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August 2, 2022

Via Email

Michael Busby
40B Specialist
MassHousing
One Beacon Street, 5th Floor
Boston, MA 02108

RE: Fenix Partners Farm Road Development, LLC
Application for Project Eligibility
Response to Town Comments

Dear Mr. Busby;

This office represents the applicant Fenix Partners Farm Road Development, LLC (the "Applicant") relating to the pending application for a Project Eligibility Letter for the property consisting of a portion of 55-65 Farm Road, Sherborn, Massachusetts (the "Property"). The purpose of this correspondence is to respond to certain comments contained in the July 18, 2022 comment letter submitted by the Sherborn Select Board. Specifically, the intent of this correspondence is to address the issue of site control raised by the Town in its comments.

In its letter, the Town claims that "the project is not clearly eligible for multiunit housing development under 40B, due to . . . a deed restriction on the parcels[.]" The deed restriction in question was placed on the Property via a deed in 1980. This deed restriction contained no specific time limitation, therefore subjecting it to the provisions of G. L. c. 184, § 23 which states that "[c]onditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them[.]" As noted by the Supreme Judicial Court in Stop & Shop Supermarket Co. v. Urstadt Biddle Props., Inc., 433 Mass. 285, 289 (2001), "[u]nder s. 23, restrictions 'unlimited as to time' expire in thirty years . . . [and] no language in s. 23 permits the enforcement of a restriction limited by its operation beyond the thirty year period."

The Town relies upon the claims made by an abutter opposing the Project that the mere recitation of the existence of the restriction in subsequent deeds was sufficient to extend the restriction. As shown above, this is clearly incorrect, as a restriction unlimited as to time may not be extended. Moreover, the Town's original draft comment letter

stated that “the 1980 deed . . . provided that the private parcels not be further subdivided, a restriction referenced [but not explicitly renewed] in all subsequent deeds including the transfer to the Applicant in 2021.” This language, while not relevant due to the plain language of G. L. c. 184, § 23 prohibiting the extension of restrictions unlimited as to time beyond the statutory thirty-year period, is indicative of the bad faith on the part of the Town in raising this baseless site control challenge.

We are also aware of a claim made to the Select Board that, because the Sherborn Conservation Commission acquired a lot benefitting from the restriction over the Applicant’s property, that it may not be subject to the 30-year restriction in G. L. c. 184, § 23. This argument suggests that the provisions of G. L. c. 184, § 26 granting an exception to the 30-year limitation on restrictions for restrictions created for “conservation, preservation, agricultural preservation, and affordable housing restrictions, as defined in section thirty-one which have the benefit of section thirty-two, and other restrictions held by any governmental body, if the instrument imposing such conservation, preservation, agricultural preservation, affordable housing” means that any restriction held by any governmental body is exempt from the 30-year limitation on restrictions. However, the case law is clear that G. L. c. 184, § 26, when read together with G. L. c. 184, § 23, provides “that (a) conservation, preservation, agricultural preservation, and affordable housing restrictions (whether held by a governmental body or a private party) are exempt from the thirty-year limitations imposed by s. 23; exempt from the bring forward filing requirements of s.s. 27-30; and entitled to the benefits, and subject to the procedural requirements, of s. 32; and (b) other restrictions held by any governmental body are exempt from the bring forward filing requirements of s.s. 27-30; not entitled to the benefits, or subject to the procedural requirements, of s. 32; and [are] subject to the thirty-year limitation imposed by s. 23 (unless eligible for exemption on other grounds).” Murphy v. Planning Bd. of Hopkinton, 70 Mass. App. Ct. 385, 396 (2007). The restriction here was between two private parties, and was clearly not a conservation, preservation, agricultural preservation or affordable housing restriction, thus bringing the matter squarely within the 30-year time limit contained in G. L. c. 184, § 23.

We would also like to address the Town’s claim that the Project is “not eligible for multiunit housing development under 40B, due to . . . (b) the 40B ‘cooling off’ period.” The Town goes on to claim that “we note that the project is not eligible at this date for submission of a Comprehensive Permit to the Sherborn Zoning Board according to 760 CMR 56.03(7).” These claims fundamentally misstate the application of the regulatory safe harbors. First, it has been conclusively determined by the Supreme Judicial Court that nothing within Chapter 40B “divests a local board of appeals of its authority to grant a comprehensive permit once a municipality satisfies its minimum affordable housing obligation.” Boothroyd v. Zoning Bd. of Appeals of Amherst, 449 Mass. 333, 340 (2007). Accordingly, the fact that a board of appeals may claim a safe harbor does not deprive an applicant from being eligible to file a comprehensive permit application. Second, the procedure for a board to assert a safe harbor is set forth in 760 CMR 56.03(8), and this procedure would be rendered meaningless if an applicant lacked

eligibility to file a comprehensive permit application simply because a valid safe harbor claim may be available.

The Applicant takes exception to many of the other claims raised by the Town in the comment letter, but the majority of these comments can and will be addressed during the comprehensive permit application process, and are not properly a part of the review during the project eligibility process.

Please feel free to contact us if you have any questions regarding this matter.

Very Truly Yours,


Paul J. Haverty