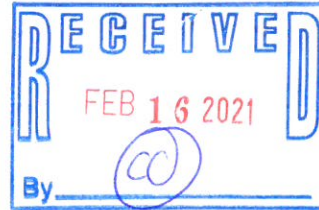


February 15, 2021

South Hadley Planning Board
116 Main Street
South Hadley, MA01075



Re: North Pole Estates Definitive Plan Review

Dear Planning Board Members –

After viewing video of the 1/25/2021 Planning Board meeting where the town planner and town counsel suggested to a citizen participant to use MGL 40A section 7 as a means to secure from the building commissioner a determination regarding special permit requirements for earth removal associated with the proposed North Pole Estates development, I felt it important, in the interest of not wasting the time of anyone who might follow that suggestion, to examine the first paragraph of MGL 40A section 7, this being the portion of the section that I believe the planner and counsel were thinking of when making that suggestion.

“The inspector of buildings, building commissioner or local inspector, or if there are none, in a town, the board of selectmen, or person or board designated by local ordinance or by-law, shall be charged with the enforcement of the zoning ordinance or by-law and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or by-law; and no permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law. If the officer or board charged with enforcement of zoning ordinances or by-laws is requested in writing to enforce such ordinances or by-laws against any person allegedly in violation of the same and such officer or board declines to act, he shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefor, within fourteen days of receipt of such request.”

The paragraph contains four provisions:

- (1) The [building commissioner] shall be charged with the enforcement of the zoning ordinance or bylaw
- (2) The [building commissioner] shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered, or moved would be in violation of any zoning ordinance or by-law
- (3) No permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law
- (4) If [the building commissioner] is requested in writing to enforce such ordinances or by-laws against any person allegedly in violation of the same and [he] declines to act, he shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefor, within fourteen days of receipt of such request.

Of the provisions listed, the first three essentially outline the building commissioner's responsibilities regarding the withholding of permits for buildings, structures, or use of land where the issuance of such permits would violate the zoning bylaws or ordinance. The fourth provision addresses requests for enforcement of alleged violations. It is the fourth provision of the section that I assume the planner and counsel were thinking of when suggesting MGL 40A section 7 as a means for the citizen to obtain a determination on the question of whether a special permit is or would be required. I think it is important to note that, whereas a determination that a violation has occurred would necessarily precede enforcement against said violation, the word "determination" does not appear anywhere in the section.

So, if on the one hand I were asked for a determination under MGL 40A section 7 as suggested by the planner and counsel, I would point out that a determination to enforce a zoning by-law or ordinance could only be made in the context of addressing an alleged violation. To my knowledge, and in the context of matters discussed in the meeting, no violation, alleged or actual, addressed by MGL 40A section 7 currently exists. As such, any request for a determination under that section would be denied.

On the other hand, if I were asked for my opinion on the question of what counsel referred to as "the elephant in the room", I would say this:

Under provisions contained in §255-84 and §245, if the Board were to approve the subdivision plan at hand, it would also be approving up to 5,000 cubic yards of incidental earth removal per calendar year for the duration of the project. Any earth removal over that amount would require a special permit and earth removal permit from the Board, and a permit from the building commissioner.

To be considered incidental, any earth removal must be "*necessary to carry out the primary use of the premises*". Whereas the applicant has provided an estimate of the quantity of earth removal needed to produce the specific site plan under review, they have apparently failed to convince the Board and members of the community that the earth removal contemplated is needed. As such, to consider the amount of earth removal under the current proposal as incidental, the applicant needs to show that it would be necessary to carry out the primary use of the premises.

Please feel free to contact me anytime with any questions you may have regarding these matters.

Sincerely,



David Gardner

Building Commissioner

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