

58 Farm Road
Sherborn, Massachusetts 01770

September 13, 2023

BY ELECTRONIC MAIL: rick.novak@sherbornma.org

Richard S. Novak, Chairman
Sherborn Zoning Board of Appeals
19 Washington Street
Sherborn, Massachusetts 01770

Re: Prohibited Farm Road Chapter 40B Subdivision at 55 Farm Road and 65 Farm Road

Dear Chairman Novak:

I am writing to follow up on some points raised during the September 6, 2023, meeting of the Sherborn Zoning Board of Appeals (ZBA).¹

1) During the meeting, the question arose whether the Town of Sherborn (Town) is in fact seeking to enforce its rights with respect to the at-issue deed restrictions governing the development site. The answer to that question, which indisputably is already in the record before the ZBA, is “Yes.”

In its July 18, 2022, comment letter to MassHousing on behalf of the Town, in the section entitled “Select Board Summary and Analysis,” the Select Board in part wrote:

However, the Project is not clearly eligible for multiunit housing development under 40B, due to . . . a deed restriction on the parcels [used for the development]^[2]

[T]he property was historically part of a large, undeveloped parcel that was divided in 1980 into 3 parts, including an addition to [sic] adjacent conservation land and two house lots. The 1980 deed (recorded in Book 13926, Page 211) contained a restriction specifying that the private parcels not be further subdivided. This restriction was referenced in all subsequent deeds including the transfer to the

¹Please note that this letter is not intended to reflect all the arguments made to the ZBA with respect to the issue of deed restrictions, and specifically does not speak to those additional arguments made in writing and at the hearings by Attorney Dennis Murphy with respect to deed restrictions, including that restrictions in favor of a municipality are enforceable in perpetuity, see 135 Wells Ave., LLC v. Housing App. Comm., 478 Mass. 346, 359 (2017), which the ZBA may consider as independent bases to deny the developer a permit for this development project.

²The Select Board letter also provided that the project was not eligible “due to . . . the 40B ‘cooling off’ period.” See id.

Applicant in 2021. State law . . . provides for a 30-year limit or [sic] deed restrictions, but because the restriction was referenced in all subsequent deeds, it should still apply. Case law regarding the validity of this restriction is detailed in a “citizen comment” letter from Attorney Arthur Fenno to the Select Board Chair (see Appendix Part II). An excerpt from Mr. Fenno’s letter follows:

The 2021 deed for the 55 Farm Road parcel incorporates by reference the “certain restrictions and conditions as recited in the deed of Richard Saltonstall and D. McLaughlin Building Co., Inc. dated February 20, 1980 and recorded with the Middlesex South Registry of Deeds in Book 13926, Page 211.” Those “restrictions and conditions” so incorporated by reference specifically provide, among other things, that (A):

1. The parcel hereinbefore described [Lot 1, a/k/a 55 Farm Road] shall not be subdivided into lots or parcels, nor shall any conveyance or transfer of less than the whole part be made.
2. The above restrictions shall be considered a covenant running with the land and shall bind the undersigned grantee, his successors and assigns.

and that (B): such restrictions and conditions “shall attach to said piece or parcel of land hereinbefore described [Lot 1, a/k/a 55 Farm Road] and shall be for the benefit of and appurtenant to Lots 2 and 3”

In other words, the deed conveying the 55 Farm Road parcel to the developer expressly prohibits subdividing that parcel, and also expressly provides that said prohibition benefits and belongs to -- and thus is enforceable by -- the owner of Lot 3 which, as noted *supra*, is the Town.

(Last ellipsis, italics in original.) Sherborn Select Board, Town of Sherborn Letter to MassHousing, July 18, 2022, at 2-3.³

³Available at https://www.sherbornma.org/sites/g/files/vyh1if1201/f/uploads/sherborn_comments_letter_to_mashousing_dated_july_18.pdf

Significantly, in addition to referencing the entirety of my “citizen comment” letter, as appended in full, the Select Board’s letter incorporated the specific aspect of my letter which expressly stated that the Town enjoyed the right to enforce the deed restrictions here at issue. See *id.* at 3, quoting from Appendix Part II (Fenno, Letter to Sherborn Select Board Chair, June 2, 2022, which in part emphasized deed restriction “benefits and belongs to -- and thus is enforceable by -- . . . the Town”).

Plainly then, (a) the Select Board considered the June 2022 comment letter I submitted and agreed with the conclusion stated therein that a deed restriction on the parcels here at issue is currently valid and enforceable, see *id.* (stating deed restriction “should still apply” and incorporating “citizen comment” letter that detailed “[c]ase law regarding the validity of this restriction” into Select Board’s “Summary and Analysis”) and (b) the Town, as represented by the Select Board, is enforcing its rights through this Chapter 40B process to prohibit subdivision of the parcels being used for the Farm Road development project, see *id.* at 2 (relying upon incorporated “citizen comment” letter and concluding: “Project is not clearly eligible for multiunit housing development under 40B, due to . . . a deed restriction on the parcels”).⁴

2) As anticipated in my June 2022 letter, the developer contends that, pursuant to G. L. c. 184, § 23, the deed restrictions here at issue have expired. See, e.g., Haverty, Letter to Sherborn ZBA, Aug. 30, 2023, at 2.⁵ For at least the reasons articulated in my letter -- which the developer has not controverted -- that contention is incorrect. See generally Fenno, Letter to Sherborn Select Board, as appended to Select Board, Sherborn Letter to MassHousing, *supra* at Appendix Part II. Moreover, it bears adding that the two cases cited by the developer as authority to support his contention that the deed restrictions have expired pursuant to G. L. c. 184, § 23, are both inapposite.

In The Stop & Shop Supermarket Co. v. Urstadt Biddle Props., Inc., 433 Mass. 285 (2001) (Stop & Shop) the court addressed the question whether a deed restriction could be “enlarged” or “extended”

⁴As explained during the September 6, 2023, ZBA hearing, the developer is mistaken that the Petrini & Assocs. January 11, 2023, “Farm Road Deed Restriction” memorandum (available at https://www.sherbornma.org/sites/g/files/vyhlf1201/f/uploads/memo_-_fm_tc_regarding_deed_restriction.pdf) is to the contrary. That memorandum expressly pertained to the entirely separate and distinct legal issue whether the Town should pursue litigation seeking a preliminary injunction to prevent development of 55 Farm Road. See *id.* Furthermore, that legal issue arose in the entirely separate context of the then-proposed development of the property which would become known as “53 Farm Road.”

⁵Available at https://www.sherbornma.org/sites/g/files/vyhlf1201/f/uploads/8-30-23_letter_to_sherborn_zba_site_control.pdf

pursuant to G. L. c. 184, § 27(b), beyond the thirty-year limit set out in G. L. c. 184, § 23. See 433 Mass. at 286-289. Here, however, no one is arguing for enlarging or extending a deed restriction. Rather, as explained in my June 2022 letter, under black letter contract principles, the January 11, 2021, deed conveying the 55 Farm Road property from Ioannis Miaoulis to Fenix Partners Farm Road LLC, for example, contains a restriction created as of the date that deed was executed (and recorded) by the parties thereto, and accordingly, by operation of G. L. c. 184, § 23, expires January 11, 2051. Section 23 provides that “restrictions, unlimited as to time . . . shall be limited to the term of thirty years after the date of the deed or other instrument . . . creating them” (emphasis supplied). See Stop & Shop, supra at 289.

The Town of Brookline v. MassDevelopment Fin. Agy., Mass. App. Ct., No. 14-P-1817 (Sep. 25, 2015) (unpublished) (Town of Brookline) case, as acknowledged during the ZBA hearing, is an unpublished, summary disposition issued by the Massachusetts Appeals Court and, accordingly, not binding authority. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008). Regardless, the facts of that case bear no resemblance to the situation here. Town of Brookline involved deed restrictions created by written agreement in 1946 between the town of Brookline and the then-owner of a piece of property, incident to the property owner’s request for favorable action by the town meeting for a change to the town’s zoning by-law. See Town of Brookline, supra at 2-3. The plaintiffs/appellants unpersuasively argued that the restrictions, by virtue of the fact that they arose in the context of a zoning by-law change, amounted to an exercise of police power, and therefore were exempt from the thirty-year period provided in G. L. c. 184, § 23. See id. (discussing Killorin v. Zoning Bd. of Appeals of Andover, 80 Mass. App. Ct. 655, 657-58 [2011], and Samuelson v. Planning Bd. of Orleans, 86 Mass. App. Ct. 901, 902 [2014]). Here, however, no one is arguing that any deed restriction came into existence as an exercise of police power and thereby is exempt from the thirty-year limitation imposed by c. 184, § 23. The Town of Brookline opinion has no material significance to the present matter.

Indeed, as neither case avails the developer, and because the developer has not refuted (nor even addressed) the specific reasoning set out in my June 2022 letter, the ZBA may appropriately deem the arguments raised therein as uncontroverted and resolve the matter summarily to deny the Farm Road comprehensive permit application without further taxing the resources of the ZBA or of the Town and its citizens. The ZBA has all the documents before it to render a decision, consonant with the Supreme Judicial Court’s decision in 135 Wells Ave., LLC v. Housing App. Comm., 478 Mass. 346 (2017), as well as long-established ZBA precedent, see Sherborn ZBA, Final Decision in the matter of “The Fields at Sherborn,” (May 5, 2006) at 8-9 (finding ZBA “does not have authority to rescind recorded [deed] restrictions”),⁶ that deed restrictions on the subject parcels preclude the proposed Farm Road Chapter 40B development.

⁶Available at
https://www.sherbornma.org/sites/g/files/vyhlif1201/f/uploads/zba_final_decision-1.pdf

Mr. Richard S. Novak
September 12, 2023
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Please let me know if you have any questions about this letter or any of the issues addressed herein, or would like additional information.

Very truly yours,

/s/

Arthur C. Fenno, Esq.