

STAFF MEMORANDUM

To: Truro Zoning Board of Appeals

From: Barbara Carboni, Interim Town Planner/Town Counsel, KP Law

Date: October 2, 2020

Re: Waivers under G.L. c. 40B and Applicant's Waiver Requests, **UPDATED**

Section I contains guidance on the principles and process under which the Board considers requests for waivers of local regulations. **Section II** contains the Applicant's waiver requests, somewhat rearranged and edited for efficiency, and with comment.

I. Waivers under G.L. c. 40B

Under G.L. c. 40B, ss. 20-23, the Zoning Board of Appeals *may*, but is *not required to* waive any Bylaw or other local regulation with which a proposed project does not comply. The Board may grant some waivers requested by the applicant, and deny others. With respect to each waiver requested, the Board must decide whether the waiver is "consistent with local needs." G.L. c. 40B, s. 20 defines "consistent with local needs" as:

"reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces."¹

A shorthand version: reasonable when balancing (1) *regional and local affordable housing need* and (2) *public health and safety, contextual site and building design, and open space preservation*.

As a practical matter, certain waiver requests are central to the project, and if denied will effectively deny the project. For example, in this case, the Use Table in Zoning Bylaw Section 30 does not permit multifamily use, so if the project is to be approved, this Bylaw provision must necessarily be waived. But the Board must *first* determine whether waiver of this Bylaw to allow multifamily housing is "consistent with local needs." If the Board finds that multifamily use is reasonable when balancing (1) and (2) above, then the waiver is consistent with local needs.

The Board may grant a waiver in part, or to some lesser extent than requested. For example, in this case, the Applicant requests approval for thirty-nine units of multifamily housing on a site of 3.91 acres. This requires waiver of the Zoning Bylaw's Lot Area

¹In addition, "consistent with local needs" means "applied as equally as possible to both subsidized and unsubsidized housing."

requirement, which would limit development to five units (@33,750 square feet per dwelling unit. The Board may waive the Bylaws to allow a multifamily development of *fewer* than thirty-nine units – in effect, granting the waiver in part, and denying it in part.² It is within the Board’s authority to do so *only if* it finds that the project at the density requested (39 units) is not “consistent with local needs.”

Where a Board is inclined to deny a waiver, there is typically discussion with the applicant regarding the impact of such denial on the project. This is one reason why public hearing is left open, so that both the applicant and the public may comment on waivers. The applicant may make the case that the project would be rendered “uneconomic” by the waiver denial. In such case, the Board is entitled to ask the applicant for a project *pro forma*, which the Board may then consider in deciding whether to grant or deny the waiver.³ This process also applies to the Board’s consideration of any permit conditions. The Board need not request a *pro forma*, and many G.L. c. 40B projects are permitted and conditioned without this step.

Input on waivers

G.L. c. 40B, s. 21 states that the Board, “in making its decision on [the] application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants.” Where Town boards or departments, or the Board’s peer reviewer have made recommendations regarding waiver requests, the Board must consider these recommendations. The Board may also consider recommendations expressed by members of the public. Ultimately, however, it is up to this Board whether to grant or deny any waivers.

Why discuss waivers now?

Finally, it is reasonable to ask whether the Board can, or should be considering waiver requests before it has voted on whether to grant a comprehensive permit. The answer is that waivers are such a significant part of a G.L. c. 40B permit that it makes sense to review them up front. This is especially true for waivers without which the project cannot be built. If the Board is inclined to deny a waiver, this gives the applicant the opportunity to address any issue raised by the Board and potentially modify the project – or to make a case that the denial would render the project uneconomic. In short, it allows for useful dialogue.

If the Board elects to discuss waivers prior to voting to grant or deny a permit, this does *not* mean that the Board has already determined that a permit should issue. The discussion may be seen as determining what waivers the Board could find as “consistent with local needs” if it elects to grant a permit.

² This may also be viewed as imposing a condition limiting the development to a specific density.

³ The *pro forma* may be subject to peer review if the Board so desires. Note that “uneconomic” is a G.L. 40B term of art, and it is up to the subsidizing agency to set profit limits. The Board cannot apply its own definition of what is an appropriate return.

II. Applicant's Waiver Requests

With the Applicant's cooperation I have edited and rearranged the waiver requests for the Board's discussion. Below are the waiver requests, in some cases with supporting argument from the Applicant and Staff comment. Additional waivers not requested by the Applicant but needed for the project are also identified.

Board of Health Regulations

Applicant's request: Relief from specific requirements of Article 14 of the Truro Board of Health regulations in excess of MA DEP Title 5 regulations.

Article 14: Nitrogen Loading Requirements

"The Truro Board of Health hereby requires that all properties within the Town of Truro meet the loading restrictions set forth in 310 CMR 15.214 and contain at least ten thousand (10,000) square feet of Buildable Upland (as defined in Article 1 hereunder) for every 110 gallons per day of design flow and that all systems designed to serve said facilities meet the same restrictions and requirements contained in Title 5 as the "Nitrogen Sensitive Areas" defined in 310 CMR 15.215 irrespective of whether the properties are located within Nitrogen Sensitive Areas as so defined."

Staff Comment: The Board's peer reviewer, Mark Nelson of Horsley Witten Group, has noted that this regulation limits wastewater flow to 440 gallons per day per acre. The Cloverleaf site contains a total of 3.91 acres or 170,320 square feet. Under Article 14, the maximum wastewater discharge would be 1,874 gallons per day. The proposed system for this project has a design flow of 7,480 gallons per day. Waiver of Article 14 would be required to allow this discharge in excess of the 1,874 gpd limit for a parcel of this size.

Mr. Nelson found that the Applicant's original wastewater disposal system did not comply with Title 5 or Article 14 of the Truro Board of Health regulations. The Applicant then submitted a revised proposal utilizing the BioMicrobics treatment system, an Innovative/Alternative technology system. Mr. Nelson's report dated July 6, 2020, reviews the system proposed and contains his discussion of this waiver request. Mr. Nelson concludes that waiver of Article 14 is appropriate, conditioned on an Operation and Maintenance Agreement; monthly sampling of wastewater effluent for one year (reduced to quarterly if warranted); a contingency plan; and groundwater monitoring downgradient of the leaching field.

Article 9: Innovative/Alternative Technology [additional waiver required]

The proposed BioMicrobics treatment system for the project is an Innovative/Alternative technology certified for enhanced nutrient removal by the Department of Environmental Protection. Article 9 limits the use of I/A Technology treatment systems to "Remedial Use Situations" arising from failed or nonconforming systems:

"(2) Standards. Innovative/alternative (hereinafter, "I/A") technologies, as defined herein, will only be permitted in Remedial Use situations, and as defined herein (see article 3). I/A technology will not be permitted in any other situations."

Use of the I/A BioMicrobics system for the project, which is not a Remedial Use Situation, requires a waiver from this Bylaw.

Zoning Bylaw

Section 30: Use Regulations

30.1(A): General Requirements

Allows “single-family dwelling or single-family dwelling with accessory apartment use” only. Waiver required to allow multi-family and two-family use.

30.2 Use Table. Does not allow two-family or multi-family use. Waiver required to allow these as principal uses.

30.2. Use Table. Does not allow on-site management office, community room or storage as accessory uses. Waiver required to allow these uses as accessory uses in conjunction with multi-family use.

Section 40.6: Growth Management

B. Residential Development Limitation

“1. There shall be no more than forty (40) building permits for new single family dwelling units authorized within any calendar year, beginning January 1 and ending December 31. . .”

Other portions of Section 40.6 limit the issuance of permits to any one applicant during a single month or year.

From Applicant: : This section limits residential building permits issued within any calendar year to 40, and further limits the total number to any one applicant to 4. Section 40.6.C.1 does provide for exemptions for “construction of affordable housing units provided such housing units have deed restrictions to ensure they remain affordable for the maximum period permitted under Massachusetts Law” however the definition of “Affordable Housing” in the bylaws refers only to housing certified as affordable by the Truro Housing Authority. The definitions in the Zoning Bylaw also defines “Affordable Households” as households earning no more than 80% of the AMI as determined by DHCD. These definitions are potentially contradictory with the mixed income nature of this rental housing development. Therefore, relief from this Growth Management section is requested to exempt all rental units in the development including the units that have deed restrictions up to 110% AMI and the unrestricted Market Rate units, so that building permits can be issued at once.

Staff Comment: Staff agrees that a waiver of Section 40.6 is required to allow the issuance to a single applicant of building permit(s) for the construction of 39 dwelling units. Staff believes that if a waiver is granted, the exemption in Section 40.6.C. 1 is not relevant.

Section 50: Area and Height Regulations

50.1 Regulations

A. Table (Dimensional Requirements)

The Applicant has submitted the following table based 50.1.A, requesting **side yard and building height waivers**, with more detail in the second table below.

<u>Dimensional Requirements</u>	<u>Required</u>	<u>Provided</u>
Minimum Lot Size:	33,750 sq. ft.	170,320 sq. ft.
Minimum Lot Frontage:	150 feet	209.61 feet
Minimum Frontyard Setback	25 feet	42 feet
Minimum Sideyard Setback	25 feet	see chart for buildings requiring waivers**
Minimum Backyard Setback	25 feet	42 feet provided [Building 23-25]
Maximum Building Height	2 stories; 30 feet	see chart for buildings requiring waivers**

Staff Comment: Minimum lot size is a limit on density; only five lots/dwelling units would be permitted on a parcel of 170,320 square feet. Staff believes that at 170,320 square feet, the does not satisfy the Bylaw minimum lot size for a project of thirty-nine dwelling units and that a waiver of 50.1.A is required to allow this density

<u>Dimensional Requirements</u>	<u>Required</u>	<u>Provided</u>
Minimum Sideyard Setback	25 feet	see chart for buildings requiring waivers**
Maximum Building Height	2 stories; 30'/23' flat	see chart for buildings requiring waivers**

Relief Required Building Number	Minimum Sideyard Setback – 25 feet Required	Maximum Building Height (definition of building height to ridge above existing grade) – 30' max	number of stories – two story maximum
1-3	conforming at 40.8 feet	conforming at 21.7 feet	conforming at two stories
5-7	**waiver required for setback at 12.3 feet	conforming at 24 feet	conforming at two stories
2-4	conforming at 91.2 feet	conforming at 28 feet	conforming at two stories
6-8	conforming at 34.2 feet	conforming at 28.5 feet	conforming at two stories

9-11	conforming at 33.3 feet	conforming at 25.25 feet	conforming at two stories
13-15	**waiver required at 24 feet to foundation excl. egress porch	conforming at 23.75 feet	conforming at two stories
10-12, 14-16, 18-20	**waiver required at 20' to foundation excl. egress porch	conforming at 27.25 feet conforming at 26.5 feet conforming at 28.5 feet	conforming at two stories conforming at two stories conforming at two stories
17-19	**waiver required at 14.8 feet to foundation excl. egress porch	conforming at 25.75 feet	conforming at two stories
22-24 23-25	conforming at 51.5' **waiver required at 14.6 feet to foundation	**waiver required at 36'11" **waiver required at 31'11" due to fill placed at rear of site above existing grade; appears 24'8" at roadway	**waiver required at three stories; definition of basement in terms of foundation exposure on more than one side will classify this basement as a third story; relief required
21	conforming at 61' west side and 40' east side	**waiver required at 31.5' that exceeds 23' limit for flat roof; based on def of building height above existing grade; visible height from road is 22.5' at front and 31.5' at rear	**waiver required at three stories; definition of basement in terms of foundation exposure on more than one side will classify this basement as a third story; relief required

Staff Comment: These tables should be reviewed and discussed in conjunction with site plans and elevations. The building heights and waivers requested for buildings 21, 22, 23, 24, 25 should be more fully described.

50.2: Building Gross Floor Area for the Residential District

“B. Applicability and Exceptions:

1. Total Gross Floor Area Allowed by Right: [B]uilding permits for new construction . . . shall be issued only where, on completion of the construction or project, the Total Gross

Floor Area of the new or expanded structure(s) does not exceed 3,600 sq.ft. for a Residential District Minimum Lot Size of 33,750 square ft. and prorated to 3,668 sq.ft. for one acre of land:

a. Plus 300 sq.ft. for each additional contiguous acre of land, or fraction thereof prorated.

..

2. Special Permit to exceed the Total Gross Floor Area limit: The Total Gross Floor Area limit for a dwelling and accessory buildings on a lot established in subsection 50.2.B.1 may be exceeded up to a maximum established by this subsection, by Special Permit. No Special Permit may be issued for any construction if the construction would result in the Total Gross Floor Area exceeding 4,600 sq.ft. for a Residential District Minimum Lot Size of 33,750 (or .775 acre) and prorated to 4,600 sq.ft for one acre of land:

a. plus 300 sq.ft. for each additional contiguous acre of land, or fraction thereof prorated.

...”

Staff comment: At 3.91 acres, the Total Gross Floor Area allowed as of right on the project site would be 4,568 sq. ft. (3,668 for the first acre + 300 sq ft. for each additional acre or fraction). The Total Gross Floor area allowed by Special Permit would be 5,568 sq ft (4,668 for the first acre + 300 sq. ft for each additional area or fraction). As calculated by the Applicant, the Total Gross Floor Area of the project is 46,172 sq.ft. A waiver is required for construction of all Floor Area in excess of 5,568 sq. ft.

Section 70: Site Plan Review

70.3. Commercial Development

A. Commercial Site Plan Review is required for:

1. Any construction, alteration, expansion, or modification of any properties, structures and uses other than that of single or two-family residences and their accessory uses and structures.

Applicant’s presentation (condensed): Applicant seeks relief from the requirements of Site Plan Review procedures and requirements; and, to allow the Comprehensive Permit to be issued in lieu thereof. Applicant is presenting a site plan, landscape planting plan and site lighting plan that incorporates many Site Plan Review requirements. The applicant has submitted the Commercial Site Plan Review Checklist and questionnaire as evidence of substantial conformance with the Procedures and Plan Requirements of Site Plan Review. Relief is requested from requirements, if any, to post a bond, cash, Letter of Credit, or impose Planning Board Covenants, related to site development.

Staff Comment: Under G.L. c. 40B, a separate Site Plan Review process cannot be required. This Board’s review of the comprehensive permit application substitutes for Site Plan Review under Section 70. The Applicant has submitted most of the information required under Section 70.3.D,⁴ and the Board has reviewed plans extensively - including with the benefit of peer review. The Board may conclude that its review has been consistent with Section 70.3, and that

⁴ Exception: lighting plan. I have asked Applicant to provide.

waiver of any remaining procedural or substantive requirements is warranted. Given the scale of this development and its impacts, the Board may wish to review the project's conformity with the Review Criteria/Design Guidelines of Section 70.3.F.

Subdivision Rules and Regulations

Staff Comment: Although the project is not a subdivision, it is residential development of a scale and impacts consistent with those of a subdivision. For this reason, many of the standards contained in the Rules and Regulations should be considered applicable to the project, and where noncompliant, waivers should be requested and considered by the Board. Section 3, Design Standards and Section 4, Specifications for Construction of Roads, and Appendix 2, Table 1 (Recommended Geometric Design Standards) are of particular importance.

Applicant's presentation: The applicant will comply with the intent of the Subdivision Control Regulations with the exception that the applicants requests the waiver of the Planning Board role and this review be made by the Zoning Board of Appeals as part of the Comprehensive Permit under MGL Chapter 40B. In addition, specific relief /waiver is requested:

Section 3. Design Standards

Section 3.6. Street Design

Section 3.6.6. Dead-end streets

- a. "The length of dead-end streets should not exceed one thousand (1,000) feet."

Waiver is required: Loop roadway is 1,060 +- feet long.

Section 3.6.7. Adjacent properties

"Proposed subdivision roads shall be separated from subdivision boundaries by a screening buffer of twenty-five (25) feet width or more. . . ."

Waiver is required: Access road is within 25 feet of side line, adjacent to Unit 21 (east), 13 feet provided.

Section 3.6.8. Design Standards: Table 1 in Appendix 2 – Type C

- Minimum Roadway width: 20 feet

Waiver is required: loop road has 14 foot travel way, with 1 foot berms provided (one-way traffic)

- Minimum Radius at street centerline: 290 feet

Waiver is required: 100 feet provided at Highland Road entrance; 50 feet provided within the site.

- Maximum Grade: 8%

Waiver is required: Main Access Road 10% proposed

- Minimum curb radius: 30 feet

30 feet required; 30 foot radius provided on main access road – exit lane

APPLICANT TO CLARIFY: Is waiver required and if so, where?

- Dead-end Street maximum length: 1000 feet
Waiver is required: loop roadway is 1,060 feet +/- long

Section 4: Specifications for Construction

4.1.8 Berms

“Berms shall be provided on both sides of all paved roads where the grade is 3% or greater. Bituminous concrete berms, eighteen (18) inches in width on rolled asphalt base or binder course, shall be constructed. . .”

Waiver is required: 12 inch berms proposed

4.1.10 Vegetation:

“Existing trees of over six (6) inches in diameter, measured at four and one-half (4-1/2) feet above existing grade, outside the travel surface of any proposed or existing roads and on proposed building lots should be preserved. . . .”

Waiver is required: Trees within the proposed limit of work line shall be removed as needed to allow for the construction of the development, beyond the edge of clearing for the roadway.

Additional waiver requested:

2.5.4(c) Performance Guarantee

Requires a performance guarantee in the form of a bond, deposit, or covenant to secure construction of ways and installation of municipal services.

The Applicant has requested waiver of “any requirement. . . to post a bond, cash, Letter of Credit, or impose Planning Board Covenants, related to site development,” which would include the above.

Staff Comment: To protect the Town’s interests and investment in this project, denial of this waiver is recommended.

General Bylaws

Chapter 1, Section 8: Soil Removal

1-8-1. “The removal of topsoil, loam, sand, gravel, clay, hardening, subsoil and earth from any parcel of land not in public use in the Town of Truro except as hereinafter provided, shall be allowed only after a written permit therefore is obtained from the Building Commissioner.

Applicant's presentation [condensed]: Applicant requests waiver of the requirement that the Permit for Soil Removal be obtained from the Building Commissioner, and that the Permit for Soil Removal, with any conditions imposed, be issued by the Zoning Board of Appeals as part of the Comprehensive Permit. Applicant requests waiver of any bond or other security.

Staff Comment: Under G.L. c. 40B, a separate permit cannot be required for the earth removal involved in this project, but the Board may secure, through a permit condition requiring administrative review, compliance with any reasonable standards and conditions that would be applied to a non-40B project. Through discussion with the Building Inspector and DPW Director, in lieu of a soil removal permit, the DPW director will have oversight of soil removal activity during the Town's part of the project, and this activity will be subject to review and approval by the Board's consultant during the Applicant's portion of the project.

Curb Cut Permit

Applicant's presentation: The Applicant requests that the Comprehensive Permit substitute for Curb Cut Permit from the Town of Truro. MA DOT Curb cut Permit is being sought by Truro DPW.

Staff Comment: Curb Cut Permits are issued by the Select Board following review by DPW and Chief of Police. The proposed project will have curb cuts on Highland Road (main entrance) and Route 6 (emergency access). The Highland Road curb cut has effectively been reviewed by DPW and the Police Chief as part of the comprehensive permit process. The DPW Director has confirmed that DPW will apply for the MassDOT curb cut approval. The Town's curb cut permit requirements may be waived.

Catch-all waivers

The Applicant seeks relief from the Truro General Bylaws and Other Regulations, as follows:

Relief is requested from any other zoning bylaw, general bylaw or regulations or procedures that may be identified in the review process if full compliance is not physically or economically feasible.

Relief is requested from the applicability of such other sections of the Zoning By-law, the Subdivision Control Regulations, or of such other local rules and regulations that would otherwise be deemed applicable to this development.

Staff Comment: Catch-all waivers are not recommended. Any relief sought should be specifically identified and considered by the Board.

Waiver of fees

Applicant's presentation: Relief is requested from any requirements for paying fees for any regulatory review or for any permits related to the development of this project, including but not limited to fees for building permits and septic system installation permits.

Staff Comment: The Board may:

- grant the relief as requested – relief from payment of *any* fees
 - waive some fees and not others
 - waive a percentage of fees (this is sometimes done in proportion to the percentage of affordable units in the project)
 - decline to waive any fees
-

Other

Section 30.9 Parking

Section 30.9 requires two parking spaces per dwelling unit. The development's 39 dwelling require 78 spaces; 81 spaces are provided.

Section 30.9.C. Off Street Parking Schedule, provides in part that "in determining the number of spaces required only delineated spaces which *are not obstructed* shall be calculated." [emphasis added]. The Planning Board has suggested that there are "at least 10 obstructed spaces" on the proposed plans and therefore an insufficient number of spaces provided. See comment letter dated July 28, 2020 and September 4, 2020 ("at least 11"). The Planning Board also suggests that the Management Office and Community Room visitor uses require additional spaces.

Staff Comment: The Board may determine the meaning of the Bylaw language and implications for the applicant's proposed number of spaces. If the Board finds that the number of parking spaces does not meet the Bylaw requirement, it may consider a (partial) waiver of the requirement.