

April 7, 2021

Via E-mail

Washington Zoning Commission  
c/o Shelley White, Land Use Administrator  
Bryan Memorial Town Hall  
P.O. Box 383  
Washington Depot, CT 06794

Re: Use of Bell Hill Road as Access to 101 Wykeham Road

Dear Chairman Solley and Commission Members:

I have been asked to clarify my advice to Nick Tsacoyannis regarding the use of Bell Hill Road for access to 101 Wykeham Road. With that in mind, I have also been asked to review the letter dated March 30, 2021, from Rob Parker and Peter Rogness to the Commission. The letter by Messrs. Parker and Rogness also deals with wetlands issues and other matters, but I will limit my response to the access issue, as requested.

It is, of course, correct that the owners of 101 Wykeham Road entered into a Settlement Agreement with the Commission and others in connection with a court appeal (the "Wykeham Appeal") and that that agreement is presently in effect. It is also correct that the Agreement provided, among other things, "The existing driveway of the Property that intersects Bell Hill Road will be permanently abandoned." For the reasons below, however, I do not agree that that provision may reasonably be interpreted to require the Bell Hill Road access to be abandoned immediately.

First, it is important to understand that a zoning permit generally allows, but does not require, a property owner to use the property for a specific principal purpose. In this case, the approval issued under the Settlement Agreement allows, but does not require, the owners of 101 Wykeham Road to use the property as an inn. Therefore, regardless of the outcome of the litigation Messrs. Parker and Rogness now have pending in the Appellate Court, the owners of 101 Wykeham Road could theoretically choose not to go forward with the approved inn project. They could, instead, decide to use the property for a residential subdivision or for any other use allowed under the Zoning Regulations or by state law.

Second, it would be highly unusual, in my opinion, for a court to allow a land use commission to require an applicant to give up a property right as a condition of approval regardless of whether the applicant chooses to go forward with it. In numerous cases, the U.S. Supreme Court has held that "exactions" (meaning forced dedications of

property rights) violate the Fifth Amendment's "takings" clause unless they are reasonably calculated to offset some public burden or detriment created *by the proposed use*. If the proposed use never goes forward, no burden or detriment is ever created, so it would be hard for a municipality to justify retaining the property right that was exacted in exchange for allowing the use.

The access provision should be reviewed in that context. It is number six in a series of 16 numbered conditions that were made part of the Settlement Agreement. Numbers 2 through 5 and 7 through 9 are all conditions that cannot possibly take effect until the proposed inn becomes operational, since they expressly restrict specific uses of the inn. The other conditions have varied functions. The first one binds Wykeham's owners to a specific site plan and is the subject of current litigation by Messrs. Parker, Rogness and others. (Even that provision, of course, would be nugatory if the inn does not go forward). Condition number 10 expressly required Wykeham's owners to file a proposed Stipulated Judgment in a separate appeal at the same time the proposed Settlement Agreement was filed for approval in the Wykeham Appeal. Unlike condition no. 6, condition no. 10 expressly stated the time by which it had to be accomplished. The remaining numbered conditions are technical provisions relating to the Agreement itself and not to the use of the property.

In short, then, condition no. 6 is in the middle of a series of conditions that contemplate the future operation of an inn and that could not become operational if the inn were never established. To interpret condition no. 6 as requiring the access from Bell Hill Road to be abandoned immediately, regardless of whether the inn was ever completed, would be inconsistent with the nature of the "surrounding" conditions and would raise Fifth Amendment taking issues (the U.S. Supreme Court has recognized the right of access to property as an important component in the overall bundle of a property owner's rights).

It is a closer question whether condition no. 6 can be deemed to preclude the owners of 101 Wykeham Road from using Bell Hill Road for construction access if and when they actually begin to construct the inn. However, given the nature of the seven surrounding conditions, the fact that condition no. 6 does not expressly mention use of the access for short-term construction or land-preparation purposes, and the tendency of courts to interpret ambiguities in favor of the landowner, it is my opinion that Bell Hill Road would be available for such purposes.

Very truly yours,



Michael A. Zizka