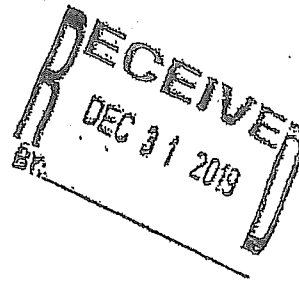


LAW OFFICES OF

DINICOLA, SELIGSON & UPTON, LLP

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Boston, MA 02108  
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Fax (617) 426-0587  
Email [info@dsu-law.com](mailto:info@dsu-law.com)

December 30, 2019



Damon M. Seligson  
617-279-2597  
[damon.seligson@dsu-law.com](mailto:damon.seligson@dsu-law.com)

**BY FEDERAL EXPRESS**  
**FOR OVERNIGHT DELIVERY**

Mr. George Morrill  
Chair, Sherborn Select Board  
19 Washington Street  
Sherborn, Massachusetts 01770

Re: 40B Proposal on 31 Hunting Lane, Sherborn, MA

Dear Mr. Morrill:

Please be advised that my firm represents various abutters to 31 Hunting Lane and other Sherborn residents, and we submit this letter to you, on their behalf, to document their concerns about the proposed 40B development at 31 Hunting Lane. This letter serves to supplement the earlier comments contained in my letter to you dated December 11, 2019.

The Chapter 40B Handbook states on page 11 that, for developers, entry to the comprehensive permit process begins with a Project Eligibility application. It further states that such application must include certain basic components including "[e]vidence of control of the site." As you know, Mr. Lybarsky references in the 40B application made by 31 Hunting Lane LLC a purchase and sale agreement whereby 31 Hunting Lane LLC agrees to purchase the properties subject to that application from Barsky Realty Trust<sup>1</sup>. He goes on to state that "[a] portion of lots 1, 2 and 3 [described in the application] are Subject to Chapter 61B restrictions" and that "a notice of the purchase and sale agreement between Barsky Estate Realty Trust and 31 Hunting Lane LLC has been sent to the Town of Sherborn starting the right of first refusal period."

Lots 1, 2 and 3 are described in the application. In fact, most of "Lot 2" (Hunting Lane Assessors Map 11, Parcel 3C, approx. 16.93 acres, Parcel One of Deed at Book [67090]<sup>2</sup>, Page 364) but for the house, 2 acres around the house and a driveway from Hunting Lane and some land on either side of the driveway, and all of "Lot 3" (Hunting Lane Assessors Map 11, Parcel 3B, approx. 8 acres, Parcel Two of Deed at Book 6709[0], Page 364) is subject to 61B. None of "Lot 1" (Hunting Lane Assessors Map 11, Parcel 2, approx. 4.88 acres, Parcel 2 of Deed at Book

<sup>1</sup> This entity is sometimes referred to as Barsky Estate Realty Trust in the application.

<sup>2</sup> The applicant misstates the Book reference in his application as Book 6709.

Mr. George Morrill  
Chair, Sherborn Select Board  
December 30, 2019  
Page | 2

66954, Page 354), the smallest lot, is subject to 61B. As a result, most of the property sought to be sold by Barsky Realty Trust to 31 Hunting Lane LLC is subject to 61B and the lien (and right of first refusal contained therein) imposed thereby.

As you also know, Mr. Lybarsky ascribed a value of \$3,000,000 to the properties being purchased by 31 Hunting Lane LLC, which value had no basis in fact as the purchase and sale agreement was between two entities owned by Mr. Lybarsky and thus was not a bona fide offer, it did not sufficiently describe the properties and had other deficiencies. For this and other reasons, the Select Board rejected the formal notice provided by Mr. Lybarsky with the Town (a so-called Notice of Intent) as invalid.

Chapter 61B is a Massachusetts state statute that permits landowners who agree to keep property for recreational purposes to obtain significantly reduced taxes on property subject to the statute. In exchange for the reduced taxes, the landowner grants a lien in favor of the town or municipality consisting of a right of first refusal to acquire the property when and if the property is sold or converted to residential, commercial or industrial use. The Town's option is specifically designed to prohibit development unless a town or municipality has waived its right of first refusal to acquire the subject property. Landowners voluntarily submit themselves to the statute in order to obtain its benefits and that is what Mr. Lybarsky did in this case. It seems clear that Chapter 40B assumes compliance by the applicant with statutes such as Chapter 61B that are specifically designed to thwart development, unless the Town waives its right.

Although there are a few Massachusetts Housing Appeals Committee cases that hold that certain restrictions on sale or other encumbrances are not in direct conflict with the site control requirement and therefore will not prevent issuance of a project eligibility/site approval letter, we believe that the present situation is fundamentally different from those situations. In those cases, the liens or encumbrances or other disputed issues involved local concerns regarding access or private arrangements for financings that could be discharged at will or private disputes giving rise to restraining orders or injunctions that could be lifted at any time (and the underlying disputes of which were not well pled by the litigants).<sup>3</sup>

In this case, the restriction is embodied in a state statute and it is specifically designed to restrict any type of development, including a 40B development, so long as it is in place. These restrictions are not of a limited or de minimis nature but rather include a right of first refusal for the benefit of the Town to acquire all of the 61B parcels upon any change in use. There is no ambiguity as to the impact of the statute on Mr. Lybarsky's ability to sell or convert the use of the 61B properties. Unless this lien is extinguished, Mr. Lybarsky cannot develop the site for residential, commercial or industrial use. We also note that unlike in some of the previously

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<sup>3</sup> See *Hollis Hills, LLC v. Lunenburg Zoning Board of Appeals*, No. 07-13 (Mass Housing Appeals Committee December 4, 2009); *Green View Realty, LLC v. Holliston Zoning Board of Appeals*, No. 06-16 (Mass. Housing Appeals Committee January 12, 2009); and *Paragon Residential Properties, LLC v. Brookline Zoning Board of Appeals*, No. 04-16 (Mass. Housing Appeals Committee December 1, 2004).

Mr. George Morrill  
Chair, Sherborn Select Board  
December 30, 2019  
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cited cases, the purchase and sale agreement signed by the seller and buyer in this case makes no reference to the 61B liens and only contains very general language referencing that the seller must convey "good and clear marketable title, free from all encumbrances"<sup>4</sup>.

Moreover, although there is a well understood procedure in place for a landowner to extinguish the 61B lien by (i) selling the land pursuant to a bona fide offer from an independent third party or (ii) converting the land to residential, commercial or industrial use, in either case triggering the Town's right of first refusal, Mr. Lybarsky has failed to do the former (as evidenced by the Town's letter of rejection of his Notice of Intent) or the latter. Accordingly, at this time, he has not even effectively taken the first step necessary under the statute to extinguish the lien by obtaining a waiver from the Town or by selling the land pursuant to the procedures set forth in the 61B statute.

We note that shortly after Mr. Lybarsky filed the Notice of Intent (later determined to be ineffective or invalid), interested, qualified buyers expressed interest in purchasing the 61B properties by taking an assignment of the Town's option, which is a common way in which Towns exercise their right of first refusal. Obviously, if and when Mr. Lybarsky again files a Notice of Intent to sell or convert the 61B properties, these buyers would likely step forward again and the 40B application filed by 31 Hunting Lane LLC would be moot.

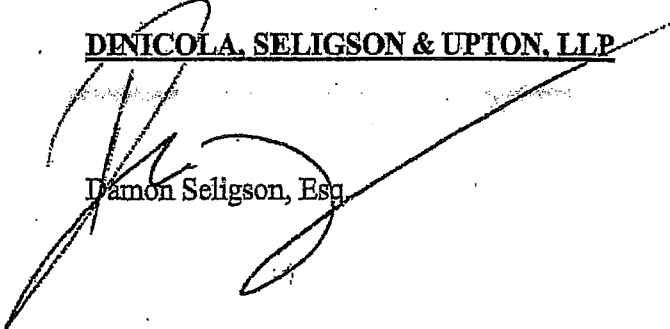
For all of these reasons, unless and until the Town has waived its right of first refusal or the property is no longer subject to the lien of 61B, we believe that Mr. Lybarsky does not "control" the site and his filing of the 40B application with Mass Housing for a Comprehensive Permit Site Approval/Homeownership is premature and not a valid application.

My clients urge the Select Board to add these important points to its comment letter to Mass Housing.

Thank you.

Very truly yours,

DENICOLA, SELIGSON & UPTON, LLP

  
Damon Seligson, Esq.

cc: Select Board Members

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<sup>4</sup> Section 4 of the Purchase and Sale Agreement.

Subject: 11 Hunting Lane and 61B

To: <smorrill@sherbornma.org>

Cc: <cdmills@alum.bucknell.edu>, Kathy Halamka <khalamka@gmail.com>

George:

My wife, Kathy, and I are the founders of Unity Farm Sanctuary, a 501c(3) providing animal rescue, education, and community service opportunities for Sherborn and adjacent towns. It is comprised of 11 Unity Lane (61A designation) and 17 Unity Lane (61B designation). The Unity Farm Sanctuary Board of Directors worked closely with the Town of Sherborn to reclassify the building at 17 Unity Lane to be a non-profit school for the benefit of the public. It is compliant with the Americans with Disabilities Act of 1990, has a public parking lot, and hosts daily classes for the town including yoga, meditation, tai chi, council on aging activities, and frequent artist/author programs. It also hosts the Summer So Round program for the town's children.

We maintain public trails on 11 Unity Lane, 17 Unity Lane and the Rockwell property owned by the Sherborn Rural Land Foundation. These 3 miles of trails are published in the Sherborn Forest and Trails public maps. Unity Farm Sanctuary ensures protection of the wildlife corridor connecting Hunting Lane, Unity Lane, Zion's Lane, and Green Lane, bounded by the Lower Orchard and Highway 27 (shown in the attached map).

It is our intent, as stated in our wills and trusts, that all Unity Farm Sanctuary lands (now existing or added to as described below) be preserved in perpetuity with public access for the benefit of the town, overseen by a professional trustee board to ensure their protection.

As a non-profit public charity serving the town, Unity Farm Sanctuary is interested in purchasing, as an assignee of the Town's 61B rights, one or more of the 61B properties located at 31 Hunting Lane depending upon the cost and terms of such purchase. We see this as a critical component to the overall long term plan to have an extensive trail system from the Town center through the Sherborn forest as described above.

We strongly urge the Town to ignore the non-arms length purchase price contained in the purchase and sale agreement where Mr. Lybarsky is essentially both the seller and the buyer, instead obtaining an impartial appraisal of the parcel subject to the 61B lien (excluding of course the portion of the Parcel BC with the residence, the driveway and any other residential property) so that we may properly evaluate the purchase.

We also assume that there is a separate right of first refusal for each of the three parcels, and that this will be confirmed.

We are very excited about the possibility of adding to our current lands and preserving them into perpetuity for the Town of Sherborn.

We heartily endorse the other concerns that have been expressed concerning wetlands issues, possible adverse effects on abutters' wells, the wildlife corridor, traffic and the overall bucolic nature of our beautiful Town.

We are very interested in talking to you about this purchase at your earliest convenience.

Thanks,

John and Kathy Halamka

**Diane Moores**

---

**From:** Craig Mills <craigdmills28@gmail.com>  
**Sent:** Wednesday, December 11, 2019 11:20 AM  
**To:** Charles Yon; Daryl Beardsley; David Williams; Diane Moores; Eric Johnson; George Morrill; Jeffery Waldron; John Higley; Neil Kessler; Paul Derennis; Peggy Novak; Richard Novak; Stephen Leahy; Susie Wheelwright; William Seymour  
**Cc:** Paul Bohicchio; John Garrison; Damon Seligson; John Halamka; Kathy Halamka  
**Subject:** Fwd: 31 Hunting Lane and 61B  
**Attachments:** Screenshot 2019-12-10 at 8:35:40 PM.png

Ladies and Gentlemen!

As you may know, abutters to 31 Hunting Lane and other residents of Sherborn are very concerned about the proposed 4DB developments on Hunting Lane as well as at 41 N. Main Street, as completely out of character with the Town, threatening nearby wells, creating much greater stress on our already difficult traffic congestion, etc. The properties along Hunting Lane are, however, subject to a 61B lien, granting the Town the right to purchase these parcels for conservation or open space or the like, or to assign its right of first refusal to another 501(c)(3) organization willing to purchase one or more of the parcels.

As you also undoubtedly know, one of the real treasures in Sherborn is Unity Farm Sanctuary, which is the brainchild of John and Kathy Halamka. The Sanctuary abuts the Hunting Lane parcels subject to the 61B lien. The Halamkas have sent the attached email to George Morrill expressing their desire to purchase one or more of these 61B parcels for the reasons noted in their email. This is a very exciting opportunity for the Town!

The Halamkas asked me, as one of the abutters who wants to see this fragile property preserved in perpetuity in its current state, to send their email along for all of your benefit.

*Best Regards,*

*Craig*

**Craig D. Mills**  
39 Hunting LN  
Sherborn, MA 01770-1308  
508.359.2465 (home phone)  
866.947.1553 (toll free fax) / 617.345.1300 (int'l fax)  
617.281.8852 (cell)  
cdmills@alum.bucknell.edu

Forwarded message  
**From:** John Halamka <jdhalamka@gmail.com>  
**Date:** Wed, Dec 11, 2019 at 9:55 AM

Diane Moores

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**From:** Diane Moores  
**Sent:** Monday, December 30, 2019 11:29 AM  
**To:** Diane Moores  
**Subject:** FW: 31 Hunting Lane; 61B

Diane Moores  
Assistant Town Administrator  
Town of Sherborn  
19 Washington Street  
Sherborn, MA 01770

(508) 651-7850

**From:** Eric Johnson <[ejohnson@sherbornma.org](mailto:ejohnson@sherbornma.org)>  
**Sent:** Thursday, December 19, 2019 6:22:08 PM  
**To:** David Williams <[dwilliams@sherbornma.org](mailto:dwilliams@sherbornma.org)>  
**Cc:** Diane Moores <[diane.moores@sherbornma.org](mailto:diane.moores@sherbornma.org)>; George Morrill <[gMorrill@sherbornma.org](mailto:gMorrill@sherbornma.org)>  
**Subject:** Fwd: 31 Hunting Lane; 61B

Please enter into the record for tonight.

Sent from my Verizon 4G LTE smartphone


----- Original message -----

**From:** David Sossen <[david.sossen@bb-61.com](mailto:david.sossen@bb-61.com)>  
**Date:** 12/19/19 4:44 PM (GMT-05:00)  
**To:** Eric Johnson <[ejohnson@sherbornma.org](mailto:ejohnson@sherbornma.org)>  
**Subject:** 31 Hunting Lane; 61B

Eric,

I had hoped to attend tonight's meeting but alas health issues prevent me. Please record my strong support for the Town assigning the right to purchase which would allow the Hamalkas to purchase the property. As far as I can see this is a cost-free way to both avoid a large and disruptive development in the town center, and add to conservation land. Please note I am speaking for myself and not in my capacity as a member of the BOH

Dave



David Sossen

Cell: 617 529 4491

Land: 508 653 1792

[David.sossen@bb-61.com](mailto:David.sossen@bb-61.com)

Diane Moores

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From: David Williams  
Sent: Monday, December 30, 2019 11:20 AM  
To: Diane Moores  
Subject: Fwd: [Sherborn MA] Assignment of Right to Purchase Ch.61B land (Sent by elisabeth wineberg, erwineberg@alumni.stanford.edu)

did this document make it into comments?

\*\*\*\*\*

Visit us at [www.SherbornMA.org](http://www.SherbornMA.org)

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From: Eric Johnson <ejohnson@sherbornma.org>  
Sent: Thursday, December 19, 2019 6:24:10 PM  
To: David Williams <dwilliams@sherbornma.org>  
Cc: Diane Moores <diane.moores@sherbornma.org>; George Morrill <gMorrill@sherbornma.org>  
Subject: Fwd: [Sherborn MA] Assignment of Right to Purchase Ch.61B land (Sent by elisabeth wineberg, erwineberg@alumni.stanford.edu)

More for the record.

Sent from my Verizon 4G LTE smartphone

----- Original message -----

From: Contact form at Sherborn MA <cmsmailer@civicplus.com>  
Date: 12/19/19 1:16 PM (GMT-05:00)  
To: Eric Johnson <ejohnson@sherbornma.org>  
Subject: [Sherborn MA] Assignment of Right to Purchase Ch.61B land (Sent by elisabeth wineberg, erwineberg@alumni.stanford.edu)

Hello ejohnson,

elisabeth wineberg (erwineberg@alumni.stanford.edu) has sent you a message via your contact form (<https://www.sherbornma.org/user/1883/contact>) at Sherborn MA.

If you don't want to receive such e-mails, you can change your settings at <https://www.sherbornma.org/user/1883/edit>.

Message:

To Selectman Johnson,  
I cannot attend tonight's Board meeting.  
I am writing to express my very strong opinion that  
it is in the very best interests of the Town  
that The Board assign to Unity Sanctuary



its Right to Purchase the Lybarsky owned  
Tax Advantaged Ch.61B land that is at issue.

Elisabeth Wineberg  
26 Goulding Street East