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BY EMAIL: jeanne.guthrie@sherbornma.org

Sherborn Zoning Board of Appeals
19 Washington Street
Sherborn, MA 01770

Re: application for comprehensive permit at 55-65 Farm Road, Sherborn MA

Dear Members of the Board:

As you know, I represent direct abutters Brian and Mary Moore of 49 Farm Road, who have raised several reasons for the Board to deny a permit for this project. We hope the Board finds this summary helpful as you begin your deliberations.

Deny the permit because nitrogen from the septic system would pollute the drinking water.

MassHousing's Project Eligibility (PE) approval was conditioned on addressing "the impact of the Project on water resources and private wells in the area and respond[ing] to reasonable requests for mitigation." (11/2/22 PE ltr., p. 3) Applicant has failed to address nitrogen overloading or to provide reasonable mitigation to protect the drinking water wells. As a result, the Board should not approve the project because that critical issue has not been resolved.

We provided a report from our own hydrologist demonstrating adverse impacts to the Moore's well from the proposed Project. (11/5/23 Horsley report) Your own peer reviewer recommended further hydrogeological assessment to evaluate nitrogen loading impacts, but none has been submitted. Your fellow land use boards (Conservation Commission and Groundwater Protection Committee) have recommended against waiving local bylaws that protect the groundwater and wetlands from elevated nitrogen levels leaching from the project.

The Board now has a solid record upon which to deny the permit in order to protect residents' "health and safety" and the "natural environment", which are recognized Local Concerns that outweigh subsidized housing in balancing the interests protected by Chapter 40B. 760 CMR 56.02. As referenced in my November 7, 2023 letter, the law supports the denial of a comprehensive permit where necessary to protect the drinking water of abutting properties from

nitrogen contamination.[1] Because Applicant has not demonstrated its wastewater disposal system can function without compromising the potable water supply to the project and to abutting wells, no permit should be issued. Approving this application would require waivers of local bylaws enacted to protect water and wetlands, which the Appeals Court has ruled would be "unreasonable."[2]

Deny the permit because a recorded restriction prohibits development on part of the site.

MassHousing directed the Applicant to evaluate the deed restriction, "specifically any progress on whether the Applicant is subject to the restriction." (11/2/22 PE ltr., p. 3) While there may have been "progress" on this issue, Applicant has not resolved it. The Board has several letters on this topic, which I will not reiterate, just list here:

- June 2, 2022 letter from Atty. Fenno to Select Board re PE application
- August 30, 2023 letter from me, and Atty. Haverty's response
- September 13, 2023 letter from Atty. Fenno to the ZBA
- October 3, 2023 letter from the Moores, arguing estoppel because Applicant is "relying on the conservation restriction in his dealings with MassDEP in order to further avoid regulation under 310 CMR 22.00 [drinking water standards] for this development."

To this robust record supporting the restriction, I add a recent ruling from the Housing Appeals Committee ("HAC") that reinforces the limits placed on local zoning boards (as well as HAC) under Chapter 40B. In the Lunenburg decision, issued just before Thanksgiving, the HAC ruled that neither it nor a ZBA has the authority to waive votes required by Town Meeting in order to extend a sewer line.[3] Those are legislative, not permitting, functions and therefore fall outside the purview of a zoning board's power. Id., p. 14, citing 135 Wells Ave., LLC v.

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[1] See Reynolds v. Zoning Bd. of Appeals of Stow, 88 Mass. App. Ct. 339, 340 (2015); see also Perisho v. Bd. of Health of Stow, 103 Mass. App. Ct. 593 (2023) (noting "the town's zoning board, in issuing a comprehensive permit, denied [Defendant's] request under G.L. c. 40B to waive a local leaching area requirement that was more health-protective than Title 5")

[2] "When faced with evidence that one or more adjacent private wells will have elevated nitrogen levels and there is no public water source in the area and no proposal to provide the abutter with clean water, it is unreasonable to conclude that the local need for affordable housing outweighs the health concerns of existing abutters. In these circumstances, the board's waiver of the bylaw provision limiting the flow into waste disposal systems within the WRPD was unreasonable." Reynolds, 88 Mass. App. Ct. at 350.

[3] *Pond View Commons, LLC v. Lunenburg ZBA*, HAC No. 2023-01, Summary Decision (Nov. 22, 2023), available at https://www.mass.gov/doc/lunenburg-pond-view-commons-llc-23-01/download.

Housing App. Comm., et al., 478 Mass. 346 (2017), which was the subject of my August 30, 2023 letter to the Board.

Lunenburg reiterates settled law established in the 135 Wells Ave. case: Chapter 40B does not abrogate the legislative functions of a municipality. The decision whether to enforce the Farm Road restriction is a legislative, not a permitting, decision. Just as in 135 Wells Ave. and more recently in *Lunenburg*, this Board does not have the authority to waive that restriction. The Town of Sherborn – if not by this Board, then the Select Board, Conservation Commission or Town Meeting – retains the right to enforce the restriction on the project site. Accordingly, this Board's permitting decision should recognize it does not waive the restriction and expressly reserve the right to enforce it. As the Newton ZBA did in the Wells Ave. case, you may also cite the restriction as among the reasons for denying the comprehensive permit. The one thing you cannot do, based on Lunenburg and Wells Ave., is purport to waive it.

Commercial solar power generation cannot be permitted under a comprehensive permit.

MassHousing referenced "issues regarding solar panel use" to be vetted during public hearing. (11/2/22 PE ltr., p. 3) But we have since learned that the project would have not just rooftop solar panels for individual residential use, but aims to sell power back to the electric grid. That stark admission requires some other administrative procedure beyond this public hearing for an affordable housing project. Applicant has cited no other instance – and I am aware of none – where a ZBA approved the kind of commercial scale power generation proposed on Farm Road in Sherborn under the guise of a comprehensive permit. Sherborn should not be the first to test these uncharted waters. Applicant's proposal to include non-residential solar as part of the comprehensive permit should be rejected outright.

Finally, the conciliatory tug of a reasonable compromise often confounds the deliberative task facing a zoning board. Applicant has put forth a specific proposal, which you must evaluate and vote on. It is not this Board's job to craft an alternative proposal that you may find to be satisfactory. If Applicant were to propose such an alternative, then you should and must consider it. But I caution against approving a less impactful project just to approve something, absent a fully engineered set of plans, calculations and design to show that it works on the site.

Thank you all for you diligent attention to these issues, which I look forward to discussing with you at the next hearing.

Very truly yours,

/s/ Dennis A. Murphy

Dennis A. Murphy

cc: Arthur Fenno, Esq.
Paul Haverty, Esq.
Clients