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April 25, 2024

VIA EMAIL ONLY
R. Scott Mallory, Chair and Members
Dracut Zoning Board of Appeals
Dracut Town Hall
62 Arlington Street
Dracut, MA 01826

RE: The Homes at Murphy's Farm 40B application

Dear Chair Mallory and Members of the Zoning Board of Appeals:

You have asked me provide my opinion to the Dracut Zoning Board of Appeals ("ZBA") concerning the March 20, 2024 letter provided by Attorney Dennis Murphy from Hill Law (the "Hill Law letter"), alleging that the ZBA must stay its review of the 40B application for the Homes at Murphy's Farm ("Murphy's Farm") in light of: (1) the ongoing appeal before the Housing Appeals Committee ("HAC") of the Methuen ZBA; and (2) the recent decision of the Dracut Planning Board to grant a one-year extension to Murphy's Farm for its previously approved subdivision approval.

In preparing this opinion, I have reviewed the letter from Hill Law, the response to the letter from counsel for Murphy's Farm dated April 2, 2024 (the "Borenstein letter"), the 40B law and regulations, and I also looked for pertinent decisions of the HAC and other relevant Massachusetts case law.

1. The Request for a Stay Based on the Appeal of the Methuen ZBA decision.

While applications for 40B approval are processed on a town-by-town basis, the need for affordable housing and the policy basis for the enactment of M.G.L. c. 40B and its regulations, are broader than the needs or issues of a particular town. As noted in the statute itself "requirements and regulations shall be considered consistent with local needs if they are reasonable *in view of the regional* need for low and moderate income housing . . ." M.G.L. c. 40B, section 20 (definition of "Consistent with Local Needs") (emphasis added). As the Land Court states in a 2023 decision,

> [c]hapter 40B creates a rebuttable presumption that the *regional need for affordable housing outweighs local concerns of that town if the town has not*

> *achieved the 10% minimum*. G. L. c. 40B, §§ 20-21; 760 CMR 56.03(3); See Zoning Bd. of Appeals of Canton v. Housing Appeals Comm., 76 Mass. App. Ct. 467, 469-470 (2010) (interpreting statute and regulation). Indeed, where a municipality has not met its minimum affordable housing obligations, that failure "*will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal*." Bd. of Appeals of Hanover, 363 Mass. at 367.

Griffith vs. Wright, Mass. Land Ct., No. 20 MISC 000036 (KTS) (Apr. 19, 2023) (emphasis added).

This context is important in considering the Hill Law letter, because there is nothing specific in the law or regulations, or in the cases or HAC decisions, which addresses the specific factual situation presented – that is, where there are two 40B applications pending in two adjacent municipalities, because the footprint of the subject project spans both municipalities. While the "Project" may be one project with elements in two municipalities, the applications and the process are separate, and each zoning board of appeals must review and consider the applications separately. Issues which are relevant and important to Dracut, may not be relevant and important to Methuen, and vice-versa. In that same light, because of the expressions within the law and as expressed by at least one Massachusetts court, that affordable housing is a regional need, the actions of a single community with respect to a portion of a project or project site, cannot dictate the actions of the adjacent community. In essence, the regional need for affordable housing, where the community or communities which are the intended location of the project have not met their 10% or 1.5% statutory minima, overrides specific individual community concerns and cannot and should not be used as a basis for staying the project within Dracut.

Ultimately, any project which spans multiple communities will need approval from both communities in order to proceed, and the applicant will need to work with both zoning boards to ensure that conditions in community A do not impede conditions in community B.[1] But as pointed out in the Borenstein letter, "a comprehensive permit applicant always has the express right to seek to alter an approved development."[2] Further, it is undisputed that a permit applicant

[1] I note that the Developer may also modify the scope of the project such that it no longer spans more than one community, as part of the public hearing process. Staying the review of an application impedes this ability.

[2] See 760 CMR 56.04(5) ("If [DHCD] finds that the changes are substantial, it shall ordinarily defer any review ... until either the Board has issued a Comprehensive Permit or the application has been denied and the Applicant has lodged an appeal ... at which time [DHCD] shall reaffirm, amend, or deny its determination of the project eligibility requirements.... In the case of a

has the ability to modify an application while the public hearing process is proceeding. Sometimes these modifications are as a result of a request of the zoning board, sometimes these modifications are as a result of peer review of the application, and sometimes these modifications are as a result of community input and comments. Given the regional need for affordable housing, it does not make sense, nor is it consistent with the policies and purposes underlying M.G.L. c. 40B, for Dracut to be required to stay its review of the Murphy's Farm application while the Methuen appeal proceeds.[3]

In reviewing the Hill Law letter and the Borenstein letter, I disagree with the Hill Law letter's construction of the language of the regulations. As noted above and based on my experience in the subject area, the interpretation of "Project" in the context of 760 CMR 56.03(8)(c) as singular is inaccurate. The full citation of that section states:

> If either the Board or the Applicant wishes to appeal a decision issued by the Department pursuant to 760 CMR 56.03(8)(a), including one resulting from failure of the Department to issue a timely decision, that party shall file an interlocutory appeal with the Committee on an expedited basis, pursuant to 760 CMR 56.05(9)(c) and 56.06(7)(e)11., within 20 days of its receipt of the decision, 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 in accordance with 760 CMR 56.05. Any appeal to the courts of the Committee's ruling shall not be taken until after the Board has completed its hearing and the Committee has rendered a decision on any subsequent appeal.

The provision provides for an interlocutory (provisional) appeal of a board's determination that its community has met one of the statutory minima (either the 10% or the 1.5% threshold) – if the board choses to file such an appeal. The appeal is not mandatory, only the process required if a board choses to make the assertion is mandatory. This appeal is singularly individual to the board which is making that claim, and is not relevant to a board of an adjacent community. The

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Comprehensive Permit that is not subject to appeal, such decision may be incorporated into [DHCD's] final approval issued pursuant to 760 C.M .R. 56.04(7). If [DHCD] finds that the changes are not substantial and that the Applicant has good cause for not originally presenting such details in its application, the changes shall be permitted if the proposal as so changed meets the requirements of M.G.L. c. 40B, §§ 20 through 23 and 760 C.M.R. 56.04.) (cited in Brooks vs. Bd. of Appeals of Chelmsford, Mass. Land Ct., No. 08 MISC 386133 AHS (Dec. 29, 2011).

[3] Also important to consider, the party in interest, the Town of Methuen, has not sought any stay of the Dracut application while its appeal is pending.

full language of the regulatory provision also makes it clear that the "Board" is singular, and not plural. Finally, an interlocutory appeal is a provisional proceeding, and cannot be the basis for an appeal to Court until after the application has been returned to the reviewing board, and a final determination is issued. Thus, it is impracticable to stay the proceeding of an adjacent community while this process play out, and not based in the law or regulations. Given the regional need for affordable housing, and the plain language of the regulations, it is my opinion that the stay of the proceedings for the Murphy's Farm application pending with the Methuen ZBA has no impact on the proceedings of the Dracut ZBA, and the Dracut ZBA must continue forward with its process.

2. Impact of the Decision the Dracut Planning Board Granting a one-year extension to Murphy's Farm.

On or about February 14, 2024, the Dracut Planning Board granted a one-year extension to Murphy's Farm related to its subdivision approval. The Hill Letter claims that extension constitutes a "Related Application" which "bars any 40B project from being considered on the same land for 12 months."

The Hill letter does not site the complete provision of the regulations. 760 CMR 56.03(1)(e) states that a Board decision to deny a Comprehensive Permit "shall be upheld" if one or more of the following grounds have been met "*as of the date of the Project's application*." Setting aside that the subdivision approval renewal is not a "related application", even if it were, the clear language of the regulations demonstrates that the date on which a "related application" is determined and can be a basis to see denial of a comprehensive permit application is "as of the date of the Project's application." Since the Murphy's Farm application was received on July 31, 2023, that is the only date which matters.

While the language above is definitive, it is also my opinion that the one year extension granted by the Planning Board is not a Related Application. Related Application is defined as follows.

> 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, if that application was for a prior project that was principally non-residential in use, or if the prior project was principally residential in use, if it did not include at least 10% SHI Eligible Housing units;
> (b) any date during which such an application was pending before a local permit granting authority;

(c) the date of final disposition of such an application (including all appeals); or
(d) the date of withdrawal of such an application.
An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

An extension of a previously approved subdivision approval does not meet any of the elements set forth in the regulation. In addition, the Hill Law letter omitted the last phrase of the regulations, which states "[a]n application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land." A one year extension of a subdivision falls within this language. It makes no changes to the preexisting use of the land, simply extends the time period for which the subdivision approval applies.

For all of the foregoing reasons, it is my opinion that the arguments set forth in the Hill Law letter are inaccurate, incomplete, and not based on the plain language of the 40B law or regulations, and not consistent with the policies underlying the reasons for the 40B law and regulations. As a result, it is my opinion that the two arguments advanced by the Hill Law letter do not provide a basis for the Dracut ZBA to stay or otherwise cease consideration of the Murphy's Farm application.

I hope this opinion is useful.

Sincerely,

/s/ Karis L. North

Karis L. North

cc: Alison Manugian, Community Development Director
Joseph D. Peznola