JOHNSON & BORENSTEIN, LLC
ATTORNEYS AT LAW

12 Chestnut Street
Andover, MA 01810-3706
Tel: 978-475-4488
Fax: 978-475-6703
www.jbllclaw.com
don@jbllclaw.com

Mark B. Johnson (MA, NH, DC)
Donald F. Borenstein (MA, ME, NH)

Keri M. Armstrong (MA, NH)
John M. Donnelly, Jr. (MA, NH)
Gordon T. Glass (ME, MA)
Andrew T. Lechner (VT, MA, NH)

Of Counsel
Robert W. Lavoie (MA, NH)

Paralegals
Karen L. Bussell
Lianne Patenaude
Ellen M. Melvin
Tina M. Wilson

April 2, 2024

Via Email – amanugian@dracutma.gov

Zoning Board of Appeals
c/o Alison Manugian, Community Development Director
62 Arlington Street
Dracut, MA 01826

Re: The Homes at Murphy's Farm 40B Development, 231 Wheeler Street

Dear Chair Mallory and Board Members,

I represent The Homes at Murphy's Farm, LLC ("Homes") in connection with its application for a Comprehensive Permit ("Application") to approve its proposed residential development of land ("Development") located in the Town's Residential 1 Zoning District at 231 Wheeler Street ("Property").[1] In this context, I write this letter to the Dracut Zoning Board of Appeals ("Board") to respond to the letter concerning the Development sent to the Board by Dennis A. Murphy, ostensibly on behalf of "neighbors whose homes abut the project site" ("Opposition"), on or about March 20, 2024 ("Letter").

I. Relevant Provisions of the Comprehensive Permit Regulations

760 CMR 56.02: "Project – means a development involving the construction or

[1] The overwhelming majority of the Development is proposed to be located within Dracut; however, the Property appears to straddle the Dracut/Methuen line, and a small portion of the Development is apparently located in Methuen. Specifically, Homes proposes to access a minor part of the Development situated in Dracut via frontage on Wheeler Street that is seemingly in Methuen.

A separate comprehensive permit application is pending before the Methuen Zoning Board of Appeals ("Methuen Board"). Recently, the Methuen Board claimed "safe harbor" under 760 CMR 56.03(8)(a) based upon Methuen's purported satisfaction of the regulatory affordable housing unit minimum and general land area minimum, which claims Homes appealed to the Housing Appeals Committee ("HAC"). The HAC appeal remains active.

substantial rehabilitation of units of Low or Moderate Income Housing that is eligible to submit an application to a Board for a Comprehensive Permit or to file or maintain an appeal before the Committee. . . ."

760 CMR 56.03(1): "A decision by a Board to deny a Comprehensive Permit, or . . . grant a Comprehensive Permit with conditions, shall be upheld if one or more of the following grounds has been met as of the date of the Project's application: . . . (e) a related application has previously been received, as set forth in 760 CMR 56.03(7). . . . A Board decision based on one or more of the grounds set forth in 760 CMR 56.03(1) shall be made solely in accordance with the procedure set forth in 760 CMR 56.03(8). . . ."

760 CMR 56.03(7): "For the purposes of 760 CMR 56.03(7), a related application shall mean that less than 12 months has elapsed between the date of an application for a Comprehensive Permit and any of the following: (a) the date of filing of a prior application for a variance, special permit, subdivision, or other approval related to construction on the same land . . . ."

760 CMR 56.03(8)(a): "If a Board considers that, in connection with an Application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that . . . one or more of the grounds set forth in 760 CMR 56.03(1) have been met, it must do so according to the following procedures. Within 15 days of the opening of the local hearing for the Comprehensive Permit, the Board shall provide written notice to the Applicant, with a copy to the Department, that it considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that it believes have been met, and the factual basis for that position, including any necessary supportive documentation. . . If the Applicant wishes to challenge the Board's assertion, it must do so by providing written notice to the Department . . . The Department shall thereupon review the materials provided by both parties and issue a decision . . . ."

760 CMR 56.03(8)(c): "If either the Board or the Applicant wishes to appeal a decision issued by the Department pursuant to 760 CMR 56.03(8)(a) . . . that party shall file an interlocutory appeal with the Committee . . . with a copy to the other party and to the Department. The Board's hearing of the Project shall thereupon be stayed until the conclusion of the appeal, at which time the Board's hearing shall proceed . . . ."

II. The Comprehensive Permit Regulations Do Not Direct or Permit the Dracut Zoning Board of Appeals to Suspend Consideration of the Application

A. The Appeal Pending Before the Housing Appeals Committee

1. The Methuen Board is the Only Zoning Board Allowed to Suspend its Public Hearing

Via the Letter, the Opposition contends that 760 CMR 56.03(8)(c) mandates in "unequivocal" and "plain terms" that the Board stay its public hearing concerning the Application "because it involves the same 'Project' as the one on appeal at HAC by the Methuen ZBA". However, such argument is unavailing, as, regardless of whether the Board agrees with the Opposition's interpretation of the term "Project", 760 CMR 56.03(8)(c) plainly directs the Methuen Board to stay its consideration of Homes' comprehensive permit application to the Methuen Board but does not require or permit the Dracut Board to suspend its consideration of the distinct Application pending in Dracut.

760 CMR 56.03(8)(a) outlines the procedure for: 1) "**a** Board" to attempt to claim "safe harbor" and thereby deny a comprehensive permit application or impose conditions or requirements on a comprehensive permit; and 2) a comprehensive permit applicant to challenge "**the** Board's assertion" before the Executive Office of Housing and Livable Communities f/k/a the Department of Housing and Community Development ("EOHLC"). **Emphasis added.** In conjunction, 760 CMR 56.03(8)(c): 1) establishes the procedure for "either **the** Board or the Applicant" to appeal EOHLC's safe harbor decision to HAC; and 2) mandates "**[t]he** Board's hearing of the Project shall thereupon be stayed until the conclusion of the appeal". **Emphasis added.**

In short, the plain language of the Comprehensive Permit Regulations concerning "safe harbor" claims/appeals and "Projects" is entirely in the singular (i.e., "a Board" that has claimed safe harbor may face an appeal from the applicant, and "the Board" involved in such a safe harbor appeal must stay its consideration of the proposed comprehensive permit project). Yet, the Opposition suggests that the Board – without a single statutory provision, regulatory provision, HAC decision, or court decision to rely on – spontaneously interpret all the narrow, singular language in the Comprehensive Permit Regulations to be expansive and plural and therefore not only permit, but mandate, the Board suspend its public hearing concerning the Application because of the pending HAC appeal concerning the distinct Methuen comprehensive permit application. Homes urges the Board to reject this unlawful request that the Board deviate from its duty to consider the Application, as set forth under the plain language of the Comprehensive Permit Act and Comprehensive Permit Regulations.

2. A Separate Note Concerning the Definition of "Project"

Separately, it is noteworthy that the Opposition's effort to characterize the Development as a single "Project" within the meaning of the Comprehensive Permit Regulations appears to be inconsistent with the usage of the word "Project" as a term of art. To wit, as noted herein, *supra*, the Comprehensive Permit Regulations define a "Project" to be "a development involving the construction or substantial rehabilitation of units of Low or Moderate Income Housing that is

eligible to submit **an** application to **a** Board for **a** Comprehensive Permit or to file or maintain **an** appeal before the Committee. . . ."[2] See 760 CMR 56.02. **Emphasis added.** Homes contends this language indicates each portion of the Development that is subject to a separate comprehensive permitting process and HAC appeal process is a distinct "Project". Indeed, such an interpretation aligns with the practical reality: the Dracut Board and the Methuen Board are considering different portions of the Development[3] and are doing so based on separate "local needs", "local concerns", and circumstances.

3. The Risks Relating to Project Changes Are Placed Upon the Applicant

Lastly, any policy-based argument – which cannot trump the plain language of the Comprehensive Permit Regulations regardless – that the Board's consideration of the Application should be stayed because the outcome of the pending HAC appeal could result in an alteration to the Development's design is also unavailing under the Comprehensive Permit Regulations.

To wit, the Opposition makes the extreme suggestion that the Board should interpret the Comprehensive Permit Regulations to mandate the Board stay its consideration of the Application simply because a distinct permitting/appeal process involving a different municipality could cause Homes to seek to alter its Development proposal in the future. Yet, such an interpretation of the Comprehensive Permit Regulations would be out of step with the plain language and readily ascertainable intent of the same. Indeed, under 760 CMR 56.05(11)(a), a comprehensive permit applicant always has the express right to seek to alter an approved development, and rather than requiring a stay of proceedings because an applicant could potentially propose to change a development in the future, the Comprehensive Permit Regulations intentionally place the risks associated with development alteration squarely on the shoulders of the applicant. See e.g. 760 CMR 56.05(11)(c) (providing that, after a new public hearing, a zoning board has the authority to conditionally approve or deny proposed "substantial" changes to approved comprehensive permit developments).

For the foregoing reasons, Homes respectfully requests the Board decline to stay its public hearing concerning the Application.

B. The Recent Extension of Homes' Subdivision Approval

Via the Letter, the Opposition argues that the Board's public hearing concerning the Application should be stayed for twelve months due to the Dracut Planning Board's decision on February 14, 2024, to extend Homes' preexisting subdivision approval. Such argument is so inconsistent with the framework of the Comprehensive Permit Regulations, conveniently omitting discussion and analysis of critically relevant provisions of the same, as to smack of disingenuity and deceit.

760 CMR 56.03(1) expressly provides that a Board may deny or conditionally approve a comprehensive permit if "a related **application** has **previously** been received, as set forth in 760

---

[2] Notably, the same language is used in 760 CMR 56.04(1) concerning "Project Eligibility".

[3] Contrary to the Opposition's description of the Development, the Development has frontage and access from two public ways at locations well within the Town of Dracut.

CMR 56.03(7)".[4] **Emphasis added.** In conjunction, 760 CMR 56.03(7) defines a "related application" to be, in pertinent part, a "**prior** application for a variance, special permit, subdivision, or other approval related to construction on the same land" that was filed less than twelve months before the relevant comprehensive permit application. **Emphasis added.** 760 CMR 56.03(1) mandates that any denial or conditional approval issued in response to a "related application" having been received "shall be made **solely** in accordance with the procedure set forth in 760 CMR 56.03(8)". **Emphasis added.**

The Opposition's argument for a twelve-month stay collapses due to numerous glaring issues. First, Homes did not submit an "application" for the subdivision approval extension from the Planning Board, and an extension does not appear to have been required under the local Subdivision Regulations. Indeed, the Planning Board issued the subdivision approval extension without a formal public hearing. Second, the subdivision approval extension was issued after the Application was filed, not "prior" or "previous" to the filing of the Application.[5] Lastly, the Board did not attempt to claim a "related application" and deny or conditionally approve the Application "in accordance with the procedure set forth in 760 CMR 56.03(8)" (i.e., "[w]ithin 15 days of the opening of the local hearing for the Comprehensive Permit") and is therefore precluded from untimely doing so now. Indeed, it would have been impossible for the Board to timely claim a "related application", as the subdivision approval extension did not issue until approximately six and a half months after the filing of the Application. Again, it is difficult to believe the Opposition did not note any of these readily identifiable failings in its request for a twelve-month stay.

For the foregoing reasons, Homes respectfully requests the Board decline to stay its public hearing concerning the Application.

Should you have any questions or concerns regarding the content of this letter, please do not hesitate to contact me for additional information or documentation. Thank you for your consideration.

Very truly yours,

JOHNSON & BORENSTEIN, LLC

/s/ Donald F. Borenstein

Donald F. Borenstein

Cc: Kevin O'Brien, Manager of The Homes at Murphy's Farm, LLC – ***via email***

---

[4] There does not appear to be any relevant language concerning "staying" consideration of a comprehensive permit application.

[5] Relevant to the seeming purpose of the "related application" provisions of the Comprehensive Permit Regulations, Homes did not apply for a comprehensive permit as a mere tactic to persuade Dracut into approving a previously denied conventional subdivision.