

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
HOUSING APPEALS COMMITTEE
NO. _____

41 NORTH MAIN STREET, LLC,

Appellant,

v.

SHERBORN BOARD OF APPEALS,

Appellee

INITIAL PLEADING UPON DENIAL OF A COMPREHENSIVE PERMIT

INTRODUCTION

1. This is an appeal brought pursuant to G. L. c. 40B, §§ 20-23 and 760 CMR 56.06(4) brought by the Appellant/Applicant 41 North Main Street, LLC (the “Applicant”) from a decision of the Sherborn Board of Appeals (the “Board”) denying a comprehensive permit for the construction of a sixty (60) unit rental on property located at 41 North Main Street, Sherborn, Massachusetts (the “Property”).

I. PRIOR PROCEEDINGS – 760 CMR 56.04(a)(1)

2. On April 30, 2020, MassHousing issued a Project Eligibility Letter to the Applicant, authorizing the construction of sixty (60) rental dwelling units (the “Project”) on the Property.

3. On October 6, 2020, the Applicant filed a comprehensive permit application (the “Application”) with the Board seeking the approval for the development

of a sixty (60) rental dwelling unit Project on the Property. A copy of the Application will be submitted with the Pre-Hearing Order.

4. The Board opened the public hearing on October 29, 2020.

5. The Board held nine (9) separate public hearings on the Application. The Applicant did not provide any extensions to the one-hundred and eighty (180) day period for conducting the public hearing pursuant to 760 CMR 56.05(3).

6. The Board was represented during the course of the public hearing by its peer review consultant Thomas Houston, P.E., of Professional Services Corporation, P.C. The Board also notified the Applicant on April 16, 2021 that it wanted to retain Dr. James Vernon of the Nobis Group to review water and wastewater concerns. Despite the fact that this date was beyond the one hundred and eighty (180) day period for closing the public hearing, the Applicant agreed to fund a portion of the review work proposed by Dr. Vernon.

6. The Applicant also provided detailed information regarding water and wastewater from its consultants David Formato, P.E., and Susan Hunnewell, P.E., of Onsite Engineering, Inc., as well as general civil engineering information from its engineer Michael Malynowski, P.E., of Allen & Major Associates, Inc. The Applicant also provided detailed traffic information from its traffic engineer Jeffrey Dirk, P.E., PTOE of Vanasse & Associates, Inc., as well as information relating to wetlands and species habitat from Scott Goddard, PWS and Daniel L. Wells, M.S., of Goddard Consulting, LLC.

7. The Board closed the public hearing on May 27, 2021.

8. The Board held multiple deliberative sessions before voting on its decision on June 28, 2021.

9. The Board filed its decision with the Sherborn Town Clerk on July 8, 2021. A copy of the Board's decision is attached hereto as Exhibit "1".

II. OBJECTIONS TO FINDINGS OF FACT

10. Section A, Summary – This section incorrectly couples the Project with a separate application located at 31 Hunting Lane, Sherborn, Massachusetts. The two projects are not inter-dependent. The Applicant could, if necessary, relocate the proposed wastewater treatment plant for the 41 North Main Street development without reliance upon the 31 Hunting Lane property. Moreover, the Board incorrectly states that the consideration of these two projects as a single project has been approved by the Applicant. The Board's claims in this section are thus not factually accurate.

11. Section B – G. L. c. 61B, the Option to Purchase and Site Control under c. 40B. This section addresses the issue of Site Control without making any actual findings. The Applicant disputes the claims made by the Town regarding Site Control, and notes that the Board made the affirmative decision during the course of the comprehensive permit hearing process not to avail itself of the process set forth in 760 CMR 56.04(5) for challenging changes in Site Control after the issuance of a Project Eligibility Letter. Moreover, the Chapter 61B issues discussed in the Board's decision are applicable only to a portion of the 31 Hunting Lane development. The Project can move forward independently, without the 31 Hunting Lane project.

12. Section C, Key Background and Project History – This section addresses historical circumstances in Sherborn unrelated to the proposed development. The

Applicant neither accepts nor denies the majority of these factual claims, as they are not relevant to the Project. The Applicant does note that the claim of a large public water supply at an expected cost of \$2,000,000 to \$4,000,000 involved an area much larger than the proposed Project, and is not relevant to this proposal. Furthermore, contrary to the claims of the Board, there was no Special Town Meeting held on these proposals, but rather there were only background informational sessions that did not garner the necessary local support to prompt the Property owner to seek a zoning change from Town Meeting. The Applicant also notes that in the affordable housing history, the Board fails to note that the Fields at Sherborn project proceeded only after the developer was forced to appeal the Board's decision to the Housing Appeals Committee (the "Committee"), as well as being forced to appeal the denial of the Title 5 approval by the Sherborn Board of Health to the Land Court and being forced to appeal the denial of an Order of Conditions by the Sherborn Conservation Commission to the Department of Environmental Protection. The Fields at Sherborn development certainly does not hold up as evidence of a municipality working to increase its affordable housing stock. Similarly, the Coolidge Crossing project referenced in the Board's decision was the subject of cross-appeals to the Housing Appeals Committee and the Land Court, appeals which have been stayed since 2017, and which was only able to obtain local approvals nearly four years later. Again, hardly evidence of municipal action open to the development of affordable housing. Moreover, the approval of the Coolidge Crossing project on June 18, 2021 is irrelevant to the question of whether the Town of Sherborn has sufficient affordable housing to be consistent with local needs as of the date of the comprehensive permit application on October 5, 2020. Finally, the Applicant objects to the factually inaccurate

claim made by the Board that no material changes were made to the Project after the issuance of the Project Eligibility Letter. Contrary to the false claims made in the Board's decision, the Applicant made significant material changes to the design of the Project both prior to submitting its comprehensive permit application and during the course of the public hearing. These changes include revising the Project to include two (2) thirty-unit rental structures rather than a single sixty-unit structure. The Applicant also reduced the height on North Main Street to two (2) stories and the height at the railroad to three and one-half (3.5) stories, instead of the originally proposed four (4) stories and five (5) stories respectively. The Applicant moved the development away from the Hunting Lane/North Main Street intersection, to concentrate development on the previously disturbed area of the Property. The setback from North Main Street was increased from sixty-five feet (65') to two hundred and one feet (201'). The setback to Hunting Lane was increased from forty-five feet (45') to sixty-five feet (65'). The design changes significantly reduce the amount of blasting required, by up to sixty-five percent (65%). These changes, plus additional changes made by the Applicant all address concerns raised both by the Subsidizing Agency during the Project Eligibility process and by the Board during the hearing process. The Board's claim that no material changes were made from the plans reviewed as part of the Project Eligibility Letter determination is demonstrably false, and shows the bad faith nature of the Board's decision.

OBJECTION TO PROCEDURAL HISTORY

13. The Applicant objects to the inclusion of the procedural history No. 1 relating to 31 Hunting Lane, as that application is separate and distinct from the Project.

14. The Applicant objects to the inclusion of the procedural history No. 2 relating to 31 Hunting Lane, as that application is separate and distinct from the Project.

15. The Applicant objects to procedural history No. 3, as the 31 Hunting Lane project is separate and distinct from the Project.

16. The Applicant objects to procedural history No. 4, as it mischaracterizes the proposed one-acre zoning-compliant parcel as a “small one-acre lot”.

17. The Applicant objects to procedural history No. 5, as it ignores the proposed access to Hunting Lane.

18. The Applicant objects to the inclusion of the procedural history No. 6 relating to 31 Hunting Lane, as that application is separate and distinct from the Project. The Applicant also disputes the Board’s claim that 31 Hunting Lane and 41 North Main Street could only support seven (7) lots under Chapter 40A, as this is factually inaccurate.

19. The Applicant has no objection to the inclusion of procedural history No. 7.

20. The Applicant has no objection to the inclusion of procedural history No. 8.

21. The Applicant has no objection to the inclusion of procedural history No. 9.

22. The Applicant has no objection to the inclusion of procedural history No. 10.

23. The Applicant has no objection to the inclusion of procedural history No. 11.

24. The Applicant objects to the inclusion of procedural history No. 12.

25. The Applicant objects to the inclusion of procedural history No. 13.

IV. OBJECTIONS TO GOVERNING LAW

26. The Applicant objects to the Board's incomplete recitation of the law governing comprehensive permit decisions.

V. OBJECTIONS TO FINDINGS

27. The Applicant objects to the Board's finding No. 1 that the Town's need for low and moderate income housing is not substantial. Sherborn's SHI at the time the Application was filed was 2.3%, far below the required 10% affordable housing minimum.

28. The Applicant objects to the Board's finding No. 2 that the Project will endanger the drinking water resources of the surrounding neighborhood. The Applicant submitted substantial information regarding the adequacy of the water supply. Moreover, the Applicant proposes a public water supply, which is within the exclusive permitting discretion of the Department of Environmental Protection (the "DEP"). The Board has no permitting authority over drinking water for the Project. Similarly, the Applicant has proposed an on-site wastewater treatment facility, the permitting of which is also within the exclusive jurisdiction of the DEP. Once again, the Board has no permitting authority over this issue, and thus does not have the right to deny the comprehensive permit based upon purported wastewater concerns.

29. The Applicant objects to the Board's finding No. 3 regarding vehicular safety. The Board's own peer review engineer acknowledged that the use of Powderhouse Lane for access presented a convenience issue, not a safety concern. Moreover, the purported safety concerns raised by the Town's DPW Director are clearly

a pretext for the Town's opposition to the development of affordable housing on the Property. Powderhouse Lane, ranging in width from twenty-two feet (22') to twenty-eight feet (28') is clearly wide enough to accommodate two-way traffic and to provide for emergency access. Furthermore, the Board once again ignored the emergency access connection to Hunting Lane from the Project. Finally, the Applicant agreed to move the project entrance as requested by the Board and to contribute a fair-share portion of the estimated cost to design and construct the improvements as defined by the net increase in traffic that the Project represents at the intersection during the weekday peak hours vs. the No-Build condition. The Applicant's traffic consultant informed the Board that, using this methodology and without consideration of trips generated by the existing uses that occupy the Project site, the Project represents an approximate 0.8 percent increase in traffic. As such, the fair-share allocation of the intersection improvements to the Project would be \$4,000 ($0.8\% \times \$500,000 = \$4,000$). The Board did not respond to this offer.

30. The Applicant objects to the Board's finding No. 4 regarding compatibility with the surrounding neighborhood and the removal of valuable open space. First, the Board raises concerns regarding compatibility relating only to the proposed project at 31 Hunting Lane, which is a separate and distinct development from the Project. Second, the Board claims that the Applicant has not submitted documentation that it has undergone review pursuant to 301 CMR 11.03 or that an Environmental Notification Form has been filed. The Applicant is not required to comply with MEPA requirements prior to obtaining a comprehensive permit, and the Board may not base a decision denying a comprehensive permit on this reasoning.

V. RELIEF SOUGHT

31. The Applicant prays that the Housing Appeals Committee, after hearing, overturn the decision of the Board denying the Comprehensive Permit, and ordering the Board to grant a comprehensive permit for the Project as proposed.

VIII. NAME AND ADDRESS OF APPLICANT

32. 41 North Main Street, LLC
Igor Lybarsky, Manager
23 Hunting Lane
Sherborn, MA 01770

Respectfully submitted,
31 Hunting Lane, LLC
By its attorneys,

Date: July 13, 2021



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