

Hi Bill –

First things first, with regard to the Agreement, you sent me the attached, which Mary apparently dropped off at your office, on 26 November. If you haven't already, you should sign the same and get Mary a copy. I'm happy to forward to her if you send to me.

Background

This case involves the end of Perkins Ave. In 1978, via Article 42 of the Warrant, the Town Meeting accepted 600' of Perkins Ave extending from Lafayette Road. The Town does not own the fee interest in Perkins Ave and we presume that the abutters own to the center line of same. Mary's client ("Waterstone") has petitioned the BOS to relocate the end portion of Perkins Ave., pursuant to RSA 231:8. More specifically, and as depicted on the attached lot line adjustment plan which was approved by the Planning Board in October 2019, the end of Perkins Ave. is proposed to be relocated over two parcels of property, both of which are owned by Mary's client, which are further identified as Tax Map 8, Lot 1 and Lot 8, all to accommodate new development. The way it sits today, the accepted portion of Perkins Ave., after changes to Lafayette Road, is 580.7' in length. The proposed relocation will result in a right of way length for Perkins Ave of 599.2'.

Agreement with Town

The key terms of the Agreement are as follows:

- 1) Waterstone acknowledges that it has met with and consulted all abutters and affected landowners during the Planning Board review process. Waterstone acknowledges its obligation to develop and present the evidence and argument supporting occasion (standard discussed below) to relocate the end of Perkins Ave. for consideration by the BOS.
- 2) Waterstone agrees to pay "for any and all expenses associated with the proposed relocation including but not limited to any and all notification requirements for the public hearing, any and all permitting and survey work required for said road layout process, any and all site work and construction costs for the proposed relocation, and any and all engineering review fees and reasonable attorney fees incurred by the Town of Seabrook involved with the proposed relocation and associated layout process."
- 3) Waterstone agrees to defend any challenge to the Board of Selectmen's action on its petition and to indemnify the Town for any damages resulting from the challenge.

Authority and Process, Occasion to Relocate and Public Hearing

- **Process:** As we have previously discussed, procedurally, the BOS has the authority under RSA 231:8 to relocate an existing Town road upon petition to relocate, which petition Arleigh Green filed on behalf of Waterstone. After receipt of a petition, and in order to exercise its authority to relocate, the BOS must provide notice of the Board's intention to consider the petition to relocate to all abutters and owners over whose land the proposed route would pass, and has to conduct a public hearing, at least 30 days after providing the notice, to consider, in quasi-judicial capacity, evidence provided by the abutters, petitioner, and other interested parties, whether there is "occasion" for the proposed relocation. The BOS also has an obligation to assess the damages sustained by any owner of land or other property taken for such highway. If the Board finds occasion to relocate, the Board will vote to so find, and will prepare a "return" which will be recorded with the Town Clerk. We think the return should include a copy of the Agreement, the recorded lot line adjustment plan, and a copy of the minutes of the BOS meeting.

- **Occasion:** In determining whether occasion for the proposed relocation exists, the BOS is charged with consideration of the public exigency and convenience of the proposal as well as the rights of affected landowners. More specifically, in determining whether occasion exists for the proposed relocation, the BOS must consider:
 - o the public convenience and public necessity for the highway
 - o the financial burden to be imposed upon the Town's taxpayers for the construction and maintenance of the same; and
 - o the rights of owners and interested parties whose land is affected by such proposal.
- **Public Hearing:** As outlined above, and as I advised Mary Ganz today, the ball is in her court, and I would expect that the BOS would be interested in hearing and considering the following information:
 - o A presentation regarding the Planning Board approved lot line adjustment plan and a discussion of the basis and context of same;
 - o Confirmation that Waterstone provided a petition to the BOS pursuant to RSA 231:8;
 - o Confirmation that proper notice has been provided to abutters and landowners pursuant to RSA 231:9 and 231:10;
 - o Confirmation that all the expenses incurred in connection with title searches, notice to the abutters and landowners, have been and will be borne by Waterstone per RSA 231:10-a and the Agreement with the Town;
 - o Confirmation that per the Agreement Waterstone has also agreed to pay for "any and all expenses associated with the proposed relocation including but not limited to any and all notification requirements for the public hearing, any and all permitting and survey work required for said road layout process, any and all site work and construction costs for the proposed relocation, and any and all engineering review fees and reasonable attorney's fees incurred by the Town of Seabrook involved with the proposed relocation and associated layout process";
 - o Confirmation that Waterstone, per the Agreement, agreed to defend any challenge to the BOS's action on its petition and to indemnify the Town for any damages resulting from the challenge;
 - o An argument regarding why there is occasion to relocate the end of Perkins Ave as requested, to specifically include discussion of the three criteria above.
 - o Clarification and confirmation that no land will be taken and no damages incurred by anyone, as they have indicated is the case.

Board Consideration and Potential Motion:

The BOS will be acting a quasi-judicial capacity meaning it has an obligation to fairly weigh the facts and evidence before it to make an informed decision. Action in this capacity is distinct from, for example, a purely legislative action which does not carry such obligation. The BOS should consider the argument and evidence presented by Mary Ganz on behalf of Waterstone and all other evidence and information presented by other interested parties at the hearing and should discuss and deliberate over the "occasion" criteria, i.e.:

- Whether the public convenience and public necessity is or is not benefited by the requested relocation;
- Whether additional financial burden to be imposed upon the Town's taxpayers for construction/maintenance of the relocated portion of Perkins Ave., if any, is or is not justified;
- Whether the rights of owners, abutters, and interested parties are unjustifiably altered by the proposed relocation.

The BOS should also assess whether there will be any damages sustained by any owner of land or other property taken for the relocation in accordance with RSA 231:15, which Mary should address. If there is a finding damages, the BOS is required to assess them, and, pursuant to the Agreement, the Petitioner would be required to pay for them.

Thereafter, if the BOS is satisfied that the three central components for “occasion” have been met, the following motion would be reasonable: “I move to approve the petition of Arleigh Greene as there is occasion to relocate a portion of Perkins Ave. pursuant to RSA Chapter 231, as presented, and as depicted in the Lot Line Adjustment Plan recorded at the Rockingham County Registry of Deeds as Plan D-41826, conditioned on Waterstone’s continued financial and other obligations memorialized in its Agreement with the Town, and I move to direct the Town Manager to record a return, consisting of the Agreement, the recorded lot line adjustment plan, and the minutes from this meeting, with the Town Clerk, pursuant to RSA 231:16.”

If the BOS does not find occasion to relocate, than a simple motion to disapprove the petition would be sufficient.

Attorney Fees

After the hearing on Monday, we can get you an accounting of the Attorney Fees and you can send Mary Ganz a bill for same.

Conclusion

Please let me know if you have any questions.

Best,

Justin