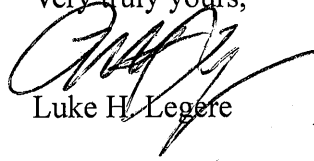
¹⁸ Regardless, the Applicant must provide compensatory flood storage for "all flood storage volume that will be lost as the result of a proposed project within" BLSF where "said loss will cause an increase or will contribute incrementally to an increase in the horizontal extent and level of flood waters 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). As noted in Mr. Horsley's letter and the West Suburban YMCA's February 26, 2018 letter, the Project plans offer no compensatory storage to offset filling in the flood zone.



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Please do not hesitate to contact me should you have any questions.

Very truly yours,



Luke H. Legere

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