



TOWN OF UPTON, MASSACHUSETTS

SELECT BOARD

July 11, 2024

William Andrews, Chair
Upton Zoning Board of Appeals
1 Main Street
Upton, MA 01568

RE: Submission of Legal Counsel Comments Regarding Upton Apartments 40B Application

Dear Mr. Andrews,

The Select Board engaged the services of Attorney Daniel Hill to examine the record associated with the Upton Apartments 40B Application and to provide an assessment of the project recommendations for the Select Board's consideration.

The Select Board met on Wednesday, July 10, 2024, to receive Attorney Hill's analysis and recommendations and to consider the distribution of the document to the Zoning Board of Appeals (ZBA). The Board voted to make the public the July 5, 2024, document prepared by Attorney Daniel Hill and to forward the document to the ZBA for consideration, which is attached to this letter.

The Select Board requests that the ZBA carefully evaluate the issues raised by Attorney Hill. The Board also requests that the project proponent and the ZBA's peer review consultant consider and address the issues prior to closing the public hearing. The Select Board recognizes that the proponent has made changes to the project and taken efforts to reduce the impact of the development. As supported by Attorney Hill's document, the Board believes that more work could be done to minimize impacts to the neighborhood and to ensure that the design of the building fits the character of Upton. The Board is of the opinion that significant adjustments to the scope, scale, and site plans for the project are required before the Select Board can support issuance of a comprehensive permit.

The Select Board thanks the Zoning Board of Appeals for consideration of these comments and concerns regarding the project.

Sincerely,

Joseph Laydon, Town Manager

On behalf of the Town of Upton, Select Board

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**CONFIDENTIAL
ATTORNEY-CLIENT CORRESPONDENCE**

TO: Upton Select Board
FROM: Daniel C. Hill, Esq.
DATE: July 5, 2024
RE: Initial Review of 40B Application – 47 Main Street

I. Summary

Under Chapter 40B, the Zoning Board’s obligation under the statute is to make a decision, after weighing all the evidence, that is “consistent with local needs.”¹ A decision is “consistent with local needs” if it is “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.”²

There is a prevailing myth that local bylaws do not apply to Chapter 40B projects, or to projects in towns that don’t have 10% affordable housing. That is wrong. Local rules apply to Chapter 40B projects unless the Applicant can prove that waivers are needed to make the project economically viable, and that the need for affordable housing outweighs the “local concerns” protected by the local bylaws and regulations for which waivers are sought. This balancing test was illustrated in the seminal case of Reynolds v. Stow Zoning Bd. of Appeals, Appeals Court No. 14-P-663 (Sept. 15, 2015), where the Court ruled that it was “unreasonable” for the zoning board to grant waivers from restrictive local bylaws given unmitigated environmental and health impacts. To put this standard in plain English, the Zoning Board need only grant waivers to the extent they are necessary to make the project economically viable, and even then, only when they do not implicate public health, safety, environmental or planning concerns.

Since the Applicant has asked for and needs waivers to deviate significantly from the Town’s bylaws to build a project with a relatively extreme level of density, and “intensity of use” of the Project Site, the Zoning Board would be within its right to demand an economic justification from

¹ G.L. c. 40B, §21

² G.L. c. 40B, § 20 (emphasis added)

the Applicant for these waivers. The Board does not need to accept a density of 60 units unless the Applicant proves that such a density is required for the financial viability of the Project. However, even if the Applicant can meet its “economic burden of proof” under Chapter 40B, as discussed above, the Board can still deny the Project, or deny specific waivers, or condition its approval of the Project, if the detrimental impacts from the Project outweigh the need for housing.

With this background, I will next address the Project’s shortcomings, from my initial review of the materials submitted to the Zoning Board.

II. Planning Issues

1. Compatibility with Historic District. The Project Site is partially within and abuts the Upton Center Historic District, and the proposed project is materially incongruent with the design standards and prevailing architecture in the District. UHD Letter 4/10/24.
2. Site Selection and Site Design
 - a. Chapter 40B Guidelines adopted by the Department of Housing and Community Development proscribe that:

[when developing multi-family housing in the context of an existing single-family neighborhood], it is important to mitigate the height and scale of the buildings to adjoining sites.

[T]he massing of the project should be modulated and/or stepped in perceived height, bulk and scale to create an appropriate transition to adjoining sites.

DHCD’s “Handbook – Approach to Chapter 40B Design Reviews” suggests that projects can be deliberately designed to minimize disruption with neighborhood patterns.

“Affordable housing projects under c.40B often have design elements that are different from the surrounding context as described by the terms used in the regulations; e.g., use, scale. However, with careful design and consideration of the project elements in relationship to the adjacent streets and properties, the projects can better integrate with the surrounding context.”

DHCD’s “Handbook – Approach to Chapter 40B Design Reviews” further provides:

“The mass and scale of a building may be reduced by altering the building’s bulk. The features that can minimize the mass and scale should be about the same size as the same features on adjacent properties.”

The Project does not meet any of these standards.

- b. The Project consists of 60 apartment units and associated parking areas, driveways, and utilities on approximately 6.75 acres of land, much of it wetlands and associated buffer zone. This population concentration is more typical of an urban environment where there is ready access to mass transportation, and where employment, retail, recreational and municipal services are within walking distance. The Project evokes urbanism in a suburban/rural context.
- c. The state's Chapter 40B program expresses a preference for projects that conform to the Commonwealth's "Sustainable Development Principles," originally adopted by the Romney Administration in 2007. To that end, the subsidizing agency (here, MassHousing) requires all applications to complete a "self-assessment" on its "sustainable development principles score card." The Project is the antithesis of smart growth. The Project Site is not supported at all by public transportation, let alone by mass transit. The closest train station, in Grafton, is more than a 3-hour walk from the Project Site, according to Google Maps. The Project will be entirely auto-dependent.

3. Open Space

- a. For a 60-unit project there is a striking lack of useable open space, recreation areas, or play areas for the residents, in particular the children. The proposed "play" area is approx. 40' x 30' (1200 square feet). Based on my quick review of GIS and aerial photos, there does not appear to be any public parks, playgrounds or outdoor recreation areas within walking distance. There is virtually no upland areas on the project site that are not proposed to be consumed by buildings, pavement or stormwater utilities.
- b. There was a recent study published in the journal of SSM - Mental Health (Publisher: Elsevier), entitled "*Playgrounds are for children: Investigating developmentally-specific "Green Space" and child mental health.*" In the peer-reviewed study, the researchers from the School of Public Health and Department of Psychology at the University of Washington, WA investigated the association between parks/playgrounds and young child mental health and concluded that children living near parks with playgrounds have better mental health than those without playgrounds (i.e., worse mental health for children without playgrounds).

III. **Outstanding Design Issues**

4. Vehicular Access

- a. There is only one driveway providing access to the Project. The driveway is approximately 600 feet until you get to the loop portion of the driveway around the apartment building. If there is ever an obstruction along that 600-foot section, the residents would be stranded. This section of the driveway runs along the edge of a wetland for the entire 600 feet, so flooding or icing during storms is a real potential.

- b. A “Truck Simulation” Plan dated September 13, 2023 **was** provided, showing a simulated route a large vehicle would take along the internal driveway of the Project. It is common for applicants to provide such a plan, typically prepared through the use of a computer modeling program like AutoTurn, demonstrating that the municipality’s largest fire trucks and other large trucks that commonly visit a large apartment complex like this (e.g., moving trucks) can navigate the internal driveways in conformity with the state Fire Prevention Code.

The Applicant’s plan, however, is deficient in a number of respects. First, there is no information on the plan describing what vehicle was used in the model (does it match the dimensions of the Upton ladder truck?), or what computer model was used. Second, the plan actually proves that the design of the Project’s driveway does not comply with the state Fire Prevention Code. The use of the opposite travel lane is prohibited in the design of all new fire access roads. 527 CMR §18.2.3.5.8.³ Yet, at the main driveway entrance, fire apparatus would need to enter the opposite lane of travel when entering the Project driveway and at several other points along the route inside the Project Site. Oddly, the simulation does not show how a fire truck with *exit* the Project Site, but given the sharp turning radii proposed at that intersection, the truck would most likely need to cross over the center line of Route 140 when taking a right turn. I note that the Applicant does not properly show the center line or travel lanes of either Route 140 or the internal driveway, which is another omission on this plan.

- c. In the Applicant’s “Updated Transportation Impact Assessment” (“TIA”) dated January 26, 2024, it states available stopping sight distance (“SSD”) on Route 140 at the location of the Project intersection is in excess of 650 feet in both directions. It also claims that the Project has over 650 feet of intersection sight distance (“ISD”) in both directions. Providing adequate sight distances is a critical public safety consideration when reviewing large development projects. The Applicant’s report does not include any diagrams or calculations supporting this conclusion, and I question the accuracy of these representations.

SSD analysis assesses the distance a driver on Route 140 must be able to see to avoid a collision with a vehicle exiting the Project driveway onto Route 140. The ISD analysis assesses the distance a driver *exiting* the Project driveway must be able to see approaching vehicles, without their line of sight being obstructed, to make a safe judgment regarding entering Route 140. The Commonwealth of Massachusetts Department of Transportation (“MassDOT”) Project Development and Design Guide, Chapter 3, § 3.7 (p. 3-37) states that project designers should refer to the widely-accepted industry standards published in the manual “Geometric Design of Highways and Streets” (Green Book” 7th Edition, 2018) by the American Association of State Highway and Transportation Officials (“AASHTO”). The Applicant’s

³ This requirement is not in the NFPA model code, but was adopted in Massachusetts.

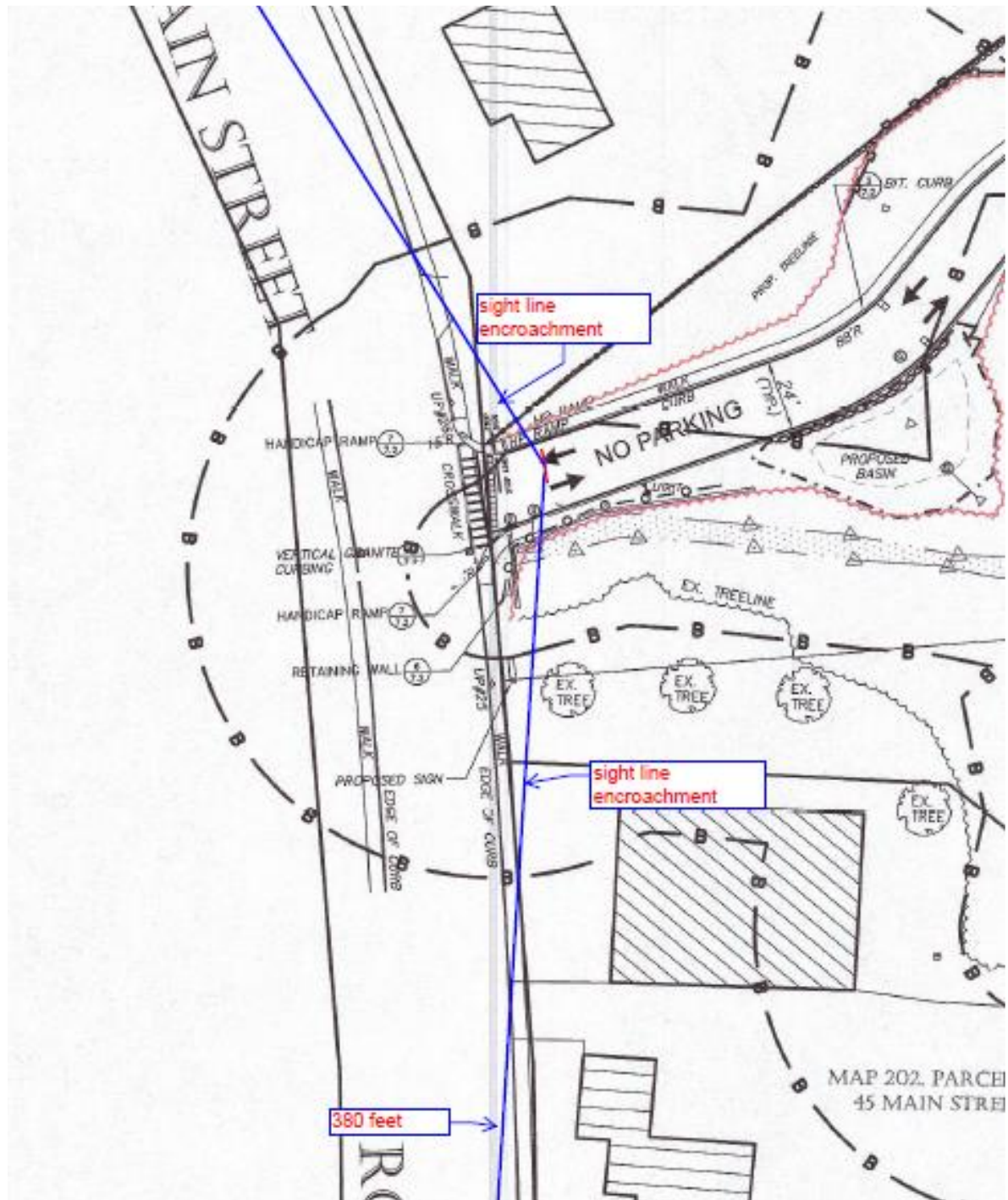
traffic study references the AASHTO standards, and claims that the Project meets them.

The Applicant states that based on the recorded travel speeds in Route 140 under existing conditions, the minimum SSD and ISD necessary for this Project intersection is 305 feet in both directions. Assuming this to be correct, I question the Applicant's conclusion that it has 650 feet of SSD and ISD in either direction. Route 140 curves to the south to the west of the proposed intersection, and this has the effect of blocking sight distances in the westerly direction. Attached are several figures I prepared using the MassGIS website and measuring tools, indicating that both the SSD and ISD sight lines would cross over private property if they are at a length of 305 feet. SSD of 650 feet is **not** achieved west of the intersection, due to the curvature of the road, based on my basic assessment.

Concerning ISD, AASHTO guidelines specify that in making this calculation, the sight line is measured from a location **14.5 feet back** from the edge of the roadway, and 3.5 feet above the driveway grade, representing the position of the driver's eye sitting in a car that has approached, but not yet entered, the intersecting street (here, Route 140). From a distance 14.5 feet back from the edge of the road, the sight line crosses over the private property at 51 Main Street, and likely crosses over 45 Main Street to the east. See, **Figure 1** below. Absent a legally-enforceable agreement such as a license or easement, the Applicant has no way of preventing that abutting owner from installing a tree, fence, or other view obstruction on its own property. Surprisingly, the ZBA's peer reviewer, Stantec, accepted the Applicant's conclusions of 650 feet.

- d. I did not see a roadway profile plan for Project driveway, which is a typical component of a plan set. The grade (slope) of the sidewalk running along the driveway appears to be exceed 6% in some locations (i.e., 338' to 344'), which exceeds the state Architectural Access Board standard of 5%. Accessible routes that exceed 5% are considered "ramps," and appropriate accommodations must be made. I did not see any details of this sidewalk or ramps in the plan set.

Figure 1 – Plan Sheet C-4.0



5. Stormwater Management

- a. There are two proposed *surface* infiltration basins, and two proposed *subsurface* infiltration systems on the east side of the Project Site. Under the state Stormwater Handbook, stormwater infiltration systems must be set back from wetland resource areas by at least 50 feet. See, SW Handbook, Vol. 1, c. 1, Table RR. Further, the Handbook requires unimpeded vehicular access around the perimeter of the basin, for maintenance purposes. DEP has recently required a 15-foot flat surface at the top of an open-air infiltration basin, or a proposed memory care facility on Highland Street in Milton.

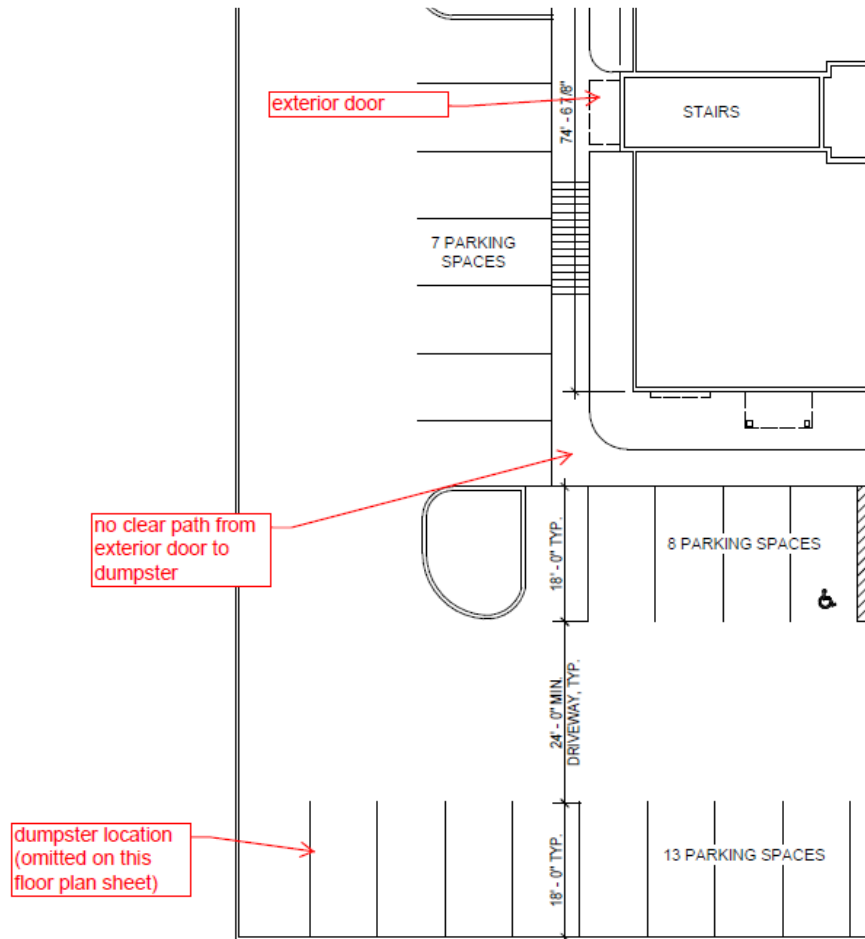
For Basin #2, a wetland is approximately 30 feet from the top of the basin, and 10 feet from the toe of the slope outside the basin, according to the Applicant's site plan (Sheet C.-5.0). The toe of the slope on Basin #1 is within 50 feet of a wetland. Basin #2 does not appear to have an access driveway.

- b. The Stormwater Handbook requires a minimum vertical separation of 2 feet between the bottom of the infiltration basin and seasonal high groundwater. Basins 1 and 2 were originally designed without adequate separation. The Applicant's engineer subsequently raised the elevation of these basins to achieve at least four feet of separation, but the two subsurface infiltration systems have less than four feet, requiring a mounding analysis to demonstrate that there will be no groundwater interference. See, "Basin Cross Sections" plan sheet (C-11.0). I did not see a mounding analysis in the Applicant's stormwater report, although I had difficulty reading the copy of the report that is posted on the ZBA's website – large portions of it are illegible.

6. Solid Waste Management

- a. Trash collection is proposed to be located *outside* of the building, rather than within a self-contained trash room within the building, which is more typical.
- b. Two dumpsters are proposed, which may not be sufficient for the demand needs of an 60-unit building. Fewer dumpsters means more frequent trash collection by trucks, which increases nuisances to residents and neighbors. Exterior trash collection also presents issues with odors and rodents, and is unsightly to abutters – the dumpsters are inappropriately proposed within approx. 30 feet and 53 feet of abutting properties (45 Main Street and 15 Whitney Lane).
- c. It is not clear whether one of the two dumpsters would be reserved for recycling.
- d. There is no walking path from the side exterior door on the ground level to the rear dumpster – if there parking lot is full of cars, you would have to walk with your trash bags between parked cars. See Figure 2 below.

Figure 2 - Architectural Plan 9/7/23



7. Parking / Loading

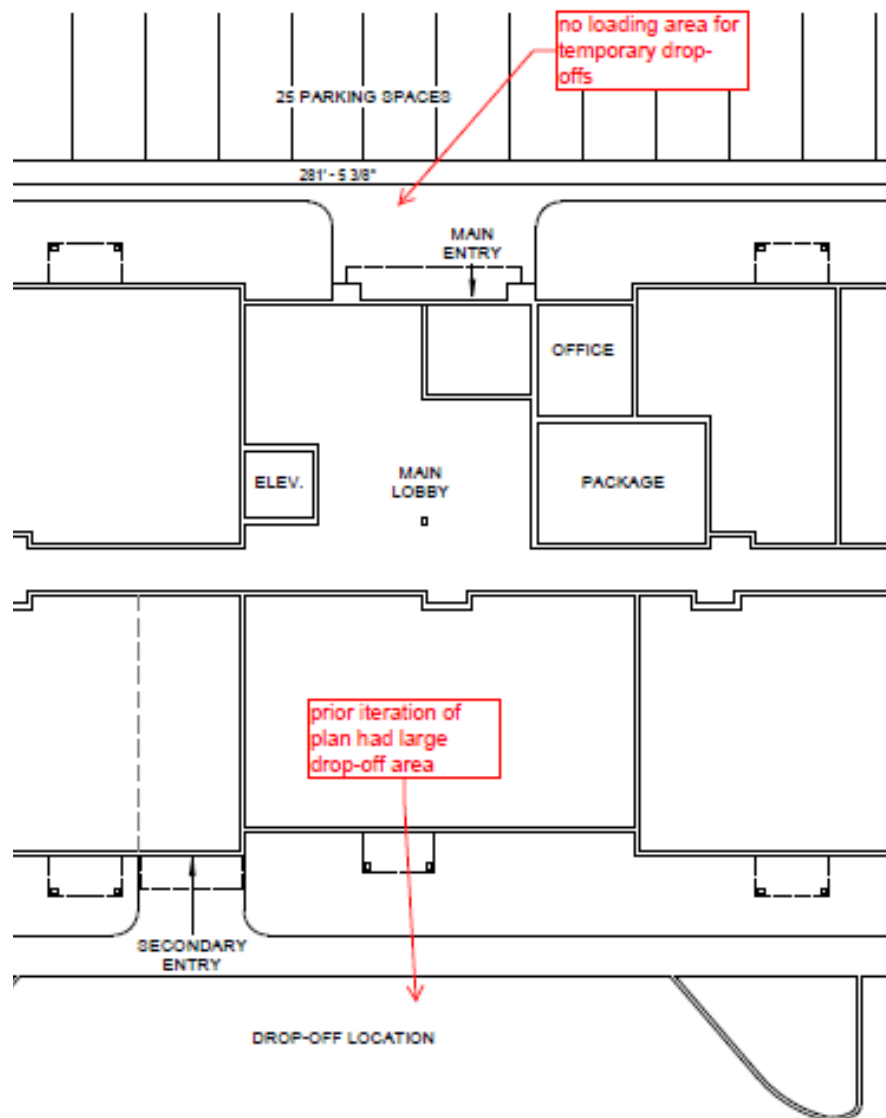
- a. The Project is providing **92 spaces**.⁴ The Institute of Traffic Engineers (ITE) Parking Generation Manual (5th Edition, January 2019) contains recommendations for various land use categories. For “Mid-Rise Multifamily Housing (LUC 221)” in “General Urban/Suburban” setting not within ½ mile of rail transit, the corresponding ITE parking ratios are 1.7 spaces per dwelling unit or 1.0 spaces per bedroom, suggesting the parking supply needed to support the Project is approximately **136 spaces**. A number of factors make expansion of parking supply on the Site untenable, necessitating instead a reduction in the parking demand for the Project, which is unrealistic in light of the Project’s auto dependance. Reducing the

⁴ See, Revised Waiver list

number of units in the Project is the only feasible way to provide a sufficient supply of parking to meet anticipated demand.

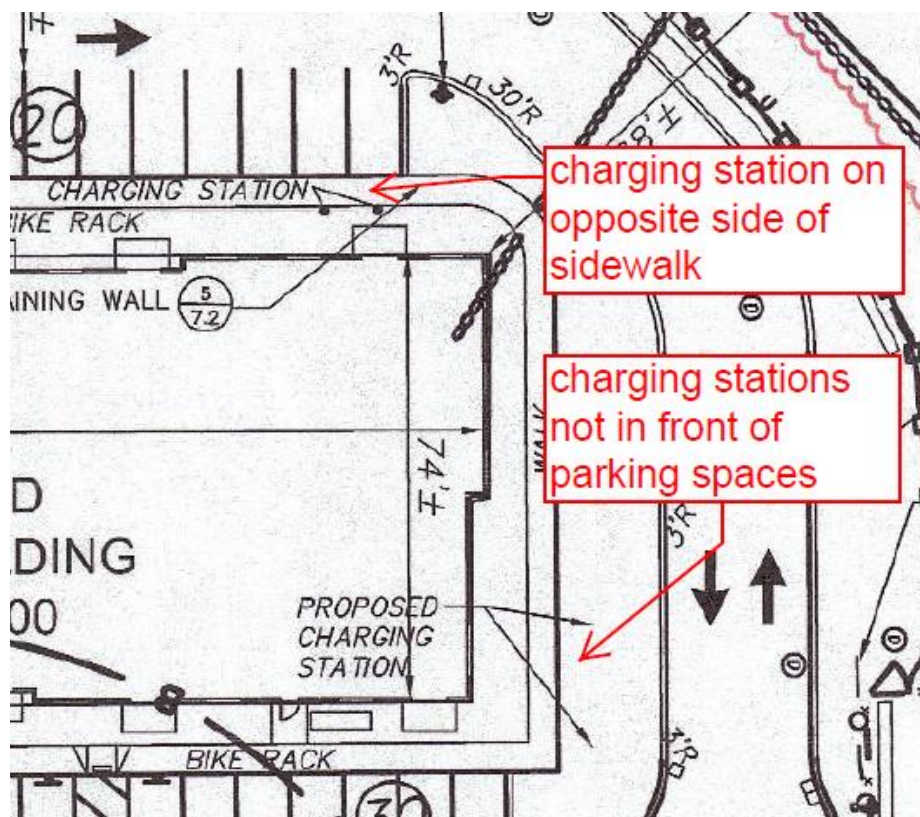
- b. There is no dedicated loading area for temporary vehicle trips, such as drop-offs (e.g., Uber), delivery vehicles, moving trucks, etc. These types of temporary or transient trips are more common in this type of residential setting. Moving trucks will be a regular occurrence because this is a rental property. There does not appear to be any thought or planning into moving day logistics. A moving truck would necessarily block a driveway while loading/unloading. See Figure 3 below.

Figure 3 – Architectural Plan 9/7/23



- c. Stantec advised the Applicant to label the proposed loading areas and visitor parking areas on the plans, and stated on 2/16/24 that these labels were added to Sheet C-4.0. I do not see those labels, except for one loading area that is on the opposite side of the main entrance, in front of the dumpster. This is not a practical location for temporary ride share and delivery visits, and is not big enough to accommodate any trucks without blocking the fire lane.
- d. Two EV charging stations are apparently proposed on the northerly side of the building. This is not practical, as there is no parking spaces on that side of the building. A charging station needs to be located in front of a parking space. Two charging stations are proposed near parking spaces on the west side of the building, but they are shown on the far side of the sidewalk opposite the parking spaces, which is also not practical. A charging station has a cord to connect to the car, and this cord would block the sidewalk, even if it were long enough. Suggest that the Applicant visit a parking lot with charging stations to better understand how these work. See Figure 4 below.

Figure 4 – Plan Sheet C-4.0



IV. Recommendations

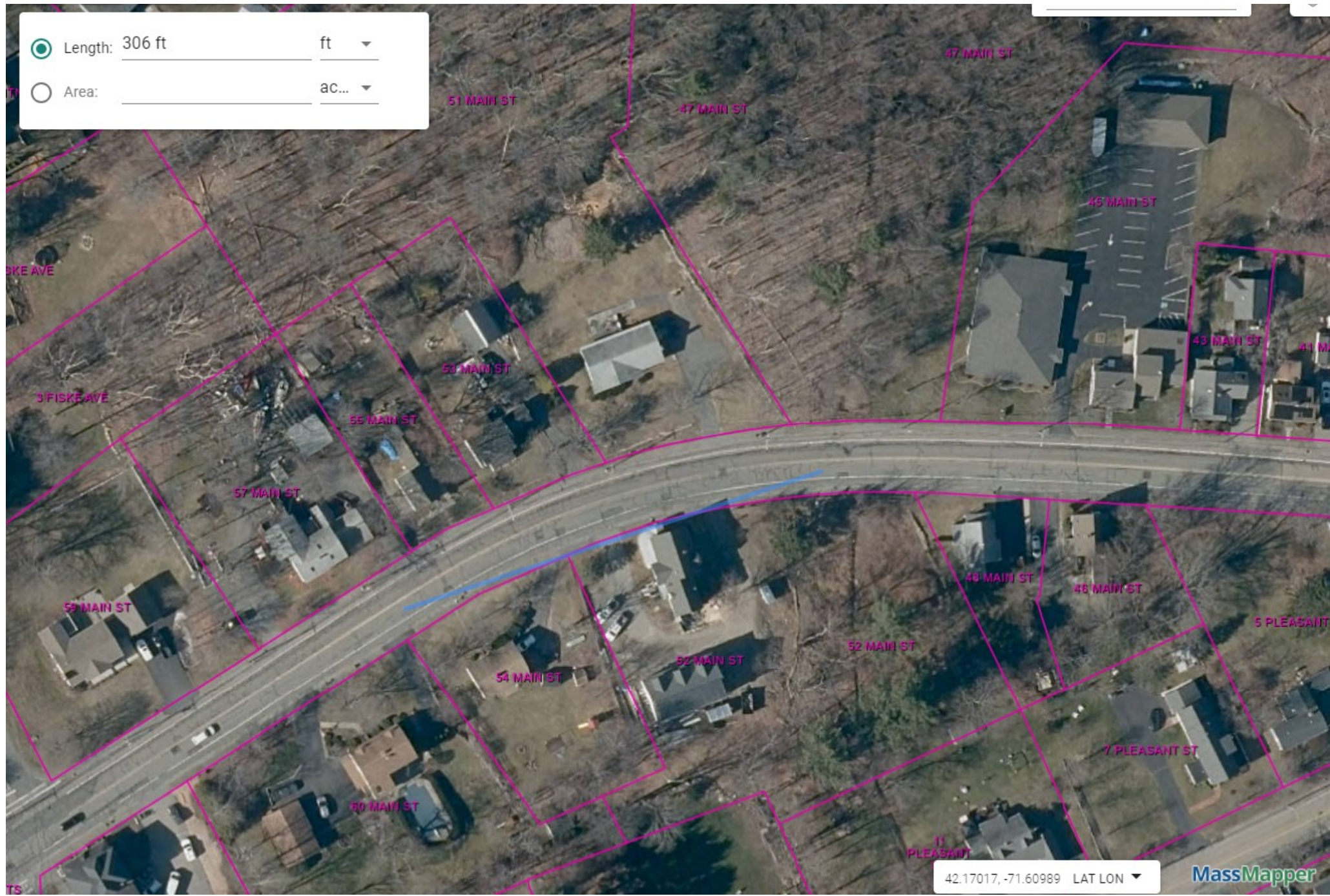
Most of the civil design issues discussed above are directly correlated to the Applicant's proposed intensity of use of the Project Site. The significant site constraints (wetlands) make the viability of a 60-unit very challenging if not impossible without presenting non-trivial risks to public safety and environmental degradation. Moreover, the Project will predictably cause nuisances and congestion within the Project Site, due to inadequate trash management, stormwater management and parking/loading arrangements. Most of these problems are driven by an unrealistic density of 60 units, and could be ameliorated by a reduction in density and a re-evaluation of the design of the Project.

In my opinion, the Zoning Board has been deprived of peer review providing a degree of scrutiny necessary for a project of this size, scale and complexity. The Select Board could take a more active role in advocating for a smaller-scale project, and potentially engage directly with the Applicant to negotiate a smaller or different project. If the Board elects to follow that course, I would recommend that I engage my civil engineer to more thoroughly review the Project plans and provide technical advice to confirm and supplement my findings.

Please let me know if you have any questions or wish to discuss this memo.

☒ Length: 306 ft ft ▾

☐ Area: ac... ▾



42.17017, -71.60989 LAT LON ▾

MassMapper

☒ Length: 306 ft ft ▾

☐ Area: ac... ▾

55 MAIN ST

MAIN ST

48 MAIN ST

52 MAIN ST

52 MAIN ST

54 MAIN ST

42.17072, -71.60889 LAT LON ▾

MassMapper

Length: 650 ft

ft

Area:

ac...

3 WHITE

5 FISKE AVE

3 FISKE AVE

57 MAIN ST

59 MAIN ST

55 MAIN ST

53 MAIN ST

54 MAIN ST

52 MAIN ST

50 MAIN ST

47 MAIN ST

47 MAIN ST

45 MAIN ST

43 MAIN ST

41 MAIN ST

48 MAIN ST

46 MAIN ST

5 PLEASANT ST

7 PLEASANT ST

11 PLEASANT ST

Click last point to finish line.

42.16965, -71.61097 LAT LON

MassMapper