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PAUL J. HAVERTY
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August 30, 2023

Via Email

Richard S. Novak, Chair
Sherborn Zoning Board of Appeals
19 Washington Street
Sherborn, MA 01770

RE: Fenix Partners Farm Road Development, LLC
55-65 Farm Road, Sherborn, MA
Response to Restriction Claim

Dear Chair Novak:

This office represents Fenix Partners Farm Road Development, LLC (the “Applicant”) regarding the comprehensive permit application for property located at 55-65 Farm Road, Sherborn, Massachusetts (the “Property”). At the Board’s initial hearing on this application on August 1st, we were requested to address the claim that the Property is subject to a deed restriction that would purportedly prevent the Applicant from developing the Property as proposed. Because the Property is not subject to the restriction alleged to be applicable, and because even if such restriction was applicable the Applicant’s proposed development would not violate said restriction, the claims that a deed restriction prevents the Project from proceeding is inaccurate.

As an initial matter, the Board has no jurisdiction to determine whether or not an applicant meets the site control requirements under Chapter 40B. Pursuant to 760 CMR 56.04(1)(c), the Subsidizing Agency (in this instance MassHousing) is required to make a determination that the Applicant controls the site as part of its determination of project eligibility. MassHousing made this determination as part of the issuance of the Project Eligibility Letters, a copy of which was included in the comprehensive permit applications. This issue was squarely addressed with MassHousing during the PEL process, as shown by the August 2, 2022 letter from this office to Mike Busby of MassHousing. A copy of the August 2, 2022 letter is included herewith. Pursuant to 760 CMR 56.04(6), the determination of site control made by the Subsidizing Agency is conclusive. The Board’s right to challenge the determination of the Subsidizing Agency is limited “solely upon the grounds that there has been a substantial change affecting the project eligibility requirements set forth in 760 CMR 56.04(1).” The burden of proof is on the Board in such challenge. Furthermore, the only way to challenge this determination is to follow the procedure set forth in 760 CMR 56.04(5), which requires a

written submittal to the Subsidizing Agency, after which the Subsidizing Agency is charged with determining whether or not the change is substantial. This is the Board's sole option for challenging site control. Absent a determination from the Subsidizing Agency pursuant to this process, the determination contained in the Project Eligibility Letter remains controlling.

While the determination made by the Subsidizing Agency is conclusive, we note that the underlying claim that a restriction prevents the development is also without merit. The restriction was created by a deed from Richard Saltonstall et al to Gilber and Barbara Mudge, dated April 28, 1979, and recorded with the Middlesex South Registry of Deeds in Book 13688, at Page 650. This restriction states that “[t]he parcel hereinbefore described shall not be subdivided into lots or parcels nor shall any conveyance or transfer of less than the whole parcel be made.” Because this restriction was not limited in time, it is subject to the provisions of G. L. c. 184, § 23, which states that “[c]onditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them[.]” The Supreme Judicial Court has interpreted this statute to mean that “[u]nder s. 23, restrictions ‘unlimited as to time’ expire in thirty years . . . [and] no language in s. 23 permits the enforcement of a restriction limited by its operation beyond the thirty year period.” Stop & Shop Supermarket Co., v. Urstadt Biddle Props., Inc., 433 Mass. 285, 289 (2001).

We are also aware of a claim that because the Sherborn Conservation Commission subsequently took title to a parcel benefitting from the deed restriction, that this exempts the restriction from the provisions of G. L. c. 184, § 23. This claim is clearly erroneous. The Appeals Court has found that restrictions benefitting a municipal body “[are] subject to the thirty-year limitation imposed by s. 23 (unless eligible for exemption on other grounds).” Murphy v. Planning Bd. of Hopkinton, 70 Mass. App. Ct. 385, 396 (2007). Since no other grounds for exemption exist, it is clear that the thirty-year limitation is applicable, and that this restriction has long-since expired.

Even if the restriction had not expired by operation of law, it is the Applicant's position that the proposed development does not violate the express terms of said restriction. As noted above, the restriction prohibits the further subdivision of the subject parcel. The Applicant does not propose a subdivision as part of its comprehensive permit application, it has proposed a condominium development on a single lot. Although the Applicant has added land area to the Property via endorsements pursuant to G. L. c. 41, § 81P, by definition such endorsements do not constitute a subdivision, and thus do not trigger the restriction against further subdivision of the Property.

As a final matter, we note that the Sherborn Select Board has reviewed the issue of this purported deed restriction at an executive session dated August 19, 2022, at which time it chose not to pursue litigation to seek to enforce the restriction. A copy of a memo dated January 20, 2023 from Town Counsel's office addressing the Select Board's decision is included herewith. Ultimately, only a court of competent jurisdiction has jurisdiction to make any sort of binding determination regarding whether or not an

enforceable restriction remains in place. However, the determination of the Subsidizing Agency as it relates to site control remains conclusive, and can only be challenged in compliance with the regulations at 760 CMR 56.04(5).

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

Very Truly Yours,



Paul J. Haverty

Cc: Client (via email)

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August 2, 2022

Via Email

Michael Busby
40B Specialist
MassHousing
One Beacon Street, 5th Floor
Boston, MA 02108

RE: Fenix Partners Farm Road Development, LLC
Application for Project Eligibility
Response to Town Comments

Dear Mr. Busby;

This office represents the applicant Fenix Partners Farm Road Development, LLC (the “Applicant”) relating to the pending application for a Project Eligibility Letter for the property consisting of a portion of 55-65 Farm Road, Sherborn, Massachusetts (the “Property”). The purpose of this correspondence is to respond to certain comments contained in the July 18, 2022 comment letter submitted by the Sherborn Select Board. Specifically, the intent of this correspondence is to address the issue of site control raised by the Town in its comments.

In its letter, the Town claims that “the project is not clearly eligible for multiunit housing development under 40B, due to . . . a deed restriction on the parcels[.]” The deed restriction in question was placed on the Property via a deed in 1980. This deed restriction contained no specific time limitation, therefore subjecting it to the provisions of G. L. c. 184, § 23 which states that “[c]onditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them[.]” As noted by the Supreme Judicial Court in Stop & Shop Supermarket Co. v. Urstadt Biddle Props., Inc., 433 Mass. 285, 289 (2001), “[u]nder s. 23, restrictions ‘unlimited as to time’ expire in thirty years . . . [and] no language in s. 23 permits the enforcement of a restriction limited by its operation beyond the thirty year period.”

The Town relies upon the claims made by an abutter opposing the Project that the mere recitation of the existence of the restriction in subsequent deeds was sufficient to extend the restriction. As shown above, this is clearly incorrect, as a restriction unlimited as to time may not be extended. Moreover, the Town’s original draft comment letter

stated that “the 1980 deed . . . provided that the private parcels not be further subdivided, a restriction referenced [but not explicitly renewed] in all subsequent deeds including the transfer to the Applicant in 2021.” This language, while not relevant due to the plain language of G. L. c. 184, § 23 prohibiting the extension of restrictions unlimited as to time beyond the statutory thirty-year period, is indicative of the bad faith on the part of the Town in raising this baseless site control challenge.

We are also aware of a claim made to the Select Board that, because the Sherborn Conservation Commission acquired a lot benefitting from the restriction over the Applicant’s property, that it may not be subject to the 30-year restriction in G. L. c. 184, § 23. This argument suggests that the provisions of G. L. c. 184, § 26 granting an exception to the 30-year limitation on restrictions for restrictions created for “conservation, preservation, agricultural preservation, and affordable housing restrictions, as defined in section thirty-one which have the benefit of section thirty-two, and other restrictions held by any governmental body, if the instrument imposing such conservation, preservation, agricultural preservation, affordable housing” means that any restriction held by any governmental body is exempt from the 30-year limitation on restrictions. However, the case law is clear that G. L. c. 184, § 26, when read together with G. L. c. 184, § 23, provides “that (a) conservation, preservation, agricultural preservation, and affordable housing restrictions (whether held by a governmental body or a private party) are exempt from the thirty-year limitations imposed by s. 23; exempt from the bring forward filing requirements of s.s. 27-30; and entitled to the benefits, and subject to the procedural requirements, of s. 32; and (b) other restrictions held by any governmental body are exempt from the bring forward filing requirements of s.s. 27-30; not entitled to the benefits, or subject to the procedural requirements, of s. 32; and [are] subject to the thirty-year limitation imposed by s. 23 (unless eligible for exemption on other grounds).” Murphy v. Planning Bd. of Hopkinton, 70 Mass. App. Ct. 385, 396 (2007). The restriction here was between two private parties, and was clearly not a conservation, preservation, agricultural preservation or affordable housing restriction, thus bringing the matter squarely within the 30-year time limit contained in G. L. c. 184, § 23.

We would also like to address the Town’s claim that the Project is “not eligible for multiunit housing development under 40B, due to . . . (b) the 40B ‘cooling off’ period.” The Town goes on to claim that “we note that the project is not eligible at this date for submission of a Comprehensive Permit to the Sherborn Zoning Board according to 760 CMR 56.03(7).” These claims fundamentally misstate the application of the regulatory safe harbors. First, it has been conclusively determined by the Supreme Judicial Court that nothing within Chapter 40B “divests a local board of appeals of its authority to grant a comprehensive permit once a municipality satisfies its minimum affordable housing obligation.” Boothroyd v. Zoning Bd. of Appeals of Amherst, 449 Mass. 333, 340 (2007). Accordingly, the fact that a board of appeals may claim a safe harbor does not deprive an applicant from being eligible to file a comprehensive permit application. Second, the procedure for a board to assert a safe harbor is set forth in 760 CMR 56.03(8), and this procedure would be rendered meaningless if an applicant lacked

eligibility to file a comprehensive permit application simply because a valid safe harbor claim may be available.

The Applicant takes exception to many of the other claims raised by the Town in the comment letter, but the majority of these comments can and will be addressed during the comprehensive permit application process, and are not properly a part of the review during the project eligibility process.

Please feel free to contact us if you have any questions regarding this matter.

Very Truly Yours,



Paul J. Haverty

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To: Neighbors of 55 Farm Road

From: Heather C. White, Esq. *(Hew)*
Petrini & Associates, P.C.

cc: Jeff Waldron, Chair, Select Board
Jeremy Marsette, Town Administrator
Diane Moores, Assistant Town Administrator
Christopher J. Petrini, Town Counsel

Date: January 20, 2023

Re: **Farm Road Deed Restriction**

This office serves as Town Counsel for the Town of Sherborn, and the Town Administrator's office has advised us that an inquiry has been made regarding the Select Board's review of a deed restriction on the property located at 55 Farm Road. On August 19, 2022, the Select Board met with counsel in Executive Session to discuss the restriction and any potential action to be taken with respect to the proposed development of the property. Upon review, the Select Board decided not to pursue litigation seeking a preliminary injunction against the proposed development at this time. Thank you for your attention to this matter.

2023.01.11 Memo re Farm Rd Deed Restriction (1910.00)

