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**TOWN OF SHERBORN
ZONING BOARD OF APPEALS**

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DECISION UPON REMAND
APPLICATION FOR COMPREHENSIVE PERMIT
G.L. c. 40B, §§ 20-23

TOWN CLERK
TOWN OF SHERBORN

Applicant: 41 North Main LLC ("Applicant")

Development Name: Pine Residences

Application For: Comprehensive Permit under G.L. Chapter 40B, §§ 20-23
Pine Residences: 28 ownership units

Property Address: 41 North Main Street, Sherborn, MA

Assessor's Map: Map 11, Parcels 41 and 43, containing approximately 7.24 acres.

Board of Appeals: Chair: Zachary F. McBride
Members: Todd Labbe and Jonathan Fitch
Associate Member: Richard S. Novak
Voting: Zachary McBride, Jonathan Fitch, Todd Labbe

Decision Date: March 21, 2025

For the reasons stated below, the Sherborn Zoning Board of Appeals denies the revised and remanded application of 41 North Main LLC pursuant to the Massachusetts Comprehensive Permit Law, G.L. c. 40B, §§ 20-23 (hereinafter, "Chapter 40B" or the "Act"), the regulations promulgated by the Department of Housing and Community Development ("DHCD") at 760 CMR 56.00, et seq. (the "40B Regulations"), the guidance set forth in the DHCD's Comprehensive Permit Guidelines, as amended (the "40B Guidelines"), the Town of Sherborn Zoning Bylaw (the "Zoning Bylaw") and the Rules and Regulations of the Sherborn Zoning Board of Appeals (the "Board" or "ZBA").

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I. FINDINGS OF FACT

INTRODUCTION

A. Summary.

The proposed Chapter 40B project at 41 North Main Street, Sherborn, MA was revised by the applicant and remanded for further review by the Housing Appeals Committee from proceedings related to a previous denial. The previous application included two, fully interdependent projects – the real estate equivalent of conjoined twins, with the 41 N. Main project being totally reliant on water supply and wastewater to/from an adjacent property at 31 Hunting Lane. In the previous denied application, 41 North Main Street contained 60 apartment units with no drinking water or septic facilities, relying on 31 Hunting Lane for infrastructure and upon which included an additional 27 units of housing with a completely uneconomic WWTP. Accordingly, and with the approval of the Applicants, the Board considered both properties together as the “Project.”

The Zoning Board previously concluded that the Project, as designed, had fatal design errors with respect to traffic safety and adequate supply of safe drinking water which could not have, under the circumstances, been Conditioned Consistent with Local Needs.

The Applicant appealed this Board’s denial to the Housing Appeals Commission (2021-06); which remanded the application back to this Board to review revised plans from the Applicant by Order dated August 15, 2024.

Even with revised plans, the Zoning Board has determined that the proposed Project has fatal flaws. The Applicant’s proposed wastewater treatment solution, specifically the soil absorption systems (“SAS”), as proposed will significantly infringe on a regulatory setback for a semi-public water supply serving an existing restaurant abutting the proposed Project. Moreover, the proposed SAS would exacerbate already existing traffic concerns at a main entrance to the Project at the intersection of North Main Street; due to inadequate depth to groundwater, the SAS would need to be raised in order to meet Title V standards – creating an unsafe condition by elevating a main traveled way in close proximity to its intersection with North Main Street. Safety concerns related to Traffic also were not resolved by the modified plans, due to the extensive modifications to the North Main Street intersection that would be required with no clear funding source identified. Finally, the Applicant did not provide any new information – since the previous denial – related to the source and quality of domestic water supply.

Because we again conclude that the revised Project, as designed, has fatal design omissions and flaws with respect to traffic safety, a viable wastewater treatment solution, risks to contamination of the supply of safe drinking water to abutters, a lack of reliable information to make any



assessment of the source, quality and quantity for domestic water supply for the Project, which omissions and flaws cannot, under the circumstances, be Conditioned Consistent with Local Needs, we disapprove the Project on the merits.

B. Key Background and Project History.

Sections C(1)-(8) of the Board's prior July 8, 2021 decision are restated and incorporated by reference, as if fully set forth herein.

The Current Application

The Applicant's current revised plan consists of 11 buildings, with 28 units, comprising 56 bedrooms. The proposed wastewater treatment solution is now to be located along the southeastern corner of the site, and partially under a main entrance to the Project Site. The applicant continues to propose to obtain domestic water supply from the previously evaluated drilled bedrock wells on an adjacent property at 31 Hunting Lane, without any additional testing or data as recommended by the peer reviewer Nobis, which in part was directly related to the basis for denial in the previously denied applications.

PROCEDURAL HISTORY

1. On October 5, 2020, seeking approval for a Comprehensive Permit pursuant to Chapter 40B ("Comprehensive Permit Applications"), Barsky filed applications to (1) construct twenty-seven (27) ownership units, including seven affordable units, on land located at 31 Hunting Lane, Sherborn (Apple Hill Estates), and two thirty-unit residential buildings (totaling sixty units) on land located at 41 North Main Street, Sherborn, 25% of which are to be designated as affordable (Pine Residences) (the "2020 Project Site"). The proposed combined Project Site was to be subsidized by the New England Fund Program of the Federal Home Loan Bank of Boston.

2. The 2020 Project Site was comprised of land identified by the Sherborn Assessors as:

Apple Hill Estates/31 Hunting Lane

Map 11, Parcel 2, containing approximately 4.88 acres, consisting mostly of wetlands, that the applicant proposed to dedicate for water and sewer uses.

Map 11, Parcel 3C, containing approximately 16.93 acres, presently improved by one single-family structure, and the applicant intended to construct the ownership units thereon. This parcel is currently encumbered by a lien under M.G.L. c.61 B, restricting it for open space and recreational uses.

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Map 11, Parcel 3B, containing approximately 8 acres of vacant land, and the applicant intended to dedicate this parcel for water and sewer uses. This parcel is currently encumbered by a lien under M.G.L. c.61 B, restricting it for open space and recreational uses. Note: while the use of this parcel appeared critical to the feasibility of the 2020 Project, the Applicants contend that this parcel is not part of the 40B Applications.

Pine Residences/41 North Main Street

Map 11, Parcel 43, containing approximately 1.3 acres.

Portions of Map 11, Parcel 41, containing approximately 5.8 acres; 4.95 acres were proposed to be developed, while a 1-acre parcel was to be retained separately by the Applicants

3. The 31 Hunting Lane parcel is proposed to serve as the location for two new drinking water wells (“DWW’s”) and a the single WWTP for the combined Project, the WWTP effluent area for the combined Project (“Leach Field”) and the location of a force sewer main connecting the 41 North Main Street elements of the Project to the WWTP. Traffic access to the 31 Hunting Lane portion of the Project would be solely from Hunting Lane.

4. For the 41 North Main Street portion of the combined 2020 Project, Barsky proposed to sever the existing 5.9-acre Fitzpatrick Parcel into a small one-acre lot containing the entire length and frontage of the 41 North Main Existing Driveway (“Remainder Site”) and a 4.95 acre development portion (“41 Development Area”), with the 41 North Main Existing Driveway ending just a few feet short of the 41 Development Area boundary.

5. Over 83% of the land area of the Fitzpatrick Parcel would have been cut off from the legal curb cut for the existing 41 North Main Driveway, and the 41 North Main Development Area would become the location for 95% of the land area of the new 60 apartments. As proposed by Barsky, the 41 Development Area would then be combined with the 43 North Main Parcel, 100% of the traffic from which would be diverted onto narrow Powderhouse Lane, with 0% of the traffic still using the existing 41 North Main Driveway.

6. Pursuant to the Applicants’ 2020 application materials, the combined 31 Hunting Lane and 41 North Main Street sites could support seven housing units by right under G.L. c. 40A. Under Chapter 40B, the Applicants proposed to increase this density over 1,200%, to eighty-seven units.

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7. On October 13, 2020, the Zoning Board of Appeals shared copies of the comprehensive permit applications to all relevant Town boards to solicit their advice and comment during the hearing process.

8. On October 15, 2020 and October 22, 2020, in accordance with the Comprehensive Permit Rules of the Sherborn Zoning Board of Appeals (adopted August 28, 2001, amended September 14, 2016) the Zoning Board of Appeals advertised notice of the public hearing to be held on October 29, 2020.

9. The Board's public hearing on the Application was duly opened on October 29, 2020 and continued for an additional nine hearing dates through May 27, 2021. The Board received extensive input from the Applicants, the Applicants' team of advisors, counsel and engineers, as well as from numerous abutters, local residents, Town Boards and Committees, and the Town's peer reviewer. During the course of the hearings, the Board received and reviewed nearly one hundred written submissions. The Board also received testimony from an outside water expert hired by abutters, Creative Land & Water Engineering, LLC ("CLWE"), other consultants retained by abutters, as well as a water supply and groundwater expert hired by the Town, James Vernon of the Nobis Group ("Nobis").

10. A site walk of the Project Site was conducted on April 22, 2021.

11. The Board utilized the peer review services of Professional Services Corporation, P.C. to review the engineering and impacts of the Project.

12. The focus on the critical issues of drinking water availability and emergency vehicle access intensified in the last several hearings. The Applicants were offered several opportunities to extend the hearing period in order that additional information concerning the availability of safe drinking water, and/or safe vehicle (emergency and non-emergency) access and traffic flow solutions could be explored, either by the Applicant team or by experts hired by the Town and abutters. The Applicants were informed during the discussion about possible extensions that the failure to provide additional evidence of drinking water availability and emergency vehicle access, or access to the site to investigate the same, would support an inference by the Board that such further investigations would not support the Project. In spite of this warning, the Applicants refused to provide further information or any extension of time, and barred all access by non-Applicant experts.

13. Accordingly, the public hearing was closed on May 27, 2021, within the time proscribed by Chapter 40B, as affected by Chapter 53 of the Acts of 2020.

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14. The Zoning Board issued its denial of the Project by decision filed with the Town Clerk on July 8, 2021.

15. The Applicant appealed said denial to the Massachusetts Housing Appeals Committee, as No. 2021-05 (31 Hunting Lane) and No. 2021-06 (41 N. Main Street).

16. The Applicant filed a Notice of Project Change with the Housing Appeals Committee on June 4, 2024.

17. The 41 N. Main St. appeal was remanded back to the Zoning Board for review of the Applicant's modified proposal by Order of the Housing Appeals Committee dated August 15, 2014.

18. The 31 Hunting Lane appeal was dismissed by Order of the Housing Appeals Committee dated December 6, 2024.

19. The Housing Appeals Committee issues an order of Remand on August 15, 2024.

20. The public hearing reviewing the Applicants renewed and revised application for a comprehensive permit commenced on September 9, 2024. Numerous Zoning Board public hearings on the matter were held, concluding on February 11, 2025.

III. GOVERNING LAW

The standards to be applied by boards of appeal in deciding whether to issue comprehensive permits are same as those to be applied by housing appeals committee in reviewing board's decision, namely, whether grant of permit is reasonable and consistent with local needs and whether any conditions imposed on permit are uneconomic. Board of Appeals v. Housing Appeals Committee in Dept. of Community Affairs, 363 Mass. 339, 294 N.E.2d 393, 1973 Mass. LEXIS 403 (Mass. 1973).

Even where "a municipality has failed to meet its statutory minimum, the HAC may still uphold denial of the permit as 'reasonable and consistent with local needs' if the community's need for low or moderate income housing is outweighed by valid planning objections to the proposal based on considerations such as health, site, design, and the need to preserve open space." Hingham v. Department of Hous. & Community Dev., 451 Mass. 501, 504 n.6, 887 N.E.2d 231 (2008), quoting from Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm., 15 Mass. App. Ct. 553, 557, 446 N.E.2d 748 (1983); G.L. c.40B, § 20.

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III. FINDINGS

The Zoning Board completed a review of the Applicant's modified proposal in accordance with the Housing Appeals Committee's Order of Remand and makes the following findings:

The following relevant plans, documents and exhibits were considered by the Zoning Board in its review and in reaching its decision.

1. MA DEQE Public Well Approval for 33 North Main Street Sherborn – October 16, 1986
2. Sherborn Zoning Board of Appeals, Decision Regarding Comprehensive Permit for 41 N. Main Street – Decided June 28, 2021, filed July 8, 2021.
3. Attorney Haverty letter to HAC (1910-38) – July 2, 2024
4. Attorney Haverty Letter Exhibit 1 (1910-38) – July 2, 2024
5. Attorney Haverty Letter Exhibit 2 (1910-38) – July 2, 2024
6. The Pines Traffic Study Update – August 23, 2024
7. Letter Regarding Substantial Change Notification – August 16, 2024
8. Housing Appeals Court Order of Remand – August 15, 2024
9. Vanesse & Associates - North Main & Route 16 Intersection Traffic Letter – October 26, 2024
10. Historical Commission Comments – October 28, 2024
11. Supplemental Waiver List - Board of Health Regulations – October 30, 2024
12. Revised Waiver List - 41 North Main Street – October 30, 2024
13. Letter from Planning Board with Exhibits – November 26, 2024
14. Letter from Resident (Garrison) - Title V Requirements – November 25, 2024
15. 41 Main Street Site Plan – May 21, 2024
16. Attorney Paul Haverty - Extension letter to January 31, 2025
17. Letter from Resident (Trainor) regarding PWS 3269024 Existing Zone 1 and WPA – January 17, 2025
18. Extension letter for the Hearing of 41 North Main Street until February 21, 2025 – January 16, 2025
19. Site Plans – Last Updated January 28, 2025

1. The Town's need for low or moderate income housing is not substantial.

With the Board's June 21, 2021 approval of a Comprehensive Permit for the 120-unit Coolidge Crossing project, the Town of Sherborn is poised to meet the 10% affordable threshold under Chapter 40B. It is expected that the said Statutory Minima set forth in 760 CMR 56.03(4) shall be met upon completion of that project.

In furtherance of the progress towards obtaining a building permit for the Coolidge Crossing project, by vote at Annual Town Meeting in 2024, the Town established a water and sewer



district to enable the project through reliance on water and sewer infrastructure from neighboring municipalities. This municipal district was created and approved by the Massachusetts legislature. Sherborn remains poised to meet the statutory minimum with the likely imminent commencement of the Coolidge Street Project.

2. The proposed wastewater solution is fatally flawed

Wastewater. The Town of Sherborn does not have a municipal sanitary sewer system. Accordingly, all wastewater generated by the Project must be treated through a private wastewater system at the Project Site. As addressed in comments from the Sherborn Board of Health, the Applicants intend to install and operate a wastewater treatment plant on the Project Site in accordance with 310 CMR 15.00, and obtain and comply with a Groundwater Discharge Permit in accordance with 314 CMR 5.00. Thus, the Massachusetts Department of Environmental Protection (MassDEP) is proposed to be the key permitting authority for sewage management. However, the Sherborn Board of Health has the most experience with the dynamics of soil absorption systems in Sherborn.

The Board of Health previously expressed substantial concerns with the Project. Specifically, it strongly recommended against granting the requested waiver from the local regulation for percolation rate in order for soil to be considered suitable for subsurface wastewater disposal, which is a higher standard than the minimum established by state Title 5 regulations. As noted by the Board of Health, towns like Sherborn that have special circumstances (low overburden, no public water or sewer systems) are encouraged to adopt more stringent requirements in order to address water quality vulnerabilities.

The current proposed wastewater treatment solution is fatally flawed for two critical reasons: (i) the location is within the buffer for an IWPA (Interim Wellhead Protection Area) of a MassDEP designated public water supply PWS well on an adjacent property (MassDEP PWS ID 3269024), and (ii) the plan as proposed would exceed the allowed nitrogen loading pursuant to Title V and 310 CMR 15.214.

According to the Applicant's current proposal, the Project would include 56 bedrooms to be constructed upon a 7.24 acre site. The maximum allowable discharge under Title V for this site is: $440 \text{ gal/day} \times 7.89 \text{ Title V acres} (40,000 \text{ sf}) = 3,471 \text{ gal/day}$. The proposed development is for 18 units, totaling 56 bedrooms. Assuming a standard daily discharge of 110 gal/day/bedroom, the result is: $110 \text{ gal/day/br} \times 56 \text{ bedrooms} = 6,160 \text{ gal/day}$; the proposal would produce almost twice the allowable wastewater discharge.

The abutting neighbor, a commercial restaurant located at 33 N. Main Street, is served by a designated public water supply (MassDEP PWS ID 3269024). Significantly, the permit for the

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existing well supplying water to said abutter (operating a restaurant) imposes a 100-foot buffer zone into which the Applicant's proposed septic soil absorption system would infringe, and/or be in detrimental proximity, all within a nitrogen sensitive area. Moreover, the location of the proposed SAS is in close proximity to the abutting restaurant's SAS. The Applicant's own expert opined during the public hearing that restaurant waste creates a higher nitrogen load in the soils than a residential system primarily serving domestic wastewater needs.

Accordingly, the Board finds that design of the modified proposal fails to provide an adequate and safe drinking water supply, and that the wastewater generated by the Project would present a substantial risk to the health and safety of the residents of the proposed development and the surrounding properties and residents. Accordingly, the Zoning Board cannot support a waiver of the applicable Title V requirements or the stricter Sherborn Board of Health regulations.

3. The Project will endanger the drinking water resources of the surrounding neighborhood.

Water Supply. The Town of Sherborn does not have a municipal water supply system, and therefore, all water to serve the Project must be drawn from private wells. The geology of Sherborn is such that there is a shallow overburden in much of the Town, meaning the bedrock is very near to the surface and there is little soil that can hold water and recharge an aquifer. Nearly all of Sherborn's water wells are drilled into bedrock.

As set forth in the May 5, 2021 Nobis report, the 2020 Project, and the current Project, were/are entirely dependent on the same fractured bedrock wells. Two wells (each in excess of 800' deep) were drilled by the Applicants, and the data obtained thereby was inconclusive on the question of whether or not the underlying aquifer could provide adequate water to support the Project. Neither did the limited testing measure the impact of the Project on the wells supplying the surrounding homes and commercial buildings. The adverse impact upon surrounding wells due to the Project is a substantial risk due to the high number of wells that are already drawing from the same bedrock aquifer that the Applicants intend to rely on. As noted by Nobis, the surrounding wells servicing other properties are of relatively great depth, from 200' to 1005', which is concerning, for that indicates a well depth of several hundred feet is necessary to provide sufficient water for even a single additional residence, much less the eighteen additional residences (with 56 bedrooms) proposed by the Applicants.

As noted in the letter to the Board dated May 26, 2011 from Andrea D. Stiller, a member of the Sherborn Groundwater Protection Committee, there have been instances of wells running dry in the downtown area. The Board also received direct evidence from Jo and Paul Sagar, who in 2017 purchased 51 North Main Street, a residence located very close to the Project Site and also located adjacent to the half-completed 59 North Main Street Chapter 40B project. The Sagars' well failed and had to be re-drilled in 2020 to a depth of 800 feet, a development the Sagars

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blame on the 59 North Main Street project. This problem was also highlighted by CLWE in a May 25, 2021 letter to the Board, as evidence of the limited capacity of water resources in the area, and by John Garrison, an abutter who provided further evidence at the March 26, 2021 hearing of the numerous residents in the immediate area who were already battling dry or failing wells.

In the current application, the Applicants have not addressed these concerns or presented a solution to the issues raised. Moreover, during the public hearing, the Applicant's own expert stated that wastewater would flow towards the direction of the drilled wells; the same wells that Nobis recommended further testing to determine the extent of wetlands drawdown which would indicate a troubling hydraulic connection.

IV. DECISION

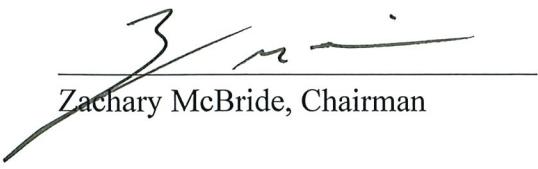
In reviewing this Application, the Board identified, and affirmed previous unresolved concerns relative to health, local water supply, wastewater disposal, and traffic. The Board was provided evidence showing that the Project could not safely manage the wastewater generated by the Project, could not adequately provide the Project's residents with safe drinking water supplies or protect the drinking water supplies of surrounding properties, and presented significant ingress, egress to the Project site and unresolved traffic concerns. Given the opportunity to present new supportive evidence for the revised Project, and despite many requests and ample opportunity afforded by the Board, the Applicants repeatedly failed and refused to do so.

In consideration of all of the foregoing, including the Applicant's modified plans, documents and testimony given during the public hearing, the Board finds that the substantial local concerns related to this Project outweigh the Town's need for affordable housing, and hereby denies the Applicant's application for comprehensive permit pursuant to Chapter 40B, §§ 20-23, for the development described above.

A handwritten signature consisting of a stylized 'M' and a 'W'.

RECORD OF VOTE

The Board of Appeals voted unanimously (3-0) at its public meeting on March 21, 2025, to deny the Applicants' application for Comprehensive Permit, for the foregoing reasons and the Chair of the Board was directed to file this Decision with the Town Clerk, as attested by the signature below.


Zachary McBride, Chairman

Filed with the Town Clerk on April 1, 2025.


Jacqueline Morris
Town Clerk

Notice: Appeals, if any, by any party other than the Applicant, shall be made pursuant to Massachusetts General Laws, Chapter 40A, § 17, and shall be filed within twenty (20) days after the filing of this notice in the Office of the Town Clerk, Town Hall, Sherborn, Massachusetts. Any appeal by the Applicant shall be filed with the Housing Appeals Committee pursuant to G.L. c.40B, § 23, within twenty (20) days after the filing of this notice in the Office of the Town Clerk.

