BLATMAN, BOBROWSKI, HAVERTY & SILVERSTEIN, LLC
ATTORNEYS AT LAW

9 DAMONMILL SQUARE, SUITE 4A4
CONCORD, MA 01742
PHONE 978.371.2226
FAX 978.371.2296

PAUL J. HAVERTY
Paul@bbhslaw.net

October 23, 2024

Via Email
Zach McBride, Chair
Sherborn Zoning Board of Appeals
19 Washington Street
Sherborn, MA 01770

RE: Fenix Partners Brush Hill, LLC
34 Brush Hill Road, Sherborn, MA
Response to Correspondence

Dear Chair McBride:

This office represents Fenix Partners Brush Hill, LLC (the "Applicant") with regards to its comprehensive permit application for property located at 34 Brush Hill Road, Sherborn, Massachusetts. We are writing to respond to correspondence dated September 18, 2024, submitted by Hill Law on behalf of abutters located at 36 Brush Hill Road. In its correspondence, Hill Law claims that the endorsement of an Approval Not Required ("ANR") Plan by the Sherborn Planning Board recorded as Plan 2173 of 1955 with the Middlesex South Registry of Deeds creates a deed restriction prohibiting the construction of any building within eighty feet (80') of the centerline to the access strip to lot 4, projected northerly to the property line[.]" While the ANR Plan endorsed by the Sherborn Planning Board does contain this condition, contrary to the claims in the Hill Law correspondence, this is not a property restriction subject to G. L. c. 184.

In its memorandum, Hill Law cites to Murphy v. Hopkinton Planning Bd., 70 Mass. App. Ct. 385, 395-396 (2007). In the Murphy case, the Hopkinton Planning Board endorsed an ANR Plan with a condition prohibiting physical access over an adjacent street. This condition was agreed to by the applicant, and "the parties memorialized the restriction in a contemporaneously executed agreement, and both documents were recorded the next day." Id. at 391. This separate agreement between the applicant and the board created the restriction that the Murphy court found to be enforceable, a restriction was not created merely by the filing of the endorsed ANR Plan.

The correspondence from Hill law notes, correctly, that the Murphy court did not rule on whether the restriction in that case was subject to the thirty (30) year limitation on enforceability in G. L. c. 184, § 23. However, they then cite to Killorin v. Zoning Bd. of Appeals of Andover, 80 Mass. App. Ct. 655 (2011), incorrectly stating that the Killorin

case holds that "restrictions created through zoning or planning approvals are not subject to the 30-year limitation." This statement is incorrect because zoning conditions are not restrictions. As the Killorin court expressly found, "restrictions or conditions contemplated by c. 184, § 23, are not those created pursuant to regulations under c. 40A or municipal zoning bylaws, and therefore not applicable to conditions of a special permit that are subsumed in the bylaws under which they are promulgated." Id. at 658. The Killorin court thus found that conditions contained in local permitting decisions were not subject to the thirty (30) year limitation contained in G. L. c. 184, § 23, because such conditions are not restrictions pursuant to the statute.

Finally, in its correspondence Hill Law claims, without citation to case law, that the Board lacks the authority to modify or amend a previously approved ANR Plan pursuant to G. L. c. 40B, §§ 20-23. Hill Law also cites the 135 Wells Ave., LLC v. Housing Appeals Comm., 478 Mass. 346 (2017) to argue that the Board does not have the authority to modify a restriction, ignoring the holding of the Killorin case that a condition in a permitting decision is not a restriction (unlike the restriction in the 135 Wells Ave. case). The condition in the 1962 ANR Plan is a permitting condition that may be waived by the Board pursuant to its authority under G. L. c. 40B, §§ 20-23.

If you have any questions regarding this correspondence, please feel free to contact me.

Very Truly Yours,

Paul J. Haverty

Cc: Client (via email)
Michael Terry, Esq. (via email)