

November 16, 2020

Town of Sherborn
Zoning Board of Appeals
19 Washington Street
Sherborn, MA 01770
Attn: Richard Novak, Chair

Re: 40B applications-41 N. Main Street/31 Hunting Lane

Ladies and Gentlemen:

At the Zoning Board of Appeals meeting held on October 29, 2020, you solicited comments on the site control issue presented by the above-described applications (the “Applications”) filed by Gary Lybarsky (the “Applicant”). Although we are aware that Town Counsel will submit a memorandum discussing many of the pertinent legal issues, as abutters and concerned residents, we submit the following comments to you for your consideration.

As you know, we submitted a letter dated October 17, 2020 (a copy of which is attached as Exhibit A) (the “October 17 Letter”), which addressed the site control issue, and we reiterate all arguments made in that letter.

Mr. Haverty, on behalf of the Applicant, argued that MassHousing made a conclusive site control determination in its project eligibility letters dated April 30, 2020 (collectively, the “PEL Letters”), and that the Zoning Board of Appeals does not have the right to revisit these determinations. In fact, MassHousing did not make a conclusive site control determination.

In issuing a project eligibility letter, MassHousing is only required to consider two factors: whether the site is generally appropriate for the proposed residential development and whether the conceptual design of the project is generally appropriate for the site. MassHousing does not do a title search and it does not exam liens and encumbrances on the property or make a qualitative assessment of any such liens. It merely recites the recording information provided by the applicant. That is all MassHousing did in this case - it merely listed the deeds by which the Applicant obtained title to the site.

MassHousing does specifically reference the M.G. L. c. 61B (“Chapter 61B” or “61B”) issues faced by the Applicant by stating in the 31 Hunting Lane PEL Letter as follows: “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.” This was a clear signal to the Applicant and the Town that MassHousing was not addressing these issues in the PEL Letter and the Town’s Zoning Board of Appeals should take up these issues. Any suggestion that the PEL Letters represent a conclusive determination of site control ignores this important condition which MassHousing included in the 31 Hunting Lane PEL Letter.

A zoning board, as the special permit granting authority under any application for zoning relief, must always make its own determination that the applicant is either the owner of the affected land or “someone other than the owner” who has some connection with the land—a buyer under a purchase and sale agreement being the most common example. As the court stated in *Brady v. City Council of Gloucester*, 59 Mass. App. Ct. at 697: “When an ownership interest adversely and substantially affects the development or use of the proposed project, the reviewing board need not ignore that reality”. MassHousing’s process for the issuance of project eligibility letters does not override a zoning board’s obligation to make its own determination of ownership and site control.

Of equal importance to the site control issue is that the facts have changed materially since the date of the PEL Letters. While the Town’s 61B lien on the vast majority of Parcel 3C and all of Parcel 3B (collectively, the “61B parcels”) represents a substantial encumbrance on the land, the Select Board of the Town of Sherborn at its meeting held on October 22, 2020 commenced the process under Section 9 of Chapter 61B to exercise its rights under the right of first refusal provided to the Town under Chapter 61B. At that meeting, the Select Board voted as set forth on Exhibit B hereto.

Section 9 of Chapter 61B lays out a very clear process by which a Town should exercise its rights. It provides that the Town (or its assignee) should obtain an appraisal and provide it to the applicant and, if the parties are unable to agree on the price based on the appraisal, then the landowner should obtain an appraisal. If the parties are still unable to agree on the price after considering the information provided by both appraisals, then the parties must jointly agree on a third appraiser whose determination of price is definitive.

At that point, the Town (or its assignee) has to make its decision as to whether it desires to exercise the option to purchase the 61B parcels at the price determined by the third appraiser.

Mr. Haverty argued that the facts had not changed and, alternatively, that the Town had not exercised its rights under Section 9 of Chapter 61B. This is manifestly untrue and, frankly, a bewildering argument.

The relevant statute does not mandate that the Town (or its assignee) exercise the option before it knows the price of the property. That would be illogical and unfair to the Town (or its assignee). Instead, as described above, the statute mandates that one or more appraisals be obtained and it culminates with a price that then leads to a decision by the Town (or its assignee) to exercise or not to exercise the option. The resolutions passed by the Select Board track this process precisely as they expressly commence the appraisal process and then reserve the Town’s right to make a decision at the statutorily mandated time. If there was any doubt as to the Town’s ultimate intent, the title of the votes passed by the Select Board remove that doubt, as they are described as “Select Board Vote to Exercise Right of First Refusal 31 Hunting Lane, Sherborn”.

Given the very substantial change in facts between the time of the issuance by MassHousing of the PEL Letters on April 30, 2020 and today, it is highly likely that MassHousing would not have issued

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project eligibility letters and instead concluded that the Applicant failed to meet the requirements for project eligibility.

Mr. Haverty further argued that the Applicant has not given the Town a Notice of Intent to Sell or Convert and has no obligation to do so, and therefore the Town does not have the right to commence the appraisal/exercise of option process described above.

Once again, this position makes no sense. The 61B parcels are currently classified as recreational use land under Chapter 61B. There are no improvements to the 61B parcels. Yet, the Applicant submitted to the Zoning Board of Appeals a set of documents in support of each of the Applications which included a Board of Appeals Petition for Relief under the Sherborn Zoning By Laws, Request for Finding of Facts, Project Description, Bank Letter of Interest, Site Plans, Architectural Plans, a Traffic Study and many other materials, and asked the Zoning Board of Appeals to sit through more than an hour presentation by several consultants reviewing the two projects. How is it possible to argue that all of the work represented by these consultants and the formal applications made by the Applicant to the Zoning Board of Appeals do not represent the Applicant's intent to change use? Any conclusion otherwise would require a massive contortion of logic.

Unfortunately, this position is part of a consistent pattern of behavior whereby the Applicant has tried to deny the Town's rights. It began a year ago when he gave the Town a Notice of Intent to sell the property to an affiliate at a sham, inflated price hoping that the Town would waive its right of first refusal. Not only did he fail to present a bona fide offer to sell the property to an unaffiliated third party (as required by Chapter 61B), but he further tried to deceive the Town by mixing the 61B parcels with non-61B property, thus inflating further the price. Fortunately, the Select Board saw through the sham and rejected the Notice of Intent by a letter dated December 20, 2019 where it stated in relevant part that "This letter shall serve to notify the Owner that the Notice is insufficient and the Notice and the P&S do not comply with the requirements of Chapter 61B..." The Town explained its rationale by citing all of the factors above. Notably, the Applicant never responded to this letter.

Once again, the Applicant is making a bold-faced attempt to deprive the Town of its rights - this time by refusing to give the Town a Notice of Intent to Sell or Convert despite his clear intent to change the use of the 61B parcels. The Applicant has enjoyed the significantly lower taxes permitted under the statute and now must keep his end of the bargain. Applicant has consistently flouted the rules when rights of the Town are involved. Here, the Applicant was required by Chapter 61B to give the Town a Notice of Intent to Sell or Convert. Again, fortunately, the Select Board was vigilant and has deemed the Applicant's actions to constitute a change of use and has started the process to acquire the properties.

If the Applicant is permitted to get away with these deceitful maneuvers, it would undermine the entire meaning and intent of Chapter 61B and would render the statutory right of first refusal meaningless.

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As a result, we once again urge the Zoning Board of Appeals to reject both Applications on the basis that the 61B parcels are critical to the development of both projects and the Applicant does not have site control by reason of the 61B lien and the Town's incipient exercise of its right of first refusal.

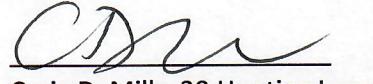
Again, as with our October 17 Letter, although this letter is signed by only two abutters, the following abutters and other concerned residents have given the undersigned their express written approval to use their names in support of this letter:

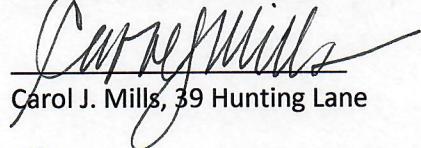
John and Kathy Halamka, 17 Unity Lane
Marcia Zais, 22 Perry Street
Allyson Woolf and Bertin Couturier, 76 Hunting Lane
Warren L. Wheelwright and Diana S. Wheelwright, 137 Hunting Lane
Robert Evans and Anne Gudaitis, 110 Hunting Lane
Alycia Goody and John Davies, 8 Zion's Lane
Mark and Allyn Callahan, 51 Hunting Lane
Alan and Joan Dunn, 146 Hunting Lane
John and Gorette DeSalvo, 44 North Main Street
Julian and Sena Fowler, 36 Hunting Lane
Jason and Melanie Chiverton, 115 Hunting Lane
Katharine R. Sturgis, 38 Hunting Lane
Robbin Bell and John Garrison, 33 Hunting Lane
Greg and Carly Donohue, 52 Hunting Lane
Wendy and Steve Harris, 24 Hunting Lane
Suzanne and Adam Craig, 58 Hunting Lane
Charlie and Tannaz Saponaro, 28 Hunting Lane
Joanie Murphy, 75 Greenwood Street
Claude Dohrn and Sarah Berwick, 32 Hunting Lane
Gary and Betsy Goldberger, 98 Hunting Lane
Peter Alphas, 8 Course Brook Road
Karen McCarthy, 66 Hunting Lane
Joyce and Andrew Silvia, 3 Eliot Street
Claire and Brady Loeck, 46 North Main Street
Fredrick J. Dodd, 210 Washington Street
Peggy Homer, 43 Mill Street
Elizabeth Homer, 43 Mill Street

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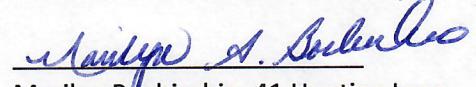
Thank you for your consideration of these important issues.

Sincerely,


Craig D. Mills, 39 Hunting Lane


Carol J. Mills, 39 Hunting Lane


Paul Bochicchio, 41 Hunting Lane


Marilyn Bochicchio, 41 Hunting Lane

cc: Zoning Board
Select Board
Town Administrator
Town Planner
Town Counsel
Kathleen O'Donnell, Esq.

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EXHIBIT A
Copy of October 17, 2020 Letter to Zoning Board of Appeals

October 17, 2020

Town of Sherborn
Zoning Board of Appeals
19 Washington Street
Sherborn, MA 01770
Attn: Richard Novak, Chair

Re: 40B applications-41 N. Main Street/31 Hunting Lane

Ladies and Gentlemen:

It has come to our attention that Barsky Estate Realty Trust and affiliates (the "Applicant") has filed two applications with the Town of Sherborn Zoning Board of Appeals, one for a comprehensive permit for a Chapter 40B project at 41 North Main Street and a second for a comprehensive permit for a Chapter 40B project at 31 Hunting Lane. The undersigned are abutters and other concerned residents of the Town of Sherborn.

The purpose of this letter is to notify you of an important issue relating to these applications.

Several of the parcels constituting 31 Hunting Lane are subject to a lien in favor of the Town pursuant to M.G.L. c. 61B (the "Statute"). These parcels (the "61B Parcels") are identified on Hunting Lane Assessors Map 11 as Parcel 3C (approx. 16.93 acres) and Parcel 3B (approx. 8 acres). The principal of the Applicant, Mr. Igor Lybarsky, has withdrawn these properties from Chapter 61B, but under the Statute, the lien will not lift until June 30, 2021, at the earliest. In addition, the Applicant's attempt to withdraw Parcel 3B from his application is invalid, given the Applicant's stated intent to put water and sewer lines under that parcel to service the proposed developments at 31 Hunting Lane as well as 41 North Main Street,

The effect of the lien on the 61B Parcels is that if the landowner intends to sell or convert the use of such property, the Town may exercise its statutory right of first refusal to obtain an impartial appraisal of the 61B Parcels and, if the appraised value of the 61B Parcels is acceptable, purchase the 61B Parcels from the Applicant or, alternatively, assign its rights to a qualified third party that would then purchase the 61B Parcels.

A 501(c)(3) organization is a qualified third party. Unity Farm Sanctuary, a 501(c)(3) non-profit farm animal sanctuary founded in December 2016 by John and Kathy Halamka that abuts the 31 Hunting Lane parcels, is very interested in acquiring the 61B Parcels assuming that the appraised value is acceptable to it. This would permit Unity Farm to expand its footprint and its mission, which is to provide a safe and loving lifelong home for farm animals, and to offer the public unique educational programs related to its mission. The owners of Unity Farm Sanctuary have stated their intent to leave all of their property in their 501c(3) in perpetuity for the use of the public. We understand that the

Select Board strongly supports these plans and we urge you to confirm this information with the Select Board.

Accordingly, not only does a material lien exist on a substantial portion of the 31 Hunting Lane properties but the Town's right of first refusal has been triggered by the filing of the applications with the Zoning Board of Appeals, if not prior to that time.

It is important to note that while the 61B Parcels are a part of the 31 Hunting Lane property alone and represent a serious restriction on the Applicant's right to develop the 31 Hunting Lane property, the interdependence of the 41 North Main Street and 31 Hunting Lane projects cannot be overlooked. The Applicant has indicated in its Chapter 40B applications for site approval to MassHousing, and as well in its applications to the Zoning Board of Appeals, that it plans to locate a wastewater treatment plant on part of the 31 Hunting Lane property that would service both projects and, likewise, to use water drawn from wells on 31 Hunting Lane to service both projects.

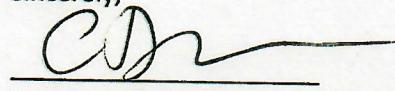
As a result, we urge the Zoning Board of Appeals to reject both applications on the ground that the applications are insufficient since the Town's 61B lien is a material encumbrance on a substantial amount of the land comprising the 31 Hunting Lane project and, as a result, the Applicant does not have site control of the 61B parcels, which are critical to both developments.

Although this letter is signed by only two abutters, the following abutters and other concerned residents have given the undersigned their express written approval to use their names in support of this letter:

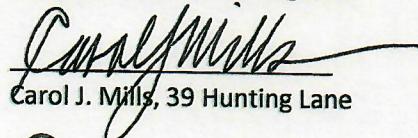
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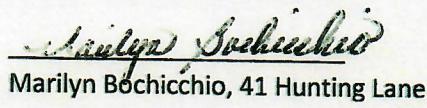
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Paul Bochicchio, 41 Hunting Lane



Marilyn Bochicchio
Marilyn Bochicchio, 41 Hunting Lane

cc: Select Board
Town Administrator
Town Counsel
Kathleen O'Donnell, Esq.

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EXHIBIT B

Select Board Vote to Exercise Right of First Refusal 31 Hunting Lane, Sherborn

**SELECT BOARD VOTE TO EXERCISE RIGHT OF
FIRST REFUSAL 31 HUNTING LANE, SHERBORN (VERSION 3)**

MAKER OF MOTION:

The Select Board, having heard comments from Sherborn officials and members of the public in accordance with a public hearing held in accordance with G.L. c. 61B, § 9 and G.L. c. 30A, §§ 18-25, moves as follows:

1. to seek an impartial appraisal performed by a certified appraiser hired at the expense of the municipality or its assignee to determine the full and fair market value of Assessors Map 11, Parcel 3B and Assessors Map 11, Parcel 3C at 31 Hunting Lane (the "Subject Parcels"), the original appraisal to be completed and delivered to the landowner on a date to be determined;
2. to continue said public hearing, or to schedule an additional public hearing, for consideration of whether to (a) exercise the Town's option to purchase the Subject Parcels and to submit an Article to for consideration by Town Meeting, (b) or to assign the Town's option to Unity Farm Sanctuary, Inc., 17 Unity Lane, Sherborn, MA 01770, or another nonprofit conservation organization, under the terms and conditions that the Select Board may consider appropriate, said purchase or assignment shall be for the purpose of maintaining the Subject Parcels in use as forest land as defined in section 1 of chapter 61, as agricultural and horticultural land as defined in sections 1 and 2 of chapter 61A, or as recreation land as defined in section 1 of chapter 61B; and
3. the Board intends to act in accordance with the provisions of M.G.L. c. 61B as affected by Section 9 of Chapter 53 of the Acts of 2020 under which all time periods within which any municipality is required to act, respond, effectuate or exercise an option to purchase having been suspended for a period of 90 days after the termination of the governor's March 10, 2020 declaration of a state of emergency.