58 Farm Road
Sherborn, Massachusetts 01770

October 2, 2023

**BY ELECTRONIC MAIL: rick.novak@sherbornma.org**
Richard S. Novak, Chairman
Sherborn Zoning Board of Appeals
19 Washington Street
Sherborn, Massachusetts 01770

Re: Developer should be estopped from denying harmful impact caused by projected increase in traffic from his proposed Farm Road development project

Dear Chairman Novak:

Currently under consideration by the Sherborn Zoning Board of Appeals (Board) in the matter of the so-called "Farm Road Homes" development is the issue of the traffic impact which will result from that 32-unit development. There is no dispute the development will cause an increase in traffic to the Farm Road and surrounding areas.[1] The question is whether the increase will have a sufficiently detrimental impact to warrant the Board denying the comprehensive permit sought for the project under Chapter 40B. Pursuant to the doctrine of judicial estoppel, the Board should preclude Mr. Robert Murchison, the developer, from denying that just such a harmful impact will be caused by the undisputed increase in traffic.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position [the party] had previously asserted in another proceeding." Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 639-640 (2005), quoting Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998). While more commonly raised in court litigation, the doctrine applies equally to administrative agency and quasi-judicial tribunal proceedings, such as a zoning board of appeals hearing.[2] See, e.g., DeRosa v. National Envelope Corp., 595 F.3d 99, 103 (2d Cir. 2010); Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 593 F.3d 1346, 1354 (Fed. Cir. 2010); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 & n.3 (6th Cir. 1982); Department of Transp. v. Coe, 112 Ill. App.3d 506, 510 (4th Dist. 1983) ("The truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.").

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[1]See, e.g., "Transportation Impact Assessment, Proposed Residential Development, 55 and 65 Farm Road, Sherborn, Massachusetts" (December 2022), available at https://www.sherbornma.org/sites/g/files/vyhlif1201/f/uploads/farm_rd_residential_development_tia_12_22.pdf .

[2]"[A] zoning board of appeals is an administrative or quasi judicial tribunal." Walker v. Board of Appeals of Harwich, 388 Mass. 42, 49 n..6 (1983), citing Lambert v. Board of Appeals of Lowell, 295 Mass. 224, 228 (1936).

Because of the doctrine's equitable nature, courts have declined to reduce the circumstances under which judicial estoppel appropriately is invoked to any general formulation of principle. Otis v. Arbella Mut. Ins. Co., supra at 640; New Hampshire v. Maine, 532 U.S. 742, 750 (2001). However, Massachusetts courts have identified two fundamental elements at the core of a judicial estoppel claim. Otis v. Arbella Mut. Ins. Co., supra. First, the position asserted by the party to be estopped in the second proceeding must be "directly inconsistent" with the position which the party asserted in a prior proceeding. Id. at 641. Second, the party must have succeeded in convincing the court or other adjudicatory tribunal in the prior proceeding to accept the position which the party had so asserted. Id. Judicial estoppel squarely applies here.

Addressing the second element first – in 2016, Mr. Murchison brought a suit in Land Court styled, Robert Murchison, et al. v. Richard Novak, et al., Mass. Land Ct., No.16 Misc 000676. In that case, Mr. Murchison challenged the Board's affirmance of the foundation permit allowing construction of one single-family home directly across the street from his house on Lake Street in Sherborn. The case proceeded to trial, at which Mr. Murchison claimed, among other things, that the construction of that one residence would "cause a harmful increase in traffic." Id. at par. 15 & n.8. Indeed, he personally testified at the trial, under oath, about the harmful effect of the increased traffic projected to result from development of one new residence. See id.

Now, however, when his own development project is at issue – a project in whose success he has a significant interest, and which is not across the street from his home – Mr. Murchison opines there will be no detrimental impact from the increased traffic which will result from construction of thirty-two (32) new residences – thirty-two times as many new residences as was at stake in the Land Court action where he alleged there would be a "harmful increase in traffic." There can be no dispute that the position Mr. Murchison now asserts in the proceeding before the Board is "clearly inconsistent" with the position he asserted in his prior Land Court proceeding. See Otis v. Arbella Mut. Ins. Co., supra at 641, quoting New Hampshire v. Maine, supra.

As to the second element – although Mr. Murchison was unsuccessful at the trial court level, and ultimately also lost on appeal, Murchison v. Zoning Bd. of Appeals of Sherborn, 485 Mass. 209 (2020), rev'g Murchison v. Zoning Bd. of Appeals of Sherborn, 96 Mass. App. Ct. 158 (2019), he found judicial acceptance of the harms he alleged during the 2016 trial in a 2021 Land Court proceeding in which a judge ruled in Mr. Murchison's favor on a motion filed against him for costs and fees and for sanctions, see Docket, June 16, 2021, Murchison et al. v. Novak et al., Mass. Land Ct., No. 16 Misc 000676, Decision (Rubin, J.) (assaying factual and legal substance of claims in 2016 Land Court action, acknowledging testimony at trial over four days about bases for harms so asserted, and finding evidentiary support), aff'd sub nom. Murchison v. Zoning Bd. of Appeals of Sherborn, Mass. App. Ct., No. 21-P-998 (Oct. 7, 2022) (unpublished). There can be no real question

that Mr. Murchison succeeded in that proceeding in persuading the judge to accept that the positions asserted in the 2016 lawsuit had some merit. See, e.g., Konstantinidis v. Chen, 626 F.2d 933, 936 n.6 (D.C. Cir. 1980) (judicial estoppel requires "merely a prior judicial acceptance of the factual assertion made by the party who now advances an inconsistent contention"); American Special Risk Ins. Co. v. City of Centerline, U.S. Dist. Ct., No. 97-CV-72874-DT, (E.D. Mich. Jun. 24, 2002) (same).

In sum, both fundamental elements at the core the doctrine of judicial estoppel are satisfied here, and the inequity redressed by application of the doctrine is in plain view. Judicial estoppel prevents a party from asserting inconsistent positions in separate proceedings, "playing fast and loose" with adjudicatory fora, adopting whatever position suits the moment "as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987), quoting Scarano v. Central R. Co., 203 F.2d 510, 513 (3d Cir. 1953); accord Otis v. Arbella Mut. Ins. Co., supra at 642; see Department of Transp. v. Coe, supra. ("The doctrine of judicial estoppel is an equitable doctrine whose primary purposes are to promote the truth and to prevent parties from deliberately shifting positions to suit the exigencies of the moment"). The Board should estop Mr. Murchison from asserting his current position that there will be no real impact caused by the increased traffic from thirty-two new residences, as a position which flagrantly conflicts with his prior position that harmful impact would be caused by the increased traffic from just one new residence. In the interest of equity and fundamental fairness, the Board should hold Mr. Murchison to the consequence of his prior position: an admission that a substantial harmful impact will result from the increased traffic projected to be generated by his Farm Road development project.

Please let me know if you have any questions about this letter or any of the issues addressed herein, or would like additional information.

Very truly yours,

/s/

Arthur C. Fenno, Esq.