

Richard Novak,
Sherborn Zoning Board of Appeals
Re: Proposed Hunting Lane 40B development

November 2, 2020

Dear Rick,

This email is in response to the discussion at last Thursday's ZBA hearing on the 40B housing projects proposed by Mr. Lybarsky. I was pleased that you focused this initial hearing on the issue of the Chapter 61B classification of a major portion of the land, the question of the developer's site control, and the town's Right of First Refusal (ROFR). As you know, it's the fundamental issue that must be resolved first. You invited input on the issue, so here goes -

I'm writing now as an individual (not as Chair of the Planning Board). You should know that I have no "inside information" on the town's strategy regarding the ROFR on these parcels. However, being a member of the Planning Board and the Land Acquisition Committee, I've been paying close attention to this for the past year and I understand that there's a candidate conservation buyer to whom the ROFR could be assigned if the town's right can be exercised. So it's a unique opportunity to preserve this environmentally sensitive property and I'm concerned that the town could miss the opportunity.

The developer's attorney sent a letter dated November 19, 2019 to the Select Board, Planning Board, Assessor and others, announcing the Lybarsky Trust's intent to sell and change the use of the 2 Ch. 61B properties (11-0-3B and 11-0-3C). The letter was accompanied by a Purchase and Sale agreement that was judged by the Select Board to be invalid, as it did not correctly distinguish Ch. 61 from non-Ch. 61 parcels. Also, the fact that the seller (Lybarsky Trust) and the buyer (31 Hunting LLC) was not clearly a change of ownership was raised, noting the very high selling price, but the intent to change the use was clear.

My reading of MGL Chapter 61 is that notice of change of use alone, with or without a change of ownership, would trigger the chapter 61 120-day period in which the Town could obtain an independent appraisal of value and exercise its ROFR.

(<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIX/Chapter61/Section8> Page 2 of 5)

"For a period of 120 days after the day following the latest date of deposit in the United States mail of any notice which complies with this section, the city or town shall have, in the case of intended sale, a first refusal option to meet a bona fide offer to purchase the land.

In the case of intended or determined conversion not involving sale, the municipality shall have an option to purchase the land at full and fair market value to be determined by an impartial appraisal performed by a certified appraiser hired at the expense of the municipality or its assignee, the original appraisal to be completed and delivered to the landowner within 30 days after the notice of conversion to the municipality."

At the time (Nov. 2019) the Select Board judged that the 120 day ROFR period had not been triggered because of the defective P&S document. However, my concern then and now is that whatever State official has authority to decide whether the "notice of change of use" letter alone triggered the ROFR period, could conclude that the ROFR period elapsed 120 days after Nov. 2019. I'm hoping that the Select Board and Town Counsel have verified that this is not the case, and that this can be addressed at your next scheduled hearing.

I note that in response to the application for a 40B development on the site, the Select Board advised Mass Housing that the application should be rejected in part because the developer does not have "site control" - due to the Ch. 61 ROFR. Nevertheless in the Project Eligibility letter to Mr. Lybarsky dated April 30, 2020, the Mass Housing Counsel stated that the developer does indeed have site control. This statement referenced Mr. Lybarsky's 2016 deeds to the land and the notice of withdrawal from Ch. 61 sent to the town. The authority of Mass Housing to make the judgment on Ch. 61 ROFR should be verified; in my view a footnote in a Project Eligibility letter should not be considered a binding determination on the Ch. 61 ROFR issue.

I realize that these concerns may already have been resolved by Sherborn's Select Board, Town Administrator and Town Counsel. If so, I'd be grateful for a word of reassurance from you and/or the Select Board. If not, I'm sure we'll hear more in upcoming meetings.

Thanks for listening,

Marian