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November 25, 2020

Via First Class Mail and Email
Richard S. Novak, Chair
Sherborn Zoning Board of Appeals
19 Washington Street
Sherborn, MA 01770

RE: Barsky Estate Realty Trust – Apple Hill Estates (31 Hunting Lane)
Response to Chapter 61B Questions

Dear Chair Novak:

This office represents Barsky Estate Realty Trust, 41 Main Street LLC and 31 Hunting Lane LLC (collectively, the "Applicant"), in relation to a proposed twenty-eight (28) unit home-ownership development on property located at 31 Hunting Lane Sherborn, Massachusetts and a 60 unit rental development at 41 Main Street and Powderhouse Lane, Sherborn, MA. The Sherborn Board of Appeals (the "Board") has requested that the Applicant address the claim made by the Sherborn Board of Selectmen that it may have the right to exercise an option to purchase relating to certain parcels that are part of this application. The Sherborn Select Board claims that this purported option to purchase calls into question the Applicant's control of the site, a jurisdictional prerequisite, thus the Select Board encouraged the Board to deny the Applicant's comprehensive permit applications. For the reasons discussed below, the Select Board's position is incorrect both substantively and procedurally.

The Select Board is wrong procedurally because 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. Pursuant to 760 CMR 56.04(6), the determination 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. Thus, if the Board chooses to deny the application based upon a purported lack of site control without following this procedure, as suggested by the Select Board, the Applicant will appeal the Board's decision to the Housing Appeals Committee, which will be required to defer to the determination of MassHousing, overturn the Board's denial and grant the Applicant a comprehensive permit.

It is important to note that a request for a determination from MassHousing pursuant to 760 CMR 56.04(5) would clearly be untimely, as the ownership status of the property has not changed since the issuance of the Project Eligibility Letter. The Select Board has simply voted to initiate the statutory process of conducting an appraisal to determine whether or not it intends to exercise an option to purchase (if such option actually existed). The statutory process then provides for the property owner to have the right to conduct its own appraisal, and also allows for a third appraisal if the first two conflict. Since an extensive process still exists to set the price on which any option to purchase must be exercised, it is premature to presume that the Select Board will choose to exercise any such option in the future. If the appraisal comes in at a figure beyond what the Select Board is comfortable with, or if the Select Board is unable to locate a qualified third-party nonprofit conservation group to whom to transfer the rights of such option to purchase, there is no requirement that the Select Board exercise the option to purchase (again presuming, arguendo, that such option to purchase exists). The Town has not provided the Applicant notice of exercise of the option to purchase, accompanied by a proposed purchase and sale contract, as required by G. L. c. 61B, § 9. The vote by the Select Board has not committed the Town to any course of action regarding the property, and in no way constitutes a change in the ownership status in a manner effecting the Applicant's control of the site. Accordingly, there is no legitimate reason for the Board to request a determination from MassHousing at this time.

In addition to being mistaken regarding the procedure, the Board of Selectmen are also clearly wrong on the merits of their argument. The Applicant does not intend to get involved in an in-depth review of the purported option to purchase question with the Board, as the Board clearly lacks jurisdiction to determine this issue. However, the Applicant notes that the Board's position is based upon a claim that the filing of a comprehensive permit application is the functional equivalent of filing a notice of intent to convert pursuant to G. L. c. 61B, §9. This position is not supported by the statute or the case law.

The submittal of the comprehensive permit application does not constitute a notice of intent to convert the parcel shown as Map 11, Lot 3C out of Chapter 61B. Pursuant to G. L. c. 61B, § 9, a notice to sell or convert "shall be sent by the landowner by certified mail or hand delivered to the . . . board of selectmen of a town, and . . . to its board of assessors, to its planning board and conservation commission, if any, and to the state forester." Furthermore, such notice of intent to convert must be "accompanied by a

statement of intent to convert, a statement of proposed use of such land, the location and acreage of land as shown on a map drawn at the scale of the assessors map in the city or town in which the land is situated, the name, address and telephone number of the landowner and the landowner's attorney, if any." The Applicant has not submitted such notice, because it has no present intent to convert this parcel out of Chapter 61B. If the Applicant obtains a comprehensive permit approving a development on this property, and thereby determines to convert the property out of Chapter 61B status, the Applicant will provide the Town the appropriate notice to convert pursuant to the requirements of the statute, as required. Until such time that the Applicant provides the Town the statutory notice to convert, the Town's option to purchase has not been triggered.

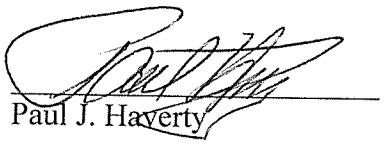
During the opening session of the public hearing on the comprehensive permit application, there appeared to be confusion over which parcels were part of the application, and which parcels were subject to Chapter 61B. The Apple Hill Estates comprehensive permit application seeks relief to allow a project located on Map 11, Lot 2 and Map 11, Lot 3C. A copy of the Petition for Relief indicating the lots subject to the application is attached hereto as Exhibit 1. Of these two parcels, Map 11, Lot 2, the location of the proposed public water supply, is not subject to Chapter 61B. The only parcel that is subject to Chapter 61B that is part of the comprehensive permit application is Assessor's Map 11, Lot 3C, a 16.93 acre parcel (of which only 14.93 acres are subject to Chapter 61B).

The Select Board's position with regard to a second lot held under Chapter 61B is even less accurate. There is an eight (8) acre parcel shown as Map 11, Lot 3B that is also subject to Chapter 61B. This lot is not part of the comprehensive permit application filed by the Applicant, nor does the Applicant have any intent to develop this parcel in a manner that is inconsistent with its use as recreational land under Chapter 61B. The Applicant proposes to grant an easement allowing water and sewer lines to be run under Lot 3B, a use for which no relief is required from the Board, and which is not inconsistent with the use of this lot as recreational land under Chapter 61B. Accordingly, there is no application for relief that could be the basis to trigger an option to purchase even if the Select Board was right in its theory that the filing of a comprehensive permit application on land subject to Chapter 61B was the functional equivalent of a notice to convert. If the Town attempts to exercise a non-existent option to purchase over a parcel for which no application for relief has been filed and for which no use inconsistent with its continued status as recreational land has been proposed, such action would be patently unlawful and an egregious act of bad faith on the part of the Town. Such action would be doubly egregious as it would clearly be done for the sole purpose of blocking an affordable housing development, thus exposing the Town to claims of civil rights violations by the Applicant and to fair housing violation claims by others.

The Applicant respectfully requests that the Board ignore the misguided advice of the Select Board to deny the application based upon a purported lack of site control, and allow the Applicant a full and fair local hearing on its proposal.

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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