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ZONING BOARD OF APPEALS 2021 JUL -8 AM 11:54

TOWN CLERK  
DECISION ON APPLICATIONS FOR COMPREHENSIVE PERMITS  
G.L. c. 40B, §§ 20-23

Applicants: 31 Hunting Lane, LLC and 41 North Main LLC (“Applicants”)

Development Name: Apple Hill Estates  
Pine Residences

Application For: Comprehensive Permits under G.L. Chapter 40B, §§ 20-23  
Apple Hill Estates: 27 ownership units  
Pine Residences: 60 rental units

Property Address: 31 Hunting Lane, Sherborn, MA  
41 North Main Street, Sherborn, MA

Assessor’s Map: Apple Hill Estates  
Map 11, Parcel 2, containing approximately 4.88 acres, consists mostly of wetlands, and the applicant intends to dedicate this parcel for water and sewer uses.

Map 11, Parcel 3C, containing approximately 16.93 acres, improved by one single-family structure, and the applicant intends 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.

Map 11, Parcel 3B, containing approximately 8 acres, is vacant, and the applicant intends 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 appears critical to the feasibility of the project, the applicant contends that this parcel is not part of the 40B Applications.

Pine Residences:  
Map 11, Parcel 43, containing approximately 1.3 acres.

Portions of Map 11, Parcel 41, containing approximately 5.8 acres, of which 4.95 acres would be developed, while a 1-acre parcel would be retained separately by the applicant.

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Board of Appeals: Chair: Richard S. Novak  
Members: Ron Steffek and Jonathan Fitch  
Voting: Richard S. Novak, Ron Steffek and Jonathan Fitch

Decision Date: June 28, 2021

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For the reasons stated below, the Sherborn Zoning Board of Appeals denies the applications of 31 Hunting Lane, LLC and 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").

## **I. FINDINGS OF FACT**

### **INTRODUCTION**

#### **A. Summary.**

These two proposed Chapter 40B projects at 31 Hunting Lane Sherborn, MA and 41 North Main Street, Sherborn, MA are fully interdependent – the real estate equivalent of conjoined twins. Without 31 Hunting's water supply wells, waste water treatment plant ("WWTP"), wastewater disposal area and sewer force main location, 41 North Main Street is simply 60 apartment units with no drinking water or septic facilities. Without the economic muscle of 41 North Main's 60 apartment units, on the other hand, 31 Hunting is 27 units of housing with a completely uneconomic WWTP. Accordingly, and with the approval of the Applicants, we consider both together as the "Project."

Because we conclude that the Project, as designed, has fatal design errors with respect to traffic safety and adequate supply of safe drinking water which cannot, under the circumstances, be Conditioned Consistent with Local Needs, we disapprove the Project on the merits.

#### **B. G.L. c. 61B, the Option to Purchase, and Site Control under MGL c. 40B.**

A significant portion of the 31 Hunting Lane Parcel (Parcels 3B and 3C, referenced herein as the "Keystone Parcel" or the "61B Land") was subject to G.L. c. 61B ("Chapter 61B"). The Sherborn Select Board has asserted that an option to purchase the Keystone Parcel (the "Option") has been triggered pursuant to Section 9 of Chapter 61B, and that they are validly pursuing execution of the same. The Applicants and Barsky (as defined below), the owner of the entire site, dispute both claims, and that dispute is presently being litigated in Land Court, in the matter entitled Lybarsky, Tr., et al. v. Town of Sherborn, Land Court No. 21 PS 000193.

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The acquisition of the 61B Land was authorized by the vote, under Article 15, at Sherborn's May 15, 2021 Annual Town Meeting. If the Option were to be exercised and completed, it is inarguable that the loss of the Keystone Parcel is fatal to the Project as proposed. There would be no drinking water supply for either the 31 Hunting Lane or 41 North Main Street development, and the 41 North Main parcel would have no ability to pump sewage to the proposed wastewater treatment plant ("WWTP") at 31 Hunting Lane. For that reason, the Select Board, abutters and the Applicants have been debating whether the Applicants have adequate "Site Control" under Chapter 40B and 760 CMR 56.04(1)(c) to pursue this application process while the Option is outstanding.

While Land Court Judge Speicher ruled on April 13, 2021 that the Select Board has established "at least a likelihood of succeeding" on its Chapter 61B claim, that issue has not been fully adjudicated. Judge Speicher also appeared to encourage this Board to continue its substantive review of the Project. We have done so. The Board has considered the issue of Site Control by the Applicants and Barsky from time to time during the legal process, as the facts have developed. Because we disapprove the Project on the merits, we do not reach the issue of Site Control, which remains unresolved as of the date of this decision.

### **C. Key Background and Project History.**

The factual context and background to the Project are indispensable to understanding the traffic and drinking water aspects of its design. Accordingly, we summarize those background matters here.

Settled only a few decades after the Plymouth landings, the history of the Town of Sherborn goes back to the earliest days of the Commonwealth. Poor soils, thin bedrock coverage, many surface wetlands and numerous ledge outcroppings throughout the Town significantly constrained agricultural endeavors over the next 300 odd years, keeping Sherborn rural and sparsely populated prior to World War II.

#### **1. Sherborn's Water Supply History.**

In the early 1920's, a portion of the Town wished to convert to public water and sewer, and, after fierce debate, did so by leaving the municipality and becoming part of neighboring Framingham. The balance of the Town stayed on private wells and septic facilities, as remains the case nearly 100 years later. See Shaughnessey, Anne Carr, The History of Sherborn, pp. 59-61 (1974).

As Sherborn transitioned away from agriculture toward more of a suburban residential community in the decades after World War II, the same absence of public water and sewer facilities significantly limited small lot residential development. See Wilson v. Town of Sherborn, 3 Mass. App. 237 (1975) (two-acre zoning bylaw upheld), and the same constraints have long limited attempts to develop a commercial tax base.

The lack of public water and sewer has been a particular constraint in the "downtown" Sherborn area which stretches roughly from the site of the Project (where state highways Route 16 and Route 27 join) to approximately one-half mile south, where the roads diverge once again.

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This downtown water and sewer problem has long been studied; Barsky previously posted both a 2007 downtown water supply study and a 2017 update in connection with an earlier proposal for both the 31 Hunting Lane and 41 North Main Street sites.

See: <http://sherbornsquare.com/projects/promo/sherbornsquare.com/media/files/Town-Center-Water-District-Workgroup-report.pdf>.

## 2. Sherborn's Traffic History.

As a small rural community, Sherborn experienced effectively no serious traffic problems for its first 300 years. The oldest roads to Medfield and points south pass in front of the Project site, and accordingly, the 41 North Main Street property (site of the historic Whitney Paul Tavern) has accessed North Main street in near its current location ("41 North Main Driveway") since approximately 1716.

Since the 1960's, however, this merged two-lane layout through a narrow colonial-era downtown setting (with antique structures set close to the road, without room for additional lanes or other traditional traffic control solutions) has become extremely congested, as discussed at length by the Applicants' traffic engineers and the Town's peer reviewer during the hearings and in their written submissions.

## 3. Sherborn's Affordable Housing History.

Because affordable housing projects are designed most frequently in small lot and/or multifamily configurations, the lack of municipal water and sewer systems has inherently been in tension with the development of such housing in Sherborn. The Town has nevertheless made notable positive efforts on this front.

In 1986, the Town adopted a novel "additional affordable unit" option for owners of single-family residences. In the 1990s, the Town followed up by self-funding and constructing Sherborn's first affordable housing available for all ages – the Leland Farms project, a leasehold condominium with 17 affordable and 10 market-rate units. In the early 2000s, a 48-unit Chapter 40B development on Whitney Street was proposed, initially turned down by the then ZBA, and then approved by the Massachusetts Housing Appeals Committee. Formerly known as Rising Tide, and now as Whitney Farms, this project remains incomplete seventeen years after approval.

Since 2015, however, a number of Sherborn affordable projects have fared better. Thirty-two units for the Fields At Sherborn project ultimately obtained conditional 40B approval, and construction and sell-out of the project has proceeded quickly. A twelve-unit 40B project at 59 North Main Street was conditionally approved, and a 120-unit 40B project called Coolidge Crossing (which connects to Framingham sewer and Natick water) has just been approved. The Coolidge Crossing project will likely push Sherborn past the 10% affordable housing level, granting the Town safe harbor under Chapter 40B.

See: <https://www.mass.gov/doc/sherborn-town-center-housing-study-final-report/download>.

4. Barsky 2016 Site Assembly.

Against this backdrop of water, sewer and traffic constraints, site assembly for the 31 Hunting Lane/41 North Main Street projects began in March 2016, when Igor Lybarsky (“Lybarsky”), as trustee of the Barsky Estate Realty Trust (u/d/t/ dated August 26, 2011 recorded with the Middlesex South District Registry of Deeds (“MSRD”) in Book 60509, Page 0174) (“Realty Trust”) purchased a 41 North Main Street lot (5.9 acres) (“Fitzpatrick Parcel”) from Kent Fitzpatrick by deed (“Fitzpatrick Deed”) dated March 18, 2016, and recorded in MSRD Book 66954, Page 354.

Simultaneously, a related entity controlled by Igor Lybarsky, Five Rocks LLC (“Five Rocks”) purchased the 43 North Main Street/6 Powderhouse Lane Parcel (“43 North Main Parcel”) from Powderhouse Lane, LLC, controlled by Kent Fitzpatrick, pursuant to a deed (“Fitzpatrick LLC Deed”) recorded in MSRD Book 66954, Page 356. Notably, the Resident Agent, sole Manager and sole Party Authorized to sign real estate documents for Five Rocks was and is Lybarsky, and the address of the LLC is his home address. The 43 North Main Parcel has only a tiny strip of frontage on Powderhouse Lane, a narrow dead-end road connecting to Main Street in the most congested part of downtown with only a stop sign for control. Fortunately, the only current occupants of the 43 North Main Parcel are two very low intensity uses – a landscape company equipment storage yard and a doggy daycare center.

Less than 30 days later, in April 2016, the Realty Trust bought a group of 31 Hunting Lane parcels (“31 Hunting Lane Parcel”) from the Mann family by deed (“Mann Deed”) recorded in MSRD Book 67090, Page 93. The 31 Hunting Lane Parcel included all of the 61B Land.

While the 2020 Chapter 40B applications were nominally submitted for the Project in the name of 31 Hunting Lane LLC and 41 North Main Street LLC (“Applicants”), the application materials are clear that the sole Resident Agent, sole Manager and sole Party Authorized to sign real estate documents for both Applicants is, again, Lybarsky. Moreover, the only real estate ownership references given in the application to support any claim of Site Control in favor of these nominal Applicants are the Fitzpatrick Deed, the Fitzpatrick LLC Deed and the Mann Deed (which deeds remain the most recent of record for all parcels at issue). None of these deeds run to the Applicants; the only deeds on record run to the Realty Trust and Five Rocks, respectively.

Accordingly, the Realty Trust, Five Rocks, 31 Hunting Lane LLC and 41 North Main LLC are together referred to herein as “Barsky.”

5. Sherborn Square project: Barsky’s initial proposal for off-site public water supply, off-site septic, and a new signalized intersection at the 41 North Main Driveway.

In 2016 and 2017, Barsky proposed a significant redevelopment for the Fitzpatrick Parcel, the 43 North Main Parcel, and the 31 Hunting Lane Parcel called “Sherborn Square.”

See: [https://www.sherbornma.org/sites/g/files/vyhlf1201/f/uploads/presentation\\_19-0117-final.pdf](https://www.sherbornma.org/sites/g/files/vyhlf1201/f/uploads/presentation_19-0117-final.pdf), and <http://www.sherbornsquare.com>.

While the Sherborn Square proposal has programmatic differences from that contained in the Applicants' current Chapter 40B proposals, Barsky's Sherborn Square materials (which were submitted to the Town as public records) demonstrated Barsky's keen awareness of:

1. the need for a large public water supply (proposal included wells on land not controlled by Barsky, and located roughly one mile from the 31 Hunting Lane and 41 North Main Street sites), with an expected cost in the range of \$2-4 Million.

See: <http://sherbornsquare.com/projects/promo/sherbornsquare.com/media/files/Town-Hall-Hearing.pdf>;

2. the need for a primary site entry and exit for regular and emergency traffic at a Town-approved rebuilt and re-signalized 41 North Main Street Driveway, with Powderhouse Lane serving only a minor and secondary role.

See: [https://www.sherbornma.org/sites/g/files/vyhlif1201/f/uploads/presentation\\_19-0117-final.pdf](https://www.sherbornma.org/sites/g/files/vyhlif1201/f/uploads/presentation_19-0117-final.pdf) (pages 3 and 15); and

3. the substantial risk that the lack of town sewers presents. As set forth within the project description: *"Septic contamination of well-water in Town Center is not only a potential health threat, but it could threaten town finances by forcing expensive emergency infrastructure remediation."* (To service Sherborn Square, Barsky proposed a WWTP located on Town Land off the 31 Hunting and 41 North Main Street sites, under playing fields near the Pine Hill School).

The Sherborn Square project ultimately did not obtain sufficient support at a 2017 Special Town Meeting in order to proceed, and accordingly, was abandoned.

6. Sherborn's 2017- 2020 Affordable Housing progress.

Meanwhile, the Town continued to work on achieving its affordable housing goals.

During 2017, the Town generated a Housing Production Plan and obtained DHCD approval of the same, and Town Meeting approved a rezoning to enable a 67- unit age-restricted affordable project ("Meadowbrook Commons") near the Framingham/Natick border.

See: [https://www.sherbornma.org/sites/g/files/vyhlif1201/f/uploads/planning\\_board\\_summary\\_of\\_article\\_1.pdf](https://www.sherbornma.org/sites/g/files/vyhlif1201/f/uploads/planning_board_summary_of_article_1.pdf).

Meadowbrook Commons, if built, will significantly add to Sherborn's SHI inventory. The project would use public water and sewer connections from abutting towns, and is not in the traffic-challenged downtown location. Meadowbrook Commons has not, however, been permitted, nor has construction started.

In 2019 the Town also endorsed its 2019 Master Plan addressing housing goals and needs, and created an Affordable Housing Trust.

See: [https://www.sherbornma.org/sites/g/files/vyhlf1201/f/uploads/sherborn\\_master\\_plan\\_04-12-2019.pdf](https://www.sherbornma.org/sites/g/files/vyhlf1201/f/uploads/sherborn_master_plan_04-12-2019.pdf)

Also during 2019, a 12-unit Chapter 40B project at 59 North Main Street was conditionally approved, despite significant concerns about impact on drinking water supply availability. That project is nearly completely constructed and is selling briskly, although some of the feared adverse water supply impacts appear to have come to pass (see below).

Finally, by decision dated June 18, 2021 and filed with the Sherborn Town Clerk on June 21, the ZBA approved a 120-unit Local Initiative Project called Coolidge Crossing, which, if constructed, will place the Town within 40B's 10% statutory minima safe harbor. Like Meadowbrook Commons, Coolidge Crossing is located outside of the downtown area, thereby avoiding traffic problems, and will use public water and sewer from Framingham and Natick.

In early October 2020, when the Applicants filed their Chapter 40B applications, the Sherborn SHI percentage remained below the 10% Chapter 40B "safe harbor" threshold. However, the issuance of a Project Eligibility Letter for the Coolidge Crossing project seemed imminent, and the Coolidge Crossing developer seemed likely to file a 40B Application at any time.

#### 7. The Current Applications.

In November 2019, with the Sherborn Square project tabled, and the looming prospect that Chapter 40B approvals for Meadowbrook Commons and Coolidge Crossing would bring Sherborn within the 760 CMR 56.03(a) Unit Housing Minimum "safe harbor," Barsky filed new Chapter 40B applications with MassHousing for the conjoined Project at 31 Hunting Lane/41 North Main Street.

For the new Project, Barsky now claimed that a robust new public water supply from an aquifer a mile away was no longer needed. Rather, in the new design, Lybarsky asserted, without adequate supporting test data, that adequate safe drinking water for eighty-seven new dwellings could come from two new wells located on the 31 Hunting Lane Parcel.

Similarly, the new re-signalized intersection design features of Sherborn Square at North Main Street vanished, and all of the emergency and regular traffic needs of a sixty-unit apartment complex on the Fitzpatrick Parcel would now, according to Barsky, be safely shunted onto tiny Powderhouse Lane.

Finally, all prior concerns with septic contamination of wells in downtown vanished, as, according to Barsky, wastewater from the proposed eighty-seven units could be discharged at a single upgradient location on the 31 Hunting Lane Parcel, through the use of a newly constructed WWTP.

The Project received substantial criticism during the MassHousing eligibility process from several Town boards, largely centered on site control, drinking water, wastewater, and traffic safety concerns.

8. The Project Eligibility Letters.

On April 30, 2020, MassHousing issued two Project Eligibility Letters (“PEL”) for the Project.

While the PEL correctly noted that, as of the date of the PEL, Sherborn’s SHI remained below the 10% statutory minimum requirement, the PEL also recognized the Town’s various affordable housing efforts as “meaningful.”

Notably, the PEL concerning the 31 Hunting Lane parcel expressly addressed concerns raised by the Town, stating, in part, as follows:

[T]he following issues should be addressed in your application to the local Zoning Board of Appeals ("ZBA") for a Comprehensive Penn it and fully explored in the public hearing process prior to submission of your application for Final Approval under the Program:

- The Applicant should be prepared to discuss the impact of the Project on water resources and private wells in the area and respond to reasonable requests for mitigation.
- The Applicant should be prepared to discuss the Site's encumbrance under M.G.L c.61B and all associated requirements for removal of the land from the tax classification.
- The Applicant should continue to engage with the Municipality to ensure adequate access is provided for emergency vehicles and responders.

The PEL concerning the 41 North Main Street parcel also addressed concerns raised by the Town, stating, in part, as follows:

[I]n light of feedback received from the Municipality, the following issues should be addressed in the application to the Sherborn Zoning Board of Appeals, and the Applicant should be prepared to explore them more fully during the public hearing process:

- The Applicant should be prepared to provide sufficient data to assess potential traffic impacts on area roadways and intersections, including the safety of proposed site access and egress, particularly as it relates to Massachusetts Complete Streets recommendations.
- The Applicant should be prepared to address Municipal concerns relative to the size, scale and density of the proposed Project and its impact on the character of the surrounding neighborhood, and to fully describe the proposed measures to address and mitigate these concerns. In particular, the Applicant is encouraged to explore architectural details, exterior materials, and building setbacks that further minimize the scale and mass of the building.

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Despite the clear admonitions of the PEL, Barsky made no material changes to the Project between April 30, 2020 and October 5, 2020, nor did they otherwise attempt to address the concerns outlined within the PEL. Meanwhile, the issuance of a PEL and potential ZBA filing for Coolidge Crossing (which could allow Sherborn to meet the 10% safe harbor) loomed.

The Applicants filed the ZBA applications for the Project ten days before the PEL issued for Coolidge Crossing, and eleven days before the Coolidge Crossing Chapter 40B filing.

## 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 “Project Site”). The proposed combined Project would be subsidized by the New England Fund Program of the Federal Home Loan Bank of Boston.

2. The Project Site is 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 proposes 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 intends 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.

Map 11, Parcel 3B, containing approximately 8 acres of vacant land, and the applicant intends 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 appears critical to the feasibility of the 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 are proposed to be developed, while a 1-acre parcel would be retained separately by the Applicants

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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 Project, Barsky proposes 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 be 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’ 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 propose to increase this density over 1,200%, to eighty-seven units.

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, listed herein as **Exhibit A**. 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.

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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.

## II. 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.

## III. FINDINGS

The Board finds as follows:

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.

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

Water Supply. As set forth in several of the submissions listed in **Exhibit A**, including the May 26, 2021 letter of Roger Demler, Sherborn Water Commission Chair, 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 noted in the April 23, 2021 letter submitted by CLWE, "[t]he proposed project will require a dramatic increase in water withdrawal from the deep bedrock aquifer, which is low yield and has small water storage capacity."

As set forth in the May 5, 2021 Nobis report, the Project will be entirely dependent on fractured bedrock wells. Only two test 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. 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 eighty-seven additional residences 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 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.

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, and obtain and comply with a Groundwater Discharge Permit in accordance with 314 CMR 5. 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 expressed substantial concerns with the Project. Specifically, it strongly recommended against granting the requested waiver from the local regulation for percolation rate (forty minutes per inch) 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.

Accordingly, the Board finds that the drinking water required, and wastewater generated, by the Project represent a substantial risk the health and safety of the surrounding properties and residents, and it cannot therefore support a waiver of the stricter local Board of Health regulations.

3. The proposed access to the Project Site does not satisfactorily protect the health and safety of the Project's residents nor those of the surrounding neighborhood.

Access/Fire Safety. The Board received evidence of substantial access and safety concerns with respect to the Project. At the Board's February 18, 2021 hearing, the Fire Department, Planning Board and Department of Public Works all strongly expressed opposition to the Applicants' proposal to move access to the 41 North Main Street site from North Main Street to Powderhouse Lane.

The Sherborn Fire Department raised serious concerns with both the 41 North Main Street and 31 Hunting Lane sites, which were not adequately addressed by the Applicants. The Fire Department has never signed off on the Applicants' plans. By email dated May 14, 2021, Fire Chief Zachary Ward summarized his concerns to the Board as follows:

"I brought up [to the Applicants] the need for a "truck turning radius" schematic for the emergency access road on Hunting Lane for 41 North Main, as well as the entrance to 31 Hunting Lane. I also requested updated site plans for 41 North Main Street, as we discussed moving some hydrants. We also discussed running a fire pipe from Cemetery Lane to supply water to the development. We also discussed concerns regarding having emergency apparatus respond to the complex on Powderhouse Lane. To date, I have not received anything to alleviate any of these concerns. I am extremely concerned with emergency vehicle access to the site." (Emphasis added),

The Board also received comments from the Public Works Department expressing significant concerns regarding the use of Powderhouse Lane as the sole access to the 41 North Main Street site. In a letter dated May 27, 2021, Director of Public Works Sean Killeen noted that the width of Powderhouse Lane is "variable, ranging from 28 feet to as little as 22 feet... with obstacles along the sides of parked cars, utility poles and plantings." He further noted the "challenges" faced by emergency vehicles accessing the narrow way and that "further concerns about getting hoses, water and other resources needed in an emergency have not been addressed." Additionally, Director Killeen observed that the "entering and exiting of vehicles from Powderhouse onto this portion of North Main Street, comprised of merged state routes 16 and 27, has long been identified as a challenge."

The Board noted during the hearings that the access for development on the 41 North Main Street site had, in all prior iterations, been via the existing 41 North Main Street Driveway, and that the relocation of all traffic to Powderhouse Lane had been unilaterally selected by the Applicants as a design feature unique to this Chapter 40B proposal.

In accordance with the above-described concerns, the Board finds that the sole access, via Powderhouse Lane, to the 41 North Main Street site proposed by the Applicant is inadequate and unsafe, and that the Applicants have failed to provide adequate water resources for fire department use during an emergency.

4. The Project is incompatible with the surrounding neighborhood and would remove valuable open space from the town center.

Design Incompatibility. As noted above, Sherborn is a bucolic town with narrow rural roads and colonial structures. The area proposed to be developed by the Applicants is a substantial piece of open space in the center of Sherborn, bisected by railway tracks. The 31 Hunting Lane parcel has never been developed and has been treated for local tax purposes as recreational land pursuant to G.L. c.61B. The parcel is adjacent to a non-profit animal sanctuary with a network of recreational trails.

The 41 North Main Street portion of the Project is located in a historic district, the Edward's Plain-Dowse's Corner National Register District. One of Sherborn's most historic structures, a house commonly known as the Whitney-Paul Tavern, thought to be over three hundred years old, is located on the property. The Applicants propose to introduce two thirty-unit, three and a half story high apartment building structures into this neighborhood.

The Applicants have not provided documentation to establish that the Project has gone through review under 301 CMR 11.03, or that an Environmental Notification Form has been filed.

Consistent with the criteria set forth in 760 CMR 56.04(4), the relationship to existing development in the surrounding area must be taken into account when reviewing a Chapter 40B project. In terms of design, location, and impact, the Board finds that this Project is entirely incompatible with its surrounding neighborhood and incompatible with the Town's interest in preserving valuable open space.

### DECISION

In reviewing these Applications, the Board identified concerns relative to health, local water supply, wastewater disposal, wetlands preservation, storm water management, traffic, and a design that is inconsistent with the surrounding historic neighborhood and the preservation of open space. The Board was provided evidence showing that the Project could not safely manage the wastewater generated by the Project and could not adequately provide the Project's residents with safe drinking water supplies or protect the drinking water supplies of surrounding properties. Given the opportunity to present opposing evidence, or allow experts retained by parties other than the Applicants to gather such evidence, the Applicants repeatedly failed and refused to do so.

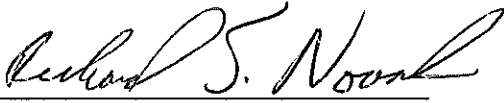
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In consideration of all of the foregoing, including the plans, documents and testimony given during the public hearing, the Board finds that the substantial local concerns related to this Project outweigh the Town's need for affordable housing, and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

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**RECORD OF VOTE**

The Board of Appeals voted unanimously (3 -0) at its public meeting on June 28, 2021, to deny the Applicants' applications 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.



Richard S. Novak, Chairman

Filed with the Town Clerk on July 8<sup>th</sup>, 2021.



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.

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**EXHIBIT A**

**41 North Main Street  
ZBA Hearing Materials**

1.	LD Massachusetts Chapter 40B Experience
2.	Paul Haverty Resume
3.	Gary Lybarsky Resume
4.	Dream Resume
5.	Dream Qualifications
6.	A&M Company Qualifications
7.	A&M Resume, Michael Malynowski
8.	List of Requested Waivers
9.	Transportation Impact Assessment
10.	Architectural Plans
11.	Subdivision Plans
12.	Site Development Plans
13.	2016 Deed
14.	Rockland Trust Letter of Interest
15.	MA Certificates of Formation
16.	Narrative Description & Development Summary
17.	Project Eligibility/Site Approval
18.	Request for Finding of Facts
19.	ZBA Petition
20.	Cover letter & table of contents
21.	MassHousing Approval Letter (May 5, 2020)
22.	Comments from Historical Commission to SB - December 14, 2019
23.	Letter From Historical Commission to SB - December 2019
24.	Historical Commission response to January 31st letter from LDS Consulting (February 2020)
25.	Letter from Select Board to ZBA dated October 27, 2020
26.	Applicant's Presentation to the ZBA, October 29, 2020
27.	Vote of the ZBA dated October 29, 2020
28.	Letter from Historical Commission to the Zoning Board, November 18, 2020

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29.	Drainage Plan - November 18, 2020
30.	Grading Plan - November 18, 2020
31.	Landscape Plan 2 - November 18, 2020
32.	Landscape Plan 1 - November 18, 2020
33.	Planning Board Comments - January 5, 2021
34.	PSC - Peer Review Comments - Transportation Impact Assessments - January 11, 2021
35.	Fire Truck Turn Plan - February 3, 2021
36.	Truck Turn Plan - February 3, 2021
37.	Allen & Major Response - Non-traffic related comments - February 3, 2021
38.	Vanasse & Associates Response w/ regards to Transportation Impact - February 3, 2021
39.	Response from DPW Director regarding use of Powderhouse Lane - February 17, 2021
40.	Sherborn Fire Department Comments - February 18, 2021
41.	PSC - Peer Reviewers Comments - February 18, 2021
42.	Vanasse & Associates response to Transportation Impact - March 1, 2021
43.	Sherborn Historical Commission letter dated March 16, 2021
44.	PSC Stormwater Review - March 22, 2021
45.	Water Supply & Wastewater Treatment Presentation - March 24, 2021
46.	Letter from Craig Mills, abutter - March 24, 2021
47.	List of Requested Waivers - April 9, 2021
48.	Drainage Report - April 9, 2021
49.	Updated Site Plans - April 9, 2021
50.	Stormwater Response Letter - April 9, 2021
51.	John Garrison, Abutter Letter - April 12, 2021
52.	Order on Applications Preliminary Injunction - April 13, 2021
53.	PSC Evaluation of Responses to Stormwater Peer Review Comments - April 15, 2021
54.	Creative Land & Water Engineering Report - April 23, 2021
55.	Stormwater Information - April 26, 2021 a. Allen & Major's Response to Peer Review Comments on Stormwater b. Grading & Drainage Plan

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56.	Onsite Engineering Response to Creative Land & Water Report - April 30, 2021
57.	Historical Commission Comments - April 30, 2021
58.	PSC Additional Comments - May 4, 2021
59.	Allen & Major Response to Creative Land & Water Report - May 5, 2021
60.	Allen & Major Response to Peer Review Comments - Stormwater - May 5, 2021
61.	Memo from Michael Lesser, Sherborn Resident, Energy Efficiency & Climate Change Issues - May 5, 2021
62.	Groundwater Protection Committee Statement - May 5, 2021
63.	Nobis Report - May 5, 2021
64.	Conservation Comments - April 23 2021
65.	Proposed Pine Residences & Apple Hill Estates Project Conditions & Local Wetlands Regulations - Fill and Stumps - May 6, 2021
66.	Board of Health Comments - May 6, 2021
67.	Energy Committee Proposed Conditions - May 12, 2021
68.	Fire Chief's Comments/Concerns - May 14, 2021
69.	Email to BOH - well issue - May 17, 2021
70.	Letter from Abutters - water concerns - May 17, 2021
71.	Utility Plan from Allen & Major - May 17, 2021
72.	Plans from Allen & Major addressing Fire Chief Concerns - May 17, 2021
73.	John Garrison Letter of May 26, 2021
74.	Letter from Creative Land & Water Engineering - May 25, 2021
75.	Redlined Updated List of Waivers - May 26, 2021
76.	Letter from Roger Demler, Chair of Water Commissioners - May 26, 2021
77.	Letter from Andrea Stiller, Resident - May 25, 2021
78.	Email from Onsite Engineering - May 26, 2021
79.	Letter from Sean Killeen, Director of DPW - May 27, 2021

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**31 Hunting Lane**  
**ZBA Hearing Materials**

1.	Paul Haverty Resume
2.	John Pugh Resume
3.	Gary Lybarsky Resume
4.	A&M Company Qualifications
5.	A & M Michael Malynowski Resume
6.	LDS Massachusetts Chapter 40B Experience
7.	Rental Preliminary List of Requested Waivers - October 15, 2020
8.	Updated Preliminary List of Requested Waivers - October 15, 2020
9.	Hunting Lane TIA
10.	Ownership Architectural Plans
11.	ZBA Submission Plans - October 1, 2020
12.	41 North Main Street Deed
13.	31 Hunting Lane Deed
14.	Rockland Trust Letter of Interest
15.	Hunting Lane LLC MA Certificates of Formation
16.	Project Description Ownership

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17.	PEL Apple Hill
18.	31 Hunting Request for Findings of Fact (October 5, 2020)
19.	ZBA Petition Ownership
20.	Cover Letter & Table of Contents
21.	MassHousing Approval Letter (May 5, 2020)
22.	Letter from Abutters - October 17, 2020
23.	Select Board Letter to ZBA dated October 27, 2020
24.	Applicant's Presentation to the ZBA - October 29, 2020
25.	ZBA Vote October 29, 2020
26.	Letter from Sherborn Resident (November 2, 2020)
27.	Chapter 61B map (November 2, 2020)
28.	Letter from Abutters - November 17, 2020
29.	Drainage Plan - November 18, 2020
30.	Grading Plan - November 18, 2020
31.	Landscape Plan 2 - November 18, 2020
32.	Landscape Plan 1 - November 18, 2020

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33.	Letter from Applicant's Counsel - Chapter 61B Questions - November 25, 2020
34.	Response from Town Counsel with regards to Chapter 61B - November 25, 2020
35.	Planning Board Comments - January 5, 2021
36.	PSC - Peer Review Comments - Transportation Impact Assessments - January 11, 2021
37.	Allen & Major Non-Traffic Related Comments - February 3, 2021
38.	Vanasse & Associates Transportation Impact Comments - February 3, 2021
39.	PSC - Peer Review Comments - February 18, 2021
40.	Updated Site Development Plans - March 2, 2021
41.	Updated Drainage Plans - March 2, 2021
42.	Letter explaining updated plans - March 2, 2021
43.	Vanasse & Associates Response to Transportation Impact - March 1, 2021
44.	Town Counsel Letter, March 3, 2021 re: Exercise of Right of First Refusal
45.	PSC Stormwater Review - March 22, 2021
46.	Water Supply & Wastewater Treatment Presentation - March 24, 2021
47.	Overview on Single Family Home Plans - March 24, 2021 a. First Floor Plan with Master on first floor b. First Floor Plan with all bedrooms up c. Footprint
48.	Letter from Craig Mills, abutter - March 24, 2021

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49.	Updated Site Plans - April 9, 2021
50.	Stormwater Response Letter - April 8, 2021
51.	Apple Hill Estates Drainage Report
52.	Letter from John Garrison, abutter - April 12, 2021
53.	Order on Applications for Preliminary Injunction - April 13, 2021
54.	PSC Evaluation of Responses to Stormwater Peer Review Comments - April 15, 2021
55.	Creative Land & Water Engineering Report - April 23, 2021
56.	Soil Suitability Assessment for On-Site Sewage Disposal
57.	Stormwater Information - April 26, 2021 a. Drainage Report b. Allen & Major's Response to Peer Review on Stormwater Management c. Grading & Drainage Plan d. Detail Sheet e. Detail Sheet
58.	On-Site Engineering response to Creative Land & Water Report - April 30, 2021
59.	PSC additional comments - May 4, 2021
60.	Allen & Major Response to Creative Land & Water Report - May 5, 2021
61.	Allen & Major Response to Peer Review Comments - Stormwater - May 5, 2021
62.	Memo from Michael Lesser, Sherborn Resident, Energy Efficiency & Climate Change Issues - May 5, 2021
63.	Groundwater Protection Committee Statement - May 5, 2021

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64.	Nobis Report - May 5, 2021
65.	Conservation Comments - April 23, 2021
66.	Hunting Lane - Order of Conditions #54 dated October 2019
67.	Proposed Pine Residences & Apple Hill Estates Project Conditions & Local Wetlands Regulations - Fill and Stumps - May 6, 2021
68.	Board of Health Comments - May 6, 2021
69.	Energy Committee Proposed Conditions - May 12, 2021
70.	Proposed Alternate Site Plan from Abutters - May 14, 2021
71.	Letter from Abutters - May 14, 2021
72.	Fire Chief's Comments/Concerns - May 14, 2021
73.	Email to BOH - well issue - May 17, 2021
74.	Letter from Abutters regarding water concerns - May 17, 2021
75.	Plans from Allen & Major addressing Fire Chief Concerns - May 17, 2021
76.	Letter from Planning Board - Stormwater Issues - May 19, 2021
77.	Response from Developer with regards to Alternate Site Plan from Abutters - May 20, 2021
78.	Letter from Abutters, May 24, 2021
79.	John Garrison Letter of May 26, 2021

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80.	Letter from Creative Land & Water Engineering - May 25, 2021
81.	Redlined Updated List of Waivers - May 26, 2021
82.	Letter from Roger Demler, Water Commission Chair - May 26, 2021
83.	Letter from Andrea Stiller, Resident - May 25, 2021
84.	Email from Onsite Engineering - May 26, 2021
85.	Goddard Consulting Wetlands & Vernal Pool Report - May 27, 2021

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