

September 29, 2023

RE: 16 & 0 Bishops Lane

Dear Members of the Planning Board,

We would like to start by thanking you all for the time and energy you volunteer to the town and in particular for the careful consideration you are giving to this project. We know that the job of evaluating whether or not a project should move forward can be a difficult one that carries many consequences for our town. Before you make a final decision on whether or not to grant the requested waivers to the 16 & 0 Bishops Lane subdivision project, we wanted to provide some additional and hopefully final comments based on the discussion that took place at the last hearing and in response to the letter submitted by Mr. Issadore. We know this project has received an unusual amount of public comment, and we really appreciate the opportunity to voice our concerns. In the interest of trying to keep our letter as concise as we can, we are focusing on the points that we think matter the most, although there are many other concerns we previously raised, which we believe remain unaddressed by the applicant.

Planning boards have discretion to require strict adherence to their rules and regulations and deny waiver requests.

There is a long history of cases that we expect the Board is familiar with already so we will only summarize here that Massachusetts courts have held that where plan does not conform to promulgated standards, it is completely within the Board's discretion whether to grant a waiver or require strict adherence to their Rule and regulations.

There are many reasons not to like this project that go beyond the requested waivers. Setting all that aside, the crux of the matter is that Mr. Young's project requires four separate waivers. Examining those waivers alone, there is sufficient grounds to deny this subdivision plan. There are significant safety concerns with each of those waivers because of the layout of this neighborhood. We thank the town's consultants for flagging issues and suggesting potential steps to remedy those issues within the scope of what is possible given the layout of Bishops Lane. Their work is very important and we appreciate the way in which they have tried to shape this project. However, we emphasize that the plan remains out of conformance, and the decision to grant any waiver is reserved to the elected officials of the Planning Board.¹

Denials of waivers in particular are accorded deference by the courts. The case law states, if:

*Although courts in some instances have held that a planning board abused its discretion in granting a waiver of its rules and regulations, **it is a rare occurrence for a court to disturb a board's discretionary decision to deny a waiver of compliance** based upon its strict adherence to its rules and regulations.*²

¹ For it is the board, not the court, to whom the statute delegates the discretion, and the role of the court is merely to ascertain whether the board exceeded its authority. Arrigo v. Planning Bd. of Franklin, 12 Mass. App. Ct. 802, 809 (1981).

² Wine v. Plan. Bd. of Newburyport, 74 Mass. App. Ct. 521, 528 (2009)

It is not up to the peer reviewers, but rather up to the elected board to review all information and apply its judgement. It is our view that the current proposal, which requires four separate waivers, is still not safe and the Planning Board would be within its authority to determine it will not grant the requested waivers.

The town has adopted a broad purpose for the Rules and Regulations governing the subdivision of land (the “Rules”). It states that the Rules have been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of the Town by regulating the laying out and construction of ways in subdivisions. The purpose includes reducing danger to life and limb in the operation of motor vehicles, and protecting, promoting and enhancing the natural beauty and amenities of the Town. It specifically states that no subdivision shall be approved unless “it is designed with due regard to the rights, health, and welfare of Hingham’s inhabitants including the residents of such subdivision.” The two other residents of Bishops Lane and nearly every other abutter has written or spoken about the multitude of ways in which this project will negatively impact their rights, health, and welfare. If the granting of the requested waivers is not consistent with the purpose of the Rules, the Planning Board should deny the request.

On the other hand, although the purpose of the Rules is broad, the Rules themselves are detailed and specific. They clearly define the standards that owners must meet, are comprehensive, and are carefully drafted, so that owners know in advance what is or may be required of them. In light of this proposed subdivisions inability to conform to the clearly set out Rules, cases like *Sealund Sisters* are not applicable because there the Boards were relying solely on the purpose clause to deny a plan. Whenever waivers are required, it is in the discretion of the Planning Board to grant or deny them.

There are many reasonable grounds upon which to deny the four waivers

Although Mr. Issadore cites *Sealund Sisters*, the facts there are easily distinguishable from the plan at hand because that subdivision did not require waivers and was denied on the basis of the impact significant blasting would have and on separate grounds related to the size of the proposed detention pond.³ This subdivision is not an acceptable plan on its face and requires the following four separate waivers:

1. Allowing a right of way that is narrower than required for a minor street,
2. Allowing a centerline radius which does not accommodate the required design speed for a minor street,
3. Allowing a sidewalk with no grass curb strip between the road and sidewalk, and
4. Allowing street trees to be planted as space allows rather than at regular intervals.

Each of these waivers presents a safety concern in the context of this neighborhood, because there are antique homes built just a few feet off the existing private 40-foot right of way. The homes are so close

³ The one way in which *Sealund Sisters* is similar to the matter at hand is that the second grounds on which Weymouth denied the subdivision plan was the size of the detention basin being too large. While the Appellate Court held that the extensive nature of blasting was not a proper ground for denial of the subdivision, it actually declined to make a finding about the size of the detention basin and remanded the case for further adjudication. In light of this, we echo the observation made by Mr. Shriver that the largest lot being created by the 16 & 0 Bishops Lane subdivision is the drainage lot and this may provide yet another basis for denial.

that at one point, as Mr. Young himself indicated, the right of way had to be relocated so that one of the homes would not be in the actual right of way.

The applicant has suggested that the first 3 waivers are not a concern because they will add granite curbing to the north side of the street. However, this solution does not adequately remedy the safety concerns that the abutters have with the granting of these waivers. As Mr. Dirk indicated, the purpose of the grass curb strip is to give space for a car that has gone off the road to come back under control. In this neighborhood, there simply is no room to widen the road to provide for additional traffic. While a granite curb may provide some protection in redirecting certain cars back into the roadway upon impact, this requires cars to be low to the ground and traveling at a low rate of speed. SUVs, delivery trucks, and even sedans traveling at higher rates of speed can and do jump granite curbs. To demonstrate this, we are sharing again the image of the vehicle which crashed into the Samuel Lincoln Cottage to point out that there is in fact granite curb in front of this home but that did not stop the vehicle from crashing into the house.



This vehicle was not even a larger SUV or truck. **If utilizing granite curbing was just as safe as having a grass curb strip, a 46-foot wide right of way, or a 200-foot centerline radius, then our design standards could provide that granite curbing would be considered an acceptable substitute to compliance with these requirements.** Clearly, that is not the case. If this project moves forward, children and families walking on the sidewalk, and homeowners along the existing part of Bishops Lane will be depending on the minor protection provided by granite curbing for their safety. Moreover, the granite curbing would only be on the north side of the street. On the south side, there will also be structures very close to where the newly-widened road would end and they would not have the benefit of the granite curb.

Additionally, granite curbs come with their own disadvantages. Granite curbs have sharp edges that are known for causing tire blowouts that can and do lead to drivers losing control of their vehicles.⁴

⁴ Other recent examples of granite curb related accidents:

- Trash truck overturns after hitting granite curb, May 2023:
<https://www.nbcboston.com/news/local/trash-truck-overturns-dumping-garbage-on-nh-highway-off-ramp/3047658/?amp=1>

The presence of the granite curb on one side and not the other would particularly be a problem for structures on the south side of the road if a car hit the granite curb and was forcefully redirected towards the south side of the street.

The waiver for tree placement should also not be granted because spacing out street trees at regular intervals serves a safety purpose and is not just for visual aesthetics. Studies have shown that people instinctively drive slower on tree-lined streets.

Trees can calm traffic and reduce vehicle speeds by appearing to narrow the width of the roadway. In an area where streets were widened and trees were not present, accidents increased by almost 500% within an 8-year period.⁵

This further supports the concerns raised at the last hearing about the granting of this waiver, which has received less attention to date. Currently, although the homes are close to the roadway there are many trees in the right of way. This not only encourages cars to go slowly, but also provides a physical barrier between the homes and vehicles moving along Bishops Lane. The removal of existing street trees, and replacement of them in clumps, rather than at regular intervals, increases the risk of vehicles speeding and accidents on Bishops Lane, particularly when combined with the grade of the road, and the widening of the street.

Additionally, while this project no longer requires waivers for sight line distances, and Mr. Young has indicated he will obtain the necessary permissions to be able to trim or remove trees to maintain sight lines, he has not actually obtained such approvals or answered the question from whom permission would need to be obtained, or whether such persons are amenable to granting these permissions.

The inability to bring the existing part of Bishops Lane into conformance with existing Design Standards is an adequate reason to deny the subdivision plan even if it doesn't trigger a waiver (but it does trigger a waiver)

Mr. Issadore tries to make the same argument that Mr. Young has made--that somehow this project is both a part of the subdivision plan that was commenced in 1925, and also that the roadway established by that plan is not a part of his subdivision. As we discussed in prior letters, no matter how you look at the existing portion of Bishops Lane, the Board has the authority to apply its current design standards as long as it does not destroy access for the homes that already exist on the right of way. We know that the Board and Town personnel have already considered this position and agree that a waiver is required.

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- Police cruiser hits granite curb while turning and crashes, June 2023: <https://merrimacpolice.org/2023/06/21/merrimac-police-cruiser-crashes-into-granite-curb-during-emergency-response-officer-treated-and-released/>
 - SUV loses control after hitting granite curb, August 2023: <https://www.pressherald.com/2023/08/15/jaws-of-life-used-to-free-woman-trapped-between-vehicles-in-crash-at-yarmouth-hannaford/>

⁵ <https://www.vibrantcitieslab.com/research/transportation/>. See also, <https://www.treesforstreets.org/how-street-trees-help-make-our-roads-safer/#:~:text=Reduced%20Speed.more%20slowly%20is%20really%20positive> "Reducing speed is one of the most important factors in preventing road accidents from happening. Reduced speed also helps limit the chances of death or serious injury if an accident does occur. Studies showing that tree-lined streets encourage people to drive more slowly is really positive."

As the case law states, an applicant must be able to determine what is required in order to subdivide from well-defined regulations promulgated by the Board. In Hingham, Section 4.K of the Rules provide specifically that the “The Board may deem said ways to be not adequate if such ways, *either within or outside the subdivision*, fail to meet the Design Standards set forth in these Rules.” Therefore, even if a waiver was not required, there can be no doubt that Mr. Young was put on notice that his subdivision plan could be rejected if he could not bring the existing portion of Bishops Lane into conformity with the Design Standards, even if that part of the road is considered to be outside of the subdivision. However, as we have discussed before and will touch upon next, we think that a waiver is required.

A more appropriate case to the matter at hand is *Wine v. Plan. Bd. of Newburyport*. In *Wine*, Newburyport denied granting a waiver of the centerline offset requirement. The applicants argued that approval of their subdivision plan was not dependent upon a waiver of the centerline offset requirement because the private way had been approved previously under a 1982 plan. The court held that the 1982 plan did not entitle the developers to expand the three-lot subdivision to a five-lot subdivision, and therefore, the plan required a waiver. The court then went on to hold that “it is a rare occurrence for a court to disturb a board's discretionary decision to deny a waiver of compliance based upon its strict adherence to its rules and regulations” and upheld the board’s denial of the plan.

The stormwater design is a separate ground upon which the Plan can be rejected

A common theme in the caselaw is that a Board cannot reject a conforming plan unless the grounds it is basing the rejection upon is the subject of enacted regulation. The Board has adopted regulations of stormwater systems in the Rules, and it has the authority to review the design of the system. The Town’s engineer objected to this design because it will be unusually deep and expensive to maintain over the long-term. Specifically, Mr. Frey noted that “The complexity and expense of operating and maintaining deep stormwater infrastructure is outside the capability of most homeowner or landowner associations. A failure of this infrastructure would make the roadway impassable.” In response, the board suggested that it would not approve this project without a condition that the lane remain private in perpetuity.

The abutters share concern over the burdensome nature of the vast commitments this very small Homeowners’ Association (HOA) is committing to undertake. Assuming Mr. Young successfully obtains permits to build on each lot and completes each such project, a maximum of four homes will be responsible for maintaining the detention pond, the deep underground stormwater system, the pavement, the sidewalk, the street trees, the granite curb, as well as all other landscaping and for all snow removal. As the builder, Mr. Young can afford to invest in this infrastructure at the outset because he is induced by the profit he expects to make from selling 3 new construction homes. The abutters, however, are concerned that the HOA will lack any the financial incentive to invest in maintenance of this infrastructure. In particular, we are concerned that a failure of the stormwater drainage system would leave the road and maybe South St. impassable. This HOA will need to start saving significant amounts of money right away to have adequate funding to meet their obligations. If they don’t, or if they poorly manage their resources, the other residents of Bishops Lane and South St. will be burdened with the fallout, and have very little, if any, recourse. **Simply put, if this infrastructure is too burdensome for the town to want to maintain (and we don’t blame the town for taking this position), then it must also be too burdensome for 4 homes to be solely responsible for.**

Finally, for the record, we would like to reassert our position that Mr. Young should be required to obtain the signatures of the other owners with fee interests/easements over the right of way on his plan under the Rules because this project impacts their ownership in the private way.

For these reasons, we request that the Planning Board not grant Mr. Young any waivers because there is no public benefit in doing so. If they agree with our safety concerns regarding the granting of the waivers, we request that they include such concerns in their findings when denying the waivers along with their own concerns to granting the waivers. This project does not give due regard to the rights, health, and welfare of the inhabitants of Hingham, or the other residents of the subdivision. This project eviscerates any setback between the existing antique homes and the road, and destroys a path through a forest that residents have been using for decades for cross country skiing and access to the country club and train station. It presents safety concerns and negatively impacts not only the current residents of the subdivision and abutters but countless inhabitants of Hingham for all the reasons that are by now well documented.

Thank you,

Kaja and Dan Fickes – 2 Bishops Lane
Katie and Phill Gallacher – 222 South St.
Priya and Peter Howell – 26 Del Prete Dr
Daniel Jacobs – 225 South St
Carson Lynch - 224 South St.
Nicole and Matti Makela – 248 South St.
Astrid Ramirez-Jacobs – 225 South St.
Kristen and Craig Shames – 6 Bishops Lane
Ginger and Ken Winslow – 166 Central St. (Former Residents of 248 South St.)