From: Michael Goldsmith <mgoldsmith@rrklaw.net>
Sent: Monday, July 27, 2026 11:17 AM
To: PlanBoard <planningboard@westtisbury-ma.gov>
Subject: RE: Opinion from Counsel

Jane –

This email contains guidance that I am providing to the Board. It is the Board's decision whether to share it with the Applicant and the public. I am also happy to attend your zoom meeting on Monday to help address questions that may arise.

Brief Conclusion

In my opinion, the Applicant's April 24, 2026, Preliminary Plan (the 2026 Plan)(as currently drafted) does not show adequate frontage to support approval of a definitive subdivision, were a Form C to be submitted. I will separately address whether a.) the small, anvil-shaped "Road Easement", or b.) the "50' Right of Way" (the "ROW") provide frontage.

If the Applicant intends to rely on "Road Easement", located on their property, to provide the requisite frontage for Lot 1-B (Lot 1-A's frontage being Old County Road ("OCR")), I see two issues. First, the frontage along the Road Easement does not meet the requirement for 100 feet for the RU District. Section 4.3-3 of the Zoning Bylaw (ZBL) does provide mechanisms or "exceptions" for the Board to permit a reduction in frontage under certain circumstances. However, even if the Applicant were to convince the Board to allow reduced frontage under one of these exceptions, the Board should, and has an obligation to, evaluate vital access to the site from ways "outside" of the subdivision. See, e.g., Rattner v. Planning Board of West Tisbury, 45 Mass. App. Ct. 8, 11 (1998)("Pursuant to § 81M, the board had an obligation to consider the adequacy of roads outside the defendants' proposed subdivision in deciding whether to approve their plan. Furthermore, the provisions of the subdivision rules and regulations indicate a reasonably definite intention on the part of the board to lessen congestion and potentially dangerous conditions on roadways adjacent to a proposed subdivision.") .

The ROW is "outside" of the proposed subdivision because the ROW uses portions of the lots created by the 2017 Plan (see below). The ROW is not a traditional subdivision road, created by a developer to serve the proposed lots. Rather, the ROW is a "Driveway" under the ZBL, which is defined as "[a] private

way providing vehicular access from a public or private road to a residence or to a commercial or non-commercial establishment." Indeed, both the 2017 Plan itself and Note 3 to that Plan call out the ROW as a "driveway easement". Lots 2 and 3 created by the 2017 Plan have reduced (25') frontage on Old County Road – the ROW (or Driveway Easement) does not serve as frontage for those lots. In 2017, the Board allowed the Applicant to create 2 "rear lots" under Section 4.3-3(C) of the ZBL which, by its terms, allows "[n]o more that two such rear lots [to] adjoin along the street line." Section 4.3-3(C)(1). The 2026 Plan seeks, in effect, to create a "third" rear lot using the total of 50' of reduced frontage on OCR to serve 3 rears lots, not only 2. By the express limitation established in the ZBL for the number of rear lots that can be supported by a land division, I think it would be reasonable for the Board to conclude that the ROW – the Driveway Easement – does not provide adequate access for Lot 1-B in addition to Lots 2 and 3 shown on the 2017 Plan.

Second, I think there are problems with the Applicant relying on the ROW <u>itself</u> as frontage for Lot 1-B. As noted, the ROW meets the definition in the ZBL for "driveway". The strips of land for the so-called "pork chop" lots (Nos. 2 and 3) created by the 2017 plan were, by the layout shown on that plan and the notes on that plan, delineated to serve as an access driveway to those lots – <u>not</u> frontage. (Again, frontage for those lots is on OCR.) The ZBL expressly <u>excludes</u> "driveways" from the ZBL's definition of Frontage: "That boundary of a lot which lies <u>along</u> a street line *(**not** a common driveway)*(emphasis added) and which contains at least one physically adequate point of vehicular access into the lot, at a location that provides safe and adequate sight distance." (Emphasis added.) Since the ROW shown on the 2026 Plan meets the definition of driveway – and not Street/Road (see below) - I don't think it can serve as Lot 1-B's frontage, on these facts.

<u>Form B</u>

A note on the procedure to address Form Bs:

*The Applicant has submitted a Form B preliminary plan under Section 81S of the subdivision control law. (Form Bs have historically been used to obtain quick approval to "freeze" zoning when an amendment is on the horizon.) Here, the Applicant is using the process to get feedback from the Board on their conceptual development and to open a dialogue before, possibly, more formal engineering plans are submitted through a Form C. (See Section 4.4-1 of the subdivision rules/regs.) Section 4.4-3 states: "The Planning Board may give such Preliminary Plan its tentative approval, with or without modification. Such tentative approval does not constitute approval of a subdivision."

Permitting/Title History

I am furnishing you with this information from the permitting and title records to the extent it is useful to consider in your discussions:

*The entirety of the land shown on the Applicants' preliminary plan has been divided twice in the past. The first plan, dated March 2, 2007, created two lots under the ANR provisions: a 5.03 acre parcel containing the Walsh home and garage with approximately 235' of frontage on Old County Road (a public way) and a 7.57 acre, "pork-chop" lot with 50' feet of frontage on OCR. The Planning Board endorsed this plan, recorded in Plan Book 15, Page 173 at the Dukes County Registry of Deeds (Registry), and recorded a covenant on June 11, 2007, in Book 1123, Page 639 (the 2007 Covenant). While the Covenant contained a prohibition on further dividing the rear lot under certain circumstances, its provisions were superseded by the next division, which I discuss in the following paragraph.

*The next division occurred in 2017. The Planning Board granted the Applicants an ANR approval for a three-lot plan, approved on March 27, 2017, and recorded at the Registry in Plan Book 18, Page 111 (the "2017 Plan") on April 30, 2017. The 2017 plan created two "rear lots" (Lots 1 and 2) of slightly over 3 acres. Each of these lots contains – as part each lot's area - a long strip on the northern boundary of the original parcel, each 25' in width, running to OCR and creating frontage on that public way of twenty-five feet per lot. Lot 1 (which the Applicants have retained) is shown as containing 6.47 acres and has in excess of 250' of frontage on OCR. The Board did not issue a Covenant in connection with this division but the approved plan contains notes and delineations, as follows:

-The two 25' strips (that are part of lots 2 and 3) and collectively identified as "driveway easement" (50 feet wide, total);

-The 2017 plan shows a dirt/gravel road in the middle of the driveway easement, which I assume is the portion used for access;

-Note 2 calls out that Lots 2 and 3 are created as "rear lots" under Section 4.3-3(C) of the Zoning Bylaw (ZBL);

-Note 3 states that this plan supersedes the 2007 Plan and Covenant; and

-Note 4 expressly states that **"[t]his plan shows a *driveway easement* for the common use of lots, 1, 2 & 3. . . .** "

Take note that the area comprising the driveway easement is part of Lots 2 and 3 – the rear lots – and not part of Lot 1, which the Applicant ultimately retained.

*The Applicant recorded an “Easement and Declaration of Protective Covenants” in the Registry on April 30, 2018, recorded in Book 1488, Page 333 (the “Easement”). The Applicants deeded out Lot 3 on May 1, 2018, on May 18, 2018, and Lot 2 on October 29, 2018, subject to the Easement. (Deeds not included.)

Applicable Zoning Provisions Definitions

I summarize several of the key zoning terms for your reference.

***4.3-3 Exceptions to Lot Frontage Requirements**

A. The frontage requirements for lots on the arc of a curve at the end of a cul-de-sac of a radius of one hundred twenty feet or less may be reduced to sixty feet on a private road.

B. In accordance with Section 81R of Chapter 41 (G.L.), the Planning Board may approve a definitive subdivision plan which creates lots which have less than the minimum frontage, if reduced frontages are likely to result in less disruption of the topographic feature of the land at full development of the subdivision, will not result in a hazardous concentration of egress points, and will not be inconsistent with the intent and purpose of the Subdivision Control Law. This provision shall not result in the creation of more lots than would be permitted if all lots conformed to the minimum frontage requirements.

C. Within the RU District, the frontage of a rear lot (a lot in which most of the buildable land is set back from the road and road access is obtained by a narrow strip of land running to the road) may be reduced for an individual lot in a subdivision or on a plan endorsed "approval not required" to a minimum of twenty-five feet (this width shall not be reduced at any depth within the lot), provided that:

1. No more than two such rear lots may adjoin along the street line.

2. The principal building shall be set back at least 150 feet from the road.

3. Notice of the reduction of frontage and increase in minimum lot size of any lot under this Subsection 4.3-3(C) shall be recorded or registered as an encumbrance upon the record title for such lot concurrently with the recording or registration of the plan which created such lot and prior to conveyance or building upon such lot.

Driveway: A private way providing vehicular access from a public or private road to a residence or to a commercial or non-commercial establishment.

Frontage: That boundary of a lot which lies along a street line (not along a common driveway) and which contains at least one physically adequate point of vehicular access into the lot, at a location that provides safe and adequate sight distance.

Further Steps

As noted, one purpose of a Form B application is to open a dialogue between the Board and the Applicant and, where appropriate, interested parties. Nothing I have noted precludes the Applicant from submitting a Form C application, either in a form similar to the 2026 Plan or a revised one showing a Form C road on their property to provide access to a new lot to the east of the existing home. I do not address today whether the Applicant could somehow show the ROW as a Form C compliant road, with or without waivers from the Board.

The Applicant's counsel contacted me and suggested that they could also divide their parcel (Lot 1 on the 2017 Plan) through a Form A, as the ROW existed on the ground before the adoption of the subdivision control law in the Town. The short answer is that question is not before you. If it were, or if it comes up for discussion, so-called preexisting roads still must meet the criteria under G. L c. 41, § 81L(c) – which is a way "having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and the installation of municipal services to serve such land and the buildings to be erected or to be erected thereon." (Just a note, the old access way, whenever it came itself into existence, also does not appear from the 2017 Plan to run along the boundary of Lot 1 on the plan. Frontage, according to the ZBL definition, is supposed to run along a lot's boundary.) This is one the one type of road over which the Board has discretion in Form A proceeding to address its adequacy.