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May 5, 2022

Deerfield Planning Board
Deerfield Municipal Offices
8 Conway Street
South Deerfield MA 01373
Attention: Analee Wulfkuhle

Deerfield Conservation Commission
Deerfield Municipal Offices
8 Conway Street
South Deerfield MA 01373
Attention: Timothy Hilchey

RE: Application: Site Plan Review/Stormwater Drainage Application
Applicant: Selectboard of the Town of Deerfield
Property: Map 151 Lot 1 North Main Street
Document: Comments from Abutter, Third Letter/Memorandum in Opposition

Memorandum in Opposition to Site Plan Review Application and Stormwater Drainage Application

Dear Ms. Wulfkuhle and Mr. Hilchey:

I apologize for the length of this written statement, but in light of the fact that the Chair of the Deerfield Planning Board ("Planning Board") is continuing to mandate that individuals, *other* than individuals associated with the applicant/town, speak for only *two minutes* (even when no one else is waiting to speak), I am forced to address all issues in writing. I also want to make it clear that I still stand behind what I have said in my prior letters regarding the issues set forth herein and those letters can be reviewed for more detail.

I believe it would be appropriate and reasonable: for the applicant to allow my client's experts to make entry onto the subject property; to answer my prior questions in public before the Planning Board; and to task the peer review engineer with responding to my expert's reports. Yet, I am no longer going to wait for resolution on these items. It is already absolutely clear that the applicant is not entitled to Site Plan Review Approval for this project and I will set forth my reasons and authorities justifying that statement below. I reserve the right to make further comments. The Stormwater Drainage Application has been addressed by our stormwater and engineering expert, Mr. Chessia, P.E., and I incorporate his report of April 1, 2022 herein, by reference, in opposition to the application for the stormwater drainage permit.

I am including the Deerfield Conservation Commission ("Commission") on this letter because many of issues referenced herein will be relevant to the Commission's consideration of the pending

Notice of Intent for this project. Please understand that the stormwater drainage plan calls for draining much of the water from the project into the intermittent stream channel ("channel"), a jurisdictional wetland resource area, near the intersection of my client's property and the subject property. Accordingly, the Commission should also be concerned that, to date, the peer reviewer for the Planning Board, Wood Massachusetts, Inc. ("Wood"), has yet to explicitly address the serious stormwater drainage issues raised by our stormwater expert (See below.).

I. Procedural Issues

1. Questions from Abutter

As you may recall, on March 16, 2022, I asked questions of the applicant in writing because the applicant's lawyer had specifically said at the January 3, 2022, Planning Board hearing the applicant would take questions from the *public*, and then at the February 7, 2022, Planning Board hearing, the applicant's lawyer said the questions would have to be in writing. Generally, my written questions pertained to: (a) the amount of fill being utilized on the project; (b) repositioning elements of the project away from the residential properties; (c) the scope of the zoning relief being sought; (d) the applicant's (the town's) budget; (e) dimensional issues; and (f) the waiver being requested by the applicant.

The applicant's lawyer has called me and answered only some of my questions over the phone. It is not my job to tell the Planning Board what the applicant's lawyer told me and I do not want to be accused of making inaccurate statements. Even if the applicant does not want to answer these questions in writing, I request that the applicant's lawyer provide *the Planning Board* with the applicant's response. It is the Planning Board who is entitled to hear what the applicant has to say regarding these questions. The applicant said they would take questions from the public; therefore, the answers to these questions from the public should also be open to the public and to the Planning Board.

I attended the last Planning Board hearing on April 4, 2022, where Jesse Marino spoke to some of these issues, but his statements regarding how much fill the applicant intends to import and utilize were not at all clear and were totally inadequate. Indeed, in the April 15, 2022, letter filed by the peer reviewer, Wood, it is *still* looking for a clear answer as to how much fill the applicant is proposing to import and utilize for this property. In that report, the peer reviewer said "Please provide quantity of fill to be imported to meet the proposed grades." The applicant must address these issues more explicitly through statements *to the Planning Board*, for the sake of the Planning Board, the citizens, and the press.

2. Entry onto the Subject Property

My client's experts would still like to enter the subject property as soon as possible to make visual observations, take photographs, and utilize hand tools such as augurs and drain spades. They would be willing to go with an applicant's agent present and any testing would be unobtrusive. Mr. Chessia has raised serious issues with reference to the Stormwater Drainage plan (See below). These issues, at least in part, pertain to the high-water table on the subject property. The peer reviewer for the Commission, Kate Bednaz, clearly believes that Mr. Chessia has raised serious issues. A copy of Ms. Bednaz's report,

from Freshwater Wetland Services, dated April 22, 2022, is attached hereto as **Exhibit A**. The hydrology of the subject property was also addressed by my client's expert, Matt Schweisberg, in his report from Wetland Strategies and Solutions, LLC, dated April 28, 2022; a copy of which is attached hereto as **Exhibit B**.

Some simple nonintrusive testing could give the Planning Board more objective data to use when considering the applicant's stormwater drainage application. If this matter ends up in litigation there would be procedures whereby my client could make entry onto the subject property anyway. Accordingly, it would be reasonable to allow my client's experts to make entry onto the property now to undertake unobtrusive testing.

While the Planning Board may not have the ability to order the applicant to allow my client's experts onto the property, I ask that the Chair at least *request* the applicant to allow my client's experts onto the property. Please realize, this property is owned by the citizens and my client, the direct abutter, is one of those citizens. If the applicant is not going to allow my client's experts to go onto the citizen owned property, the applicant should at least publicly explain to the Planning Board, the citizens, and the press why the applicant will not allow for the entry. The applicant's unwillingness to date of allowing others on to town-owned strongly suggests it is trying to hide something.

3. Peer Review

I request that the Planning Board *specifically* task the peer reviewer, Wood, with reviewing the two expert reports submitted by our engineering expert John Chessia, P.E.. Mr. Chessia is an extremely qualified professional engineer with much experience with drainage issues; he has done hundreds of peer review reports for cities and towns in the commonwealth. Indeed, he may have more experience regarding these types of plans than either the applicant's consultant or the Planning Board's peer reviewer.

The Planning Board should realize that it is tasked with deciding fairly complicated engineering and hydrological issues regarding compliance with the Town's new Green Bylaws and the Stormwater Bylaws and regulations. When making this determination, it is irrelevant as to whether problematic issues were first raised by the peer reviewer or an expert for an abutter. The issues raised by Mr. Chessia should not be willfully ignored because he represents an abutter. These are technical issues and the Planning Board should seek the assistance of the peer reviewer to evaluate and respond to the issues raised by Mr. Chessia. The Planning Board should not be lenient on the applicant simply because it is the Town. If the applicant were a corporation in this industrial district and an abutter's extremely qualified expert raised these serious issues, it is hard to imagine that the Planning Board would not have the issues examined by its peer reviewer.

The peer reviewer for the Commission, Kate Bednaz, filed her initial report on April 26, 2022, and discussed her report at the Commission's hearing on April 28, 2022. In her report and in her discussion she *explicitly* addressed many of the issues raised in Mr. Chessia's April 1, 2022 Stormwater Drainage report. Ms. Bednaz did not her limit her analysis to only the submissions of the applicant's consultants. In her report Ms. Bednaz said "In this review, it is recommended that *all stormwater management and design questions presented by qualified individuals be reviewed and addressed by the*

applicant" (*Emphasis* added). She repeated this during her oral comments at the Commission's April 28, 2022 hearing.

The Planning Board should make sure that its peer review process is at least as comprehensive as the Commission's peer review process. The Planning Board should direct Wood *and the applicant* to explicitly address Mr. Chessia's issues. The fact that the Board reviewer did not address these issues initially is no reason for the reviewer not to address these issues now. Otherwise, Wood may feel constrained to only address the submissions of the applicant. Hopefully, the applicant's expert will address the issues raised by Mr. Chessia in the applicant's upcoming written response to Wood's report of April 15, 2022 (Which was due on May 2, 2022 but which has yet to be posted).

While the Planning Board's peer reviewer should address all of the issues raised by Mr. Chessia, there are certain extremely significant issues (**See (a)-(d) below**) that Wood should address in depth. Indeed, the *applicant's consultants* should also address these issues. The Planning Board should also take note of the fact that Wood and Mr. Chessia already agree regarding the many flaws with the applicant's plan.

a) <u>Overstating the Amount of Current Drainage from the Subject Property</u>

Generally, when the Planning Board considers approving an application for a stormwater drainage plan, the Board must determine: (a) how much water is currently draining from the property and where it flows; (b) how much water will be draining from the property after the development and where it would flow; and (c) is the post-development drainage equal to or less than the pre-development drainage at the same discharge locations? The goal is to achieve a situation where the rate and quantity of water leaving the property after the development is the same or less than rate and quantity of the water that was leaving the property before development.

Remember, right now the subject property has been used for agriculture and the principal way water drains from this property is through the channel that runs along the border between the subject property and my client's property. In fact, the channel goes into my client's property at points. The applicant intends to build a massive municipal development on the subject property. To do this the applicant must show that after this major development (with buildings and parking for hundreds of individuals) there will not be any more water in this channel. This is going to be a difficult, if not an impossible, undertaking on this particular waterlogged property.

If the applicant overstates the amount of water that is currently leaving the property, then the Board's analysis will be flawed. Such a situation would enable the applicant to actually drain *more* water off of the property after the development through the channel than currently drains off the property, in violation of the Bylaws and regulations. In such a situation there would be a danger that my client's property would be flooded from an overflow in the channel, especially in a significant rain or snow melt event.

Mr. Chessia has pointed out at least two ways that the applicant is overestimating the amount of water currently draining through the channel:

(1) The applicant is claiming that the water from the central area of the property is currently draining to both the west towards the railroad and to the south and east where the water enters the channel. Based upon the contours and elevations shown this does not appear to be the case at all. The water

from this area is *not* going into the channel; it is currently only going west towards the railroad. Through this miscalculation, the applicant makes it appear that more water is currently going through the channel than what is actually going through the channel.

(2) Aside from some western areas of the subject property, which do drain towards the railroad on the west, the applicant is contending that most of the water originating on the subject property currently goes through the channel along the south property line. Yet there is some, not insignificant amount, of water that does not go through the channel or flow towards the railroad to the west. There are significant areas of the property where, because of the contours, elevations, and topography, the water or snow melt simply pools where it falls and either eventually evaporates or in large storms is detained. The water associated with all of this pooling should *not* be shown as currently going directly through the channel because the water does not go directly through the channel. Indeed, in Jesse Marino's statements to the Board, he has admitted that water sometimes "puddles" on the property, but the analysis submitted by the applicant does not take this into account. Through this miscalculation, the applicant makes it appear that more water is currently going through the channel than what is actually going through the channel.

b) <u>Understating the Post-Development Drainage Leaving the Subject Property</u>

Mr. Chessia has pointed out at least two ways that the applicant is *significantly* underestimating the amount of water that will be draining through the channel post-development:

(1) The applicant is claiming that a significant amount of the water that will be generated by the development's impervious surfaces and other development, water which would otherwise flow directly into the channel, will not make its way to the channel because it will be temporarily retained and/or partially infiltrated into the ground through the proposed stormwater basins and subsurface systems. Mr. Chessia has pointed out significant flaws in the applicant's calculations. Some of the capacity *claimed* for unlined water storage retention areas is located *under* the high-water mark. The portion of the water storage areas located below the high-water mark would, during much of the year, *already* be filled with water. The applicant cannot claim that these facilities have the full capacity as set forth in its plan. When there is a rain event, a considerable amount of the stormwater drainage capacity claimed will *already* be full of water. For soil conditions as present on this site infiltration is not feasible and there would not be any available storage below system outlets. The lined water storage areas also include significant capacity below the culverts exiting these structures. These areas will, permanently, be filled with water such that they will not have claimed the storage capacity during significant rain or snow melt events. This means that during a serious rain or snow melt event the amount of the water going into it would be significantly greater than the applicant is claiming and the water could overtop the channel and enter my client's property. Through these miscalculations the applicant makes it appear that there will be less water going through the channel and leaving the property post-development than will actually occur.

(2) The applicant is claiming that a significant amount of the stormwater, snowmelt, and irrigation on the sporting fields, water which would otherwise flow into the channel, will not make its way

to the channel because the applicant is claiming that the water will be infiltrated into the soil in this area of the property. Mr. Chessia has pointed out a significant flaw in the applicant's calculations regarding this matter. Please realize that the soils currently on the subject property are extremely poor with reference to water infiltration; they are classified as Hydrologic Soil Group (HSG) *C/D.* These types of soils do not readily allow for the infiltration of water such that water accumulating on the soils from rain events or snowmelt events would drain off the property rather than infiltrate into it. Yet, the applicant unilaterally changes the soil classification of the areas where the sports fields are located so that the applicant can claim that there will be significantly more infiltration and less runoff. The applicant contends because they of the fill they propose on top of the poorly draining soils, a significant amount of the water will stay on the fields. Mr. Chessia contends that this is an unacceptable engineering practice. The applicant cannot normally change the soil designations simply by putting better draining soils on top of a poorly draining soils. The poorly draining soils will still be there and prevent infiltration at rates of the better draining soils. Mr. Chessia has never seen an applicant do this in his 35-plus years of practice. More to the point, any accumulated water will eventually reach the poorly draining soils underneath the top fill. Also, the sports fields are designed with culverts underneath them to drain water away. The water accumulating on these fields will not simply stay mostly in the field area as the applicant claims; a significant amount of that water will make it to the channel.

c) <u>Delineation of Intermittent Stream Channel not Provided</u>

The intermittent stream channel located near the border of and portions of which are on my client's property is extremely crucial to the applicant's plan. Most of the water draining from the subject property that must be considered with reference to the Stormwater application, goes through this channel. Mr. Chessia pointed out that the Stormwater Regulations require an applicant to provide the "Locations, cross sections and profiles of all brooks, streams, drainage swales and their method of stabilization." This information pertaining to the channel has simply not been supplied by the applicant and this information is required.

d) <u>The Massive Amount of Fill Required for this Project and the New Green Bylaws.</u>

Mr. Chessia has pointed out that the applicant intends to import and use a *massive* amount of fill on this project. Despite multiple hearings and multiple questions regarding this matter (including questions from the Board), the applicant has yet to specifically state how much fill they intend to bring in or even answer specific questions. More significantly, the applicant has yet to explain how the importation and utilization of this massive amount of fill can possibly be in conformity with the new Green Site Plan Review Bylaws which provide: "site alteration *shall* be *designed*…. to *Minimize* the volume of cut and *fill*' (*Emphasis* added). See new Green Site Plan Review Bylaws 5470-5471; and "The site design shall *minimize* and balance cut and *fill, to reduce total land disturbance and minimize the importing* or exporting *of earth materials from the site.* See new Green Site Plan Review Bylaws 5481(c).

II. Site Plan Review

Site plan review is totally a creature of local bylaws or ordinances; "site plan review" does not appear in the provisions of the Massachusetts Zoning Act (Chapter 40A). Therefore, the actual applicable laws this Board must follow are the new Green Site Plan Review Bylaws, Article 22 from the Town Meeting of 2021 (See below), and the town's other existing zoning bylaws as they interact with these new provisions.

However, there is a body of case law with reference to appeals pertaining to site plan review decisions which establish precedent for how site plan review generally works in the zoning field. E.g. see, *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 23 Mass.App.Ct. 278 (1986). In the *Prudential* case the Appeals Court of Massachusetts reviewed a board's denial of site plan review with reference to an applicant who was undertaking a use where no special permit was required. The court found against the denial in that particular instance, but the court also set forth what a board's powers are with reference to site plan review, with the court saying:

> Our conclusion does not mean that a board authorized to approve site plans is devoid of regulatory power over such plans. A board may lawfully reject a site plan that fails to furnish adequate information on the various considerations imposed by the by-law as conditions of the approval ' the plan. See *Auburn v. Planning Bd. of Dover,* 12 Mass. App. Ct. 998, 429 N.E.2d 71 (1981). A board also possesses discretion to *impose reasonable conditions* under a by-law's requirements in connection with approval of a site plan, *even if the conditions are objected to by the owner or are the cause of added expense to the owner*. See, e.g., the conditions suggested by the planning board of Canton on the site plan before it in the *Y.D. Dugout* decision, as set forth at 357 Mass. 31 n. 7. *In some cases, the site plan, although proper in form, may be so intrusive on the needs of the public in one regulated aspect or another that rejection by the board would be tenable.* This would typically be a case in which, despite best efforts, *no form of reasonable conditions could be devised to satisfy the problem with the plan* and the judge conducting de novo review concurs in that conclusion. See also the discussion in the *SCIT, Inc.* decision, 19 Mass. App. Ct. at 111 n. 17, 472 N.E.2d 269, as to other regulatory tools available in circumstances similar to those considered in this case. *Id* at FN 9 (*Emphasis* added.)

Based upon the *Prudential* case, this Planning Board has three actions it could take in regard to the application for site plan review in this matter: (1) the Planning Board could reject the plan if it fails to furnish adequate information required by the bylaw; (2) the Planning Board could impose reasonable conditions in connection with the site plan review even if the applicant objects to the conditions and even if there is additional expense to the applicant; and (3) the Planning Board could reject the site plan application, even if the application is proper in form, if: (a) the plan is so intrusive on the needs of the public in a regulated aspect; and (b) the problem is so intractable that the Planning Board cannot find any reasonable conditions that could cure the problem with the applicant's plan. (Sometimes referred to as "clause (3) of the *Prudential* case") See *Id* FN9

III. The New Green Site Plan Review Bylaws

The new Green Site Plan Review Bylaws were recently all approved through Article 22 at the annual town meeting in the spring of 2021. They are a comprehensive scheme for site plan review

based upon more environmentally sensitive protocols. The general layout of the provisions is as follows:

1. Section 5410 and the subsections thereof, set forth when the site plan review process is required.
2. Section 5420 mandates that all site plan review applicants "*shall* demonstrate compliance with the *Green Development Performance Standards*" and that "applicants *shall*, to the maximum extent practicable meet the standards for" (*emphasis* added) certain enumerated provisions, including 5481, the "Limits to Site Disturbance" provisions (see below) which includes: Subsection 5481 (j), setting forth the percentage limit of the area to be altered; and Subsection 5481(c) requiring the minimizing the amount of fill to be imported and utilized.
3. Section 5430 is the Definitional section.
4. Section 5440 and the subsections thereof set forth the procedures to be followed for site plan review.
5. Section 5450 sets forth the requirements for site plan review plans.
6. Section 5451 sets forth the standards for assessing the impacts of the proposed project.
7. Section 5452 provides that where an applicant fails to include the required materials, the application shall not be accepted until it is complete.
8. Section 5460 is the waiver provision and enables the planning board to grant waivers "where the project involves *relatively simple development plans*" (*Emphasis* added.).
9. Section 5470 and the subsections thereof, set forth the criteria for approval of plans. Subsection 5471 pertains to the minimization of the amount of fill utilized with the proposed development. This provision is not governed by the "to the maximum extent practicable" language set forth in Section 5420 (See above.).
10. Section 5480 and the subsections thereof, are the Green Development Performance Standards. The Subsections include: Subsection 5481 (j) setting forth the percentage limit of the area to be altered; and Subsection 5481(c) pertaining to minimizing the amount of fill.
11. Section 5490 pertains to a lapse in approval.
12. Section 5491 enables the board to create regulations.
13. Section 5492 sets forth the procedures for appeal.
14. Section 5495 and the subsections thereof, set forth the Incentivized Green Performance Standards Special Permit provisions.
15. Section 5496 sets forth the Dimensional and Density regulations pertaining to the incentivized special permit.
16. Section 5497 sets forth the special permit process for the incentivized special permit.
17. Section 5498 cents for the special permit criteria for the incentivized special permit.

Legislative History

Article 22, along with other articles for the then upcoming town meeting, was the subject of; (a) a joint public hearing of the Planning Board and the Selectboard on April 26, 2021; and (b) a Selectboard meeting, with the chair of the Planning Board present on May 26, 2021. I have reviewed the videos of these hearings and it does not appear that Subsection 5481 (j), setting forth the percentage

limit of the area to be altered, or Subsection 5481(c), pertaining to minimizing the amount of fill to be imported or utilized were explicitly discussed at either hearing. However, at the meeting of May 26, 2021, the chair of the planning board specifically said "…*green development standards* are actually applicable to *all* site plan review applicants" (*Emphasis* added.) and there they did not appear to be any discussion to the effect that the town would somehow be exempt from any of the green development performance standards. This would be consistent with other provisions of the Zoning Bylaws that do not exempt municipal uses unless, in a few places, explicitly state an exemption.

To the Maximum Extent Practicable

At the hearings there were questions pertaining to the "to the maximum extent practicable" language contained in 5420. The response from the government officials to these questions was essentially that the language was included at the suggestion of the town's attorney. I can find no Massachusetts state court case dealing with the phrase "to the maximum extent practicable" but there is a case from the United States Court of Appeals for the First Circuit, the Federal appellate court that governs our District of Massachusetts, that dealt with this phrase. See *SMS Data Products Group, Inc. v. U.S.*, 853 F.2d 1547 (1988).

In the *SMS* case a government contract had been awarded by a procurement officer to a particular bidder; a competing bidder protested the award. The pertinent government agency approved the award. However, Federal Appeals Court found that the award was flawed because the procurement officer, in making the award, did not abide by the statutory provision which mandated that he maximize competition "to the maximum extent practicable." In discussing the pertinent language, the court said:

> Since we have no established interpretation of § 49.402–6, we look first to the plain meaning of its language. As one would expect, use of the word "shall" in the phrase "shall obtain competition to the maximum extent practicable" denotes the imperative. *See* 48 CFR § 2.101 (definition). As to the word "practicable," in common usage it means "possible to practice or perform," or "capable of being put into practice, done, or accomplished: feasible." Webster's Third New International Dictionary (1971). Thus, the contracting officer *did not have unbridled discretion* in conducting the reprocurement, but was *required* to conduct the reprocurement in *the most competitive manner feasible*. (*Emphasis* added.) *Id* at 1553-4

In this matter the Planning Board is obligated to require the applicant to abide by the Green Development Performance Standards, "to the maximum extent practicable" or feasible. The Planning Board does not have unbridled discretion to simply "go easy" on the applicant because of this language. To the contrary, the Planning Board must mandate feasible compliance with the green development standards even if that means the applicant is not able to go forward with all of the elements of its plan in exactly the way the applicant desires.

IV. <u>Green Site Plan Review Bylaw 5481 (j)</u>

Green Site Plan Review Bylaw 5481 (j) provides:

> Except on urban and infill sites where higher density development has been determined to be desirable, clearing of vegetation and *alteration of topography* should be limited to 35% of the

> site for residential uses, or *40%* of the site for commercial, industrial or institutional uses. Native vegetation shall be planted in disturbed areas as needed to enhance or restore wildlife habitat. (*Emphasis* added)

Mr. Chessia and the Wood peer reviewer questioned whether there was compliance with this provision through this plan. In Wood's initial peer review letter, it stated:

> If we are correctly interpreting Bylaw 5481j to mean that the Applicant is only allowed to alter 40% of the site topography for commercial, industrial, or institutional uses, then the Applicant should be requesting a waiver for this bylaw since they are proposing to ***alter approximately 84% of the topography*** (7.41 acres are proposed to be disturbed). (**Emphasis** added.)

The applicant responded by stating that because 5481(j) does not include the word "governmental," when that word is included in section 5411 of the new Green Site Plan Review bylaws, 5481(j) must be construed to not apply to the government. This is not an unusual legal argument and I'm sure the applicant's attorney and/or the town's attorney could easily find case law to support such a contention, but in this case this legal argument leads to an absurd result. The problem with following that case law is that it would lead to an absurd result. *The applicant is contending that the town, and only the town, is not bound by this Green Development Performance standard and the town could alter **100%** of this property or any other property if it so desired*. There is ample case law (see below) saying that a Court will not interpret a bylaw or legislation in any manner that would lead to an absurd result.

When discussing this matter with the applicant's engineer at the last Planning Board hearing, the Chair said "…Often I think municipalities being held certainly to the same standards, if not potentially higher, of the other entities that the zoning bylaws are directed towards…" While this language is somewhat cryptic, it appears to at least express surprise at the applicant's contention that the town is not bound by this this crucial provision of the Green Development Performance Standards. The Chair's surprise is understandable because, at the meeting of May 26, 2021 (See above.), she said "…*green development standards* are actually applicable to *all* site plan review applicants" (*Emphasis* added.) For the town, and only the town, not to be obligated to abide by this crucial provision of the Green Development Performance Standards would be an absurd result. Yet, there is a reasonable explanation for the situation: that the word "governmental" was left out of 5411 through a scrivener's error

The legislative history we have for these provisions (see above) supports this explanation. There is also other evidence that supports the contention that the proponents and the town voters did not intend to exempt the town from any of the green development standards. The undersigned counsel attended an ice cream social held at the library before the town meeting vote last year, where, to my recollection, the proponents of the new Green Site Plan Review Bylaws specifically said the provisions *would* apply to the town. Also, there is no provision anywhere in the bylaws that explicitly exempts the government from the dimensional-type Bylaw provisions of the town except for the 50 foot frontage exemption which, ostensibly, was approved at the special town meeting in October 2021. Perhaps most significantly, the Planning Board should remember that at the same town meeting where the Green Site Plan Review Bylaws were approved, the voters rejected an article which would have given the town exemptions from many of the town's dimensional bylaws. The citizens would be shocked to learn that

one of the most crucial green development standards does not apply to the town. Further, the Town has participated recently in the state's the Municipal Vulnerability Preparedness program and adopted a MVP report and the Selectboard's recently adopted Green Infrastructure and Climate Resiliency Policy. This Board could readily and reasonably find that the word "governmental" was not included in 5481(j) through a scrivener's error.

If this Board does indeed find that "governmental" was not included in 5481(j) through a scrivener's error, the Planning Board is not bound to blindly obey the literal words of the bylaw where there has been a scrivener's error that leads to an absurd result. See *Attorney General v. School Committee of Essex*, 387 Mass. 326 (1982). In the *Attorney General* case the Supreme Judicial Court of Massachusetts said:

> We will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable. We assume the Legislature intended to act reasonably. *Van Dresser v. Firlings*, 305 Mass. 51, 53–54, 24 N.E.2d 969 (1940). Rather, when a literal reading of a statute would be inconsistent with legislative intent, we look beyond the words of the statute. *Price v. Railway Express Agency, Inc.*, 322 Mass. 476, 484, 78 N.E.2d 13 (1948), and cases cited therein. Such intent may be derived in part from other statutes on the same subject. *Nichols v. Commissioner of Corps. & Taxation*, 314 Mass. 285, 291, 50 N.E.2d 76 (1943). *Id* at 336-337

Based upon what legislative history we have regarding this provision, the Planning Board can readily find that the town's voters intended to have the new Green Site Plan Review provisions, including 5481(j), apply to the town. Indeed, such a determination is supported by the fact that the other pertinent provisions, including the provision pertaining to fill, clearly apply to the town. *To follow the reading of the statute recommended by the applicant would lead to the absurd situation where the town, and only the town, could alter 100% of any property the town chose to develop.*

Alternatively, the Planning Board could find that the term "institutional" includes municipal uses. The term "institutional" is not defined in the bylaws. In Merriam-Webster's Unabridged Dictionary, a pertinent definition of "institutional" is "of, relating to, involving, or constituting an institution <an *institutional* investor> <*institutional* elements **of a political system**> <*institutional* care of the blind>" (**Emphasis** added). The definition references that there can be institutional elements of a "political system", such as a local government. Therefore, town's proposed use of the property could be considered akin to an institutional-type use and thus 5481 (j) can be determined to apply to the town's use. Indeed, the ***applicant*** has actually already used the term "institutional" to include the government itself. When the applicant filed its "Stormwater Permit Eligibility Worksheet" the applicant checked, as applicable, the section which provided "This project is for commercial, industrial or ***institutional*** use that will disturb an area of 12,500 square feet or more" (***Emphasis*** added.)

While such a construction might be somewhat unusual, it should, nonetheless, be undertaken where language is fairly susceptible to such a reading and it avoids an absurd or unreasonable reading of the bylaw. See *Bell v. Treasurer of Cambridge,* 310 Mass. 484, 489, 38 N.E.2d 660 (1941) (where construction of statute would lead to absurd and unreasonable conclusion, such a construction should not be adopted if language is fairly susceptible to a construction leading to a logical and reasonable result).

One way or the other, the Planning Board can and should determine that the provisions of 5481 (j) apply to the town and that the town is limited to the "alteration of topography" of the property of up to 40%.

The Wood peer Review engineer found that, through the applicant's plan, the town intended to alter 84% of the topography. This is accurate. The term "alteration" is not defined in the bylaws; in Merriam-Webster's Unabridged Dictionary, the pertinent definition of "alteration" is "the act or action of altering" and the pertinent definition of "alter" is "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else." Clearly, the change referenced in 5481 (j) pertains to changing the existing topography of the subject property. At the last Planning Board hearing, applicant's engineer argued that the subject land was already altered through past agricultural use. It is absolutely irrelevant whether the topography of the subject property has changed since the Europeans first came to this town; the only pertinent question is whether the applicant is changing the *topography of the existing conditions*. It is absolutely clear that, through its proposed plan, the applicant intends to change 84% of the existing topography of the subject property through grading, importing and utilizing fill, paving, obliterating and replicating new wetlands, and other intrusive activities which are alterations to the existing topography of the subject property.

The fact that the applicant is obligated abide by 5481 (j) "to the maximum extent practicable" will not change any significant element of the analysis. This language does not grant the applicant or the Planning Board the ability to ignore the mandates of this provision. It is clearly feasible for the applicant to develop a park on this property while only altering 40% of the topography of the existing property. If that limits the amount of development, that is what is required through the provision, and that is what any other applicant, such as a commercial developer or an industrial developer, would be limited to.

Accordingly, the Planning Board must condition any approval of the applicant's plan on an order that all development would be limited to only disturbing 40% of the existing topography of the property. The Planning Board should require the applicant to come back to this Board with a new plan abiding by this provision or, if the applicant is not willing to abide by such an order, the Planning Board should deny the application.

V. Green Site Plan Review Bylaw 5470-5471

Green Site Plan Review Bylaw 5470, in pertinent part, and 5471, taken together provide:

> …New building construction or other site alteration ***shall be designed in the Site Plan*****,** after considering the qualities of the specific location, the proposed land use, the design of building form, grading, egress points, and other aspects of the development, so as to…***Minimize the volume of*** cut and ***fill***, the number of removed trees 6" caliper or larger,{at 4.5 feet above the ground) the length of removed stone walls, the area of wetland vegetation displaced, the extent of stormwater flow increase from the site, soil erosion, and threat of air and water pollution. (***Emphasis*** added.)

The term "minimize" is not defined in the bylaws; in Merriam-Webster's Unabridged Dictionary, the pertinent definition of "minimize" is "to reduce to the smallest possible number, degree, or extent."

While the applicant's expert continues to avoid providing the Board and public a clear estimate of the amount of fill the applicant intends to use with this plan, it is clearly an astronomically high amount of fill, by Mr. Chessia's estimate, probably over 15,000 yd.^{3} of fill. It is possible that the applicant might even attempt to bring in *more fill* to deal with the high ground water issues on this waterlogged property. Mr. Chessia has shown that some of the storage capacity claimed for the proposed stormwater drainage system should not be calculated into the capacity calculations because they are located *below* the groundwater level. If the applicant were to try to cure this issue by bringing in fill to raise the level of the stormwater storage areas, then an additional large amount of fill would be required.

While some elements of the park plan *might* not require huge amounts of fill (again, the applicant has not clearly stated how much fill it intends to import or where it will be used), such as the playground or picnic area, to construct the two sports fields the applicant proposes to utilize massive amounts of fill. The applicant seems to be arguing that: they have a right to build whatever they what they want, wherever they want, without a special permit; they want these two sports fields as elements of their park plan; and because of the waterlogged conditions *of this particular property*, they are somehow entitled use massive amounts of fill.

The applicant is simply not acknowledging the problem with attempting to construct sports fields on the subject property. The subject property is waterlogged; it has a high water-table and the soils do not accept infiltration of water, as multiple experts have observed. Yet, sports fields must be extremely well drained and they must be constructed on soils which accept the infiltration of water. The only practical way to do this would be to utilize massive amounts of fill, actions which are not allowed pursuant to the provisions of Green Site Plan Review Bylaw 5470-5471.

As I said in my prior letter, attempting to build sports fields on this waterlogged property is like trying to build a golf course in the desert. The applicant's apparent argument, with reference to the Green Bylaw Fill provisions, is similar to a situation where there was a bylaw requiring minimizing of the use of irrigation in a desert community. An applicant, who wanted to build a golf course in the desert, argued that they were abiding by the bylaw because the applicant only proposed using the massive amount of irrigation required to build a golf course in the desert. To construe the Green Site Plan Review Bylaw 5470-5471 as the applicant apparently suggests, would be to essentially make the provisions meaningless and ineffectual.

The applicant's argument simply ignores the fact that the town voters just voted for the Green Bylaw Fill Provisions which significantly constrain the amount of fill an applicant can use and still obtain site plan approval. These provisions are to protect the natural environment from a massive man-made intrusion caused by excessive use of fill. Indeed, using the town's argument, the town could build additional sports fields on this waterlogged property, or the town could make the smaller sports field larger, so long as they *only* used the thousands of cubic yards of fill required to build as many sports fields as they want, of any size they want.

The problem with the town's argument is that even though the town does not need a special permit for this park project, the town does not really have an *unfettered* right to build a sports field *at any particular location.* Where a particular project is large enough to require site plan review, as this project does, the town must abide by Green Site Plan Review Bylaw 5470-5471. The hydraulic characteristics

of this particular property require a massive amount of fill to construct even a single sports field. The only reasonable reading of Green Site Plan Review Bylaw 5470-5471 is that where the hydrology of a particular site requires excessive amounts of fill to undertake a proposed construction, as this project does with the sports fields, that construction would be in violation of Green Site Plan Review Bylaw 5470-5471, even if the applicant has the *right* to undertake such a construction, without a special permit.

Pursuant to Green Site Plan Review Bylaw 5470-5471 the Planning Board can reasonably reject the sports fields portion of the application. This is one of those, admittedly rare, occasions where the rejection would be justifiable pursuant to clause (3) of the *Prudential* case:

(a) The amount of fill is clearly intrusive as to the expressed needs of the Deerfield voters with reference to environmental degradation. These needs are not just some vague aspirational environmental statements, the needs have been set forth in regulation, specifically, the Green Bylaw Fill Provisions.

(b) The problem with the amount of fill required to construct sports fields on the waterlogged property is so intractable that there is no reasonable condition that could bring about compliance with the Green Bylaw Fill Provisions.

Accordingly, the Planning Board should deny at least so much of the application that seeks to construct the sports fields and the Board should require the applicant to provide more information regarding the amounts of fill required for the other elements of the park shown on the plan.

VI. Green Site Plan Review Bylaw 5481 (c)

Green Site Plan Review Bylaw 5481(c) provides:

> The site design ***shall minimize and balance*** cut and ***fill, to reduce total land disturbance and minimize the importing or exporting of earth materials from the site***. (***Emphasis*** added.)

This provision is one of the green development performance standards. It is similar to Green Site Plan Review Bylaw 5470-5471, however, this provision references minimizing the balance of fill to reduce the total disturbance and it explicitly references minimizing importation of earth materials. Most of the analysis set forth for Green Site Plan Review Bylaw 5470-5471 (see above) would also apply to this provision. As with the provision referenced above, it does not appear that the applicant could possibly import and utilize the massive amounts fill required to build the sports field without violating Bylaw 5481(c)

The other difference is that because this provision is a Green Performance Standard referenced in 5420 the applicant "*shall*, to the maximum extent practicable meet" (e*mphasis* added) the standards set forth in 5481(c). This will not change any significant element of the analysis. This language does not grant the applicant or the Planning Board the ability to ignore the mandates of this provision. It is clearly feasible for the applicant to develop a park on this property while only constructing the elements of the proposed plan that do not violate this particular provision.

VII. Waivers

The applicant has requested a waiver from "compliance with 5482 Tree Preservation (d) replacement of trees lost 19" or greater with 4" diameter breast height." ***The applicant is not eligible for this waiver or any waivers to avoid any of the deficiencies with the applicant's plan referenced herein***. New Green Site Plan Review Bylaw, 5460 provides:

> 5460. Waiver of Technical Compliance. The Planning Board may, in its sole discretion, upon written request of the applicant, waive any of the technical requirements of this Section ***where the project involves relatively simple development plans***. (***Emphasis*** added.)

This project is clearly not a "relatively simple development" plan. Therefore, the Planning Board has no authority to grant the requested waiver or any other waivers with reference to this project.

VIII. Wetlands

Green Site Plan Review Bylaw 5450(a) provides that the site review plans shall include the following:

> All boundary line information pertaining to the land sufficient to permit location of same on ground with existing and proposed topography at 2 foot contour intervals and the location of wet lands, streams, waterbodies, drainage swales, areas subject to flooding and unique natural features;

Please take note that this provision is *not* limited to wetlands that have been "delineated." I understand that the applicant, to date, on his plans is only showing delineated wetlands from 2020. Yet, there likely are other wetland features on the site which are required to be shown on the plan for the *Planning Board* pursuant to these site plan review provisions. These elements are important for the overall plan and the Planning Board's analysis of the stormwater drainage plan. Please recall the applicant's engineer admitted that there were areas of puddling on the property. The areas of pooling on the property, which most of the experts apparently acknowledge exist, should be shown. Putting aside any issue with reference to the Conservation Commission and its analysis with reference to the Notice of Intent, these areas are absolutely relevant to the Stormwater Drainage application and they must be shown in accordance with Bylaw 5450(a).

Additionally, there is a section of the subject property at the far eastern end which is fairly close to Bloody Brook. This area should be shown on the plan and taken into consideration when the Planning Board analyzes the Stormwater Drainage application. Specifically, the Mean Annual High-Water Line (MAHWL) of the reach of Bloody Brook due east of the Project Site entrance appears to be only approximately 160 feet away. This portion of Bloody Brook appears as "perennial" on the most recent U.S. Geological Survey (USGS) map, and a USGS *StreamStats* query and computation indicates the contributing watershed to this point of the brook is ~ 1.6 square miles, meaning it meets the definition of a "River" per 310 CMR 10.58(2)(a)1 of the Wetlands Protection Act Regulations, and thus has an associated 200-foot Riverfront Area, meaning that it is a "wetland" resource area. Putting aside the issue of the applicability of the River's Protection Act with reference to the proceedings before the commission,

this Wetland Resource Area must nonetheless be shown on the Site Plan review plan for the Planning Board, as this information will be relevant with reference to the Stormwater Drainage application. It should be shown in accordance with Bylaw 5450(a).

Green Site Plan Review Bylaw 5452(a) provides "Lack of Complete Application. Any application submitted which fails to include the required materials shall not be accepted until the application is complete." Accordingly:

1. If the Planning Board finds that Bylaw 5450(a) mandates that the applicant must show the areas of pooling and/or the pertinent area near the Bloody Brook *for its own purposes for the Stormwater Drainage application and site plan review;*
2. But the applicant refuses to put these elements on his plan; then
3. The Planning Board should not accept the applicant's plan and find that it is incomplete.

IX. Fencing

Green Site Plan Review Bylaw 5471-5474 provide that "…site alteration *shall* be designed in the Site Plan … so as to Minimize visual intrusion by controlling the visibility of parking, storage, or other outdoor service areas viewed from public ways or premises ***residentially used*** or zoned." (***Emphasis*** added.) Green Site Plan Review Bylaw 5471-5475 provide that "…site alteration *shall* be designed in the Site Plan … so as to Minimize glare from headlights through plantings *or other screening* (*Emphasis* added.)

Green Site Plan Review Bylaw 54795 provides the plans should "Achieve compliance *with the provisions of this zoning By-law*, including parking and landscaping" (*Emphasis* added) Section 3300, which pertains to the general landscaping provisions. Section 3313 states that a purpose of the bylaw is "To separate different and otherwise incompatible land uses from each other in order to partially or completely reduce potential nuisances such as dirt, dust, litter, noise, glare from motor vehicle headlights, intrusion from artificial light (including ambient glare), or view of signs, unsightly buildings or parking lots." Section 3710 provides:

> No use shall be allowed if it will cause sound, noise, vibration, odor or flashing (except for warning devices, temporary construction, or maintenance work, parades, recreational or agricultural activities, or other special circumstances) perceptible without instruments more than 200 feet from the boundaries of the originating premises if in a non-Residential district, or more than 40 feet from the boundaries of the originating premises if in a Residential District, unless otherwise specified herein. However, the Board of Appeals may grant a special permit for an exception for activities not meeting these standards, in cases where the Board determines that no objectionable conditions are thereby created for the use of other affected properties.

The Planning Board should be aware that my client's home at 131 North Main Street, which is south of and immediately adjacent to the subject property, is made up of two lots: the lot located on the

street, where the home is located is zoned residential; and a second lot located behind the home which *my client uses as the backyard for her residential home*. This back lot is zoned industrial but it is not used for that purpose. This is important because the buffering provisions in the new Green Site Plan Review Bylaws protect land that is either zoned residential *or* use residential.

My client uses her backyard/back land specifically to protect the unaltered natural aspect of the land and the animals who live there. While the backyard/back property has not been the subject of proceeding to delineate wetlands by the Conservation Commission, much of the area should ultimately be designated as wetlands. Ms. Rathbone has taken great efforts to document the natural aspects of her backyard/back land and the animals that live there. She has retained wildlife and forestry experts to help her with this endeavor. Attached hereto as **Exhibit C** is the Plant & Wildlife Survey report of Charley Eiseman which has been updated through April 2022. Attached hereto as **Exhibit D** is the report of Kate Marquis, Massachusetts License Forester 422, from September 2021.

One of my client's experts placed high resolution video cameras on the backyard/back land property. The video clearly evidences the fact that my client's backyard/back land is a habitat for many animals and haven for wildlife. The link below will take you to excerpts from the video cameras in her backyard. These videos were taken between June 2021 and March 2022.
https://photos.google.com/share/AF1QipOxzE1HkJn1D56Hbct-G4dnAkLOB-91JZgdWXWLBLrruDVp3G1wHlCz65gHRSznSw?key=dUhyTTRtcGduaFVyRFlYN0c2Y1c1WDB6NEE2YVd3
If you have trouble viewing the video, please see **Exhibit E,** which contains screenshots of the animals from the video.

My client has requested that this Planning Board condition any approval of the subject plan with the requirement that the applicant construct a 8 foot high fence separating my client's entire property, the residentially zoned portion of her property and the residentially used portion of her property, from the subject property. The Planning Board clearly has the power to do this based upon the provision set forth above.

The applicant's lawyer has told me that the applicant does not intend to put *any* fence at all on the southern side of the subject lot. They only intend to plant some trees. This would not be in conformity with your bylaws in that:

(a) trees will not be sufficient to truly screen my client's residentially zoned and residentially used property from visibility of the parking for the cars and buses for hundreds of people.
(b) trees will not be a sufficient barrier to stop the sound from the cars and buses for hundreds of people and the sound of the musical stage from being detected, without instruments, at my client's property.
(c) the applicant has agreed to provide fencing for the other nearby residential abutter but the parking area, with its driveway, is actually *closer* to my client's property.
(d) Without a fence my client's backyard will become prone to trespass by individuals coming from the school property and this could greatly damage the wetlands and the animal habitat located in her backyard/back lot residentially used property.

Therefore, even if the applicant objects, this Board should condition any approval with the requirement that a 8-foot-high fence must be installed along the entire southern portion of the subject property. The fence could be constructed in a way that allows water and small animals to still pass under the structure.

X. Repositioning Elements of Project at Different Locations on Plan

My client has requested that the applicant move the most obtrusive elements of the plan, the parking lot and the music soundstage, further west, with the sports fields being moved further east. This would move the light sources and sound sources further away from the neighboring residential properties. Based upon the same Bylaw provisions which justify that the fence along the southern border be installed (see above), this Planning Board could also condition any approval with an order that moves obtrusive elements of the plan in such a manner. The applicant's lawyers told me the applicant will not do this and the applicant claims to have environmental reasons for not doing this. The applicant should tell the Board what environmental reasons they have and provide specific environmental analysis as to why they will not move the most obtrusive elements away from the neighboring residential properties. The Board could then reach a determination in regard to this matter.

XI. Sanitary Sewerage

The new Green Site Plan Review Bylaw 5450 (d) provides "All plans... shall include the following… Sanitary sewerage." The term "Sanitary sewerage" is not defined in the Bylaws and the exact term is not defined in the Merriam-Webster Unabridged Dictionary. My client's expert, Mr. Chessia, would state that the term usually refers to pipelines or conduits, pumping stations, and force mains, and all other components used for collecting or conducting liquid or sewage wastes to a point of discharge or treatment.

On its plan, the applicant depicts a public bathroom structure and the piping related to that to bring the sewage to the public sewer system. However, the applicant intends to construct the elements shown in the planning phases and the public bathroom structure is not included in phase 1. While the applicant seeks to utilize the sports fields as soon as they are constructed, it could be years before the applicant constructs the sanitary sewage system shown on the plan. In such a situation Bylaw 5450 (d) must be construed to *require* the applicant to depict how they are going to deal with sewage wastes until the public bathroom structure is built.

If the applicant intends to use portable chemical toilets, possibly for years, the applicant must depict on the plan: how many of these portable chemical toilets will be used; what types will be used (e.g. handicap accessible); and where they will be located. The Planning Board should also insist that once these items are depicted on the plan the applicant request Board of Health review the revised plan and make comment on same. While the Board of Health may have reviewed the initial plan, the Board of Health may not have been aware that the public bathroom structure depicted on the plan might not be constructed for many years, and that in the meantime, hundreds of people may be attending sporting events with only portable chemical toilets for sanitary sewage.

XII. Utilization of Client's Property by Applicant

The intermittent stream channel ("channel," see above) is critical to the applicant's stormwater drainage plan and Notice of Intent. The plans depicted that this channel runs along the boundary between my client's property and the subject property and, at points, is actually located on my client's property. My client is not a co-applicant with the town and my client does not grant any permission or license to any town employees, town agents, or individuals utilizing the park to make entry onto her property.

If there is any measuring, analysis or work to be done on the channel, my client gives no permission or license to people entering onto her property and she gives no permission or license for any work to be undertaken on that portion of the channel located on her property. Please recall the applicant will not even allow my client's experts to make entry onto the subject property to simply make observations and take photographs.

I also implore the Planning Board to seriously consider Mr. Chessia's report regarding how the applicant has significantly underestimated the amount of water which will be flowing through the channel post-development. Based upon the engineering flaws in the applicant's plan, a significant increase in water would occur if the Planning Board approves the plan in its current condition. This significant increase in water could give rise to common law claims against the town. My client does not want to be forced to make such legal claims. Again, I ask you to task your peer reviewer with responding to Mr. Chessia's reports such that this Board may better be able make sure that the amount of water traveling through the channel post development will not increase.

XIII. Conclusion

Based upon the reasoning and authorities set forth above, this Planning Board should *deny* the application for site plan review approval:

1. The applicant does not have the right to import and utilize the proposed massive amounts of fill to construct the sports fields on the subject property and such an undertaking would violate Green Site Plan Review Bylaws 5470-5471 and 5481(c); and
2. The Planning Board should construe Green Site Plan Review Bylaw 5481 (j) to apply to the town and as such find that the subject plan is clearly in violation of that provision because the plan depicts that the town would alter 84% of the subject property.

Alternatively, if the Planning Board approves the application, it should only do so with conditions which would include:

1. limiting the construction of the park project to those items which could be constructed without importing and utilizing massive amounts of fill which would not include the sports fields;
2. limiting the alteration of the subject property to 40% of its area which would require a significant change from the current development plan;
3. requiring that the applicant construct a 8 foot high fence along the entire southern portion of the subject property, with the fence being constructed in such a way as to allow water and small animals to pass under;

4. requiring the applicant to move the parking area and the music soundstage further west on the subject property, with the sports fields then being moved further east; and
5. requiring the applicant to set forth on its plans the Sanitary Sewerage facilities that will be used until the public bathrooms are constructed and requiring that the Board of Health comment with approval on those plans.

Based upon the opinions, reasonings, and analysis set forth in the reports of Mr. John Chessia, the Applicant's Stormwater Drainage Plan is extremely flawed and *not* compliant with Deerfield's Bylaws and Regulations (See I.3(a)-(c) above). The Applicant's Stormwater Drainage Plan overestimates the amount of water currently draining from the subject property and underestimates the amount of water which will be draining from the subject property post development. Post development there will be considerably more water draining from the property through the channel located near my client's property than currently goes through the channel. This additional water will endanger my client's property with flooding. Accordingly, the Applicant's Stormwater Drainage Plan should be denied.

Respectfully submitted,

John M. McLaughlin, Esq.

Exhibits A – E

Cc: Kayce Warren
Lisa Mead, Esq.
James Martin, Esq.