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September 17, 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 – Hill Law letter dated 8.27.2024

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

You have asked me to provide my opinion to the Dracut Zoning Board of Appeals ("ZBA") concerning the August 27, 2024 letter provided by Attorney Daniel Hill from Hill Law (the "Hill Law 8.27 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 the revisions to the application before the ZBA.

In preparing this opinion, I have reviewed the letter from Hill Law, the 40B law and regulations, working group meeting minutes, other relevant documents, and attended the August 29, 2024 ZBA meeting and listened to the testimony provided.

On or about July 16, 2024, the applicant submitted a revised site plan for the Murphy's Farm project, which reduced the number of units from 300 four bedroom units to 268 one, two, and three bedroom units. At the August 29, 2024 ZBA hearing, the applicant stated that the unit mix would be a typical mix for 40B projects, i.e., 20% one bedroom, 60% two bedrooms, and 20% three bedrooms. According to the applicant, this reduces the bedroom count of the project from 1200 to 600. The Applicant also removed Parcel X and Parcel Y from the project, which, according to Attorney Hill, reduces the land area of the project by 21.7 acres.

Attorney Hill argues that the effective density of the project is now increased, from 5.92 units per acre (300 units on 50.7 acres) to 9.24 units per acre (268 units on 29 acres). He also argues that the increase in density and the reduction in bedroom count constitutes a "major change" in the project design, which "may impact the Applicant's project eligibility status with MassHousing." Attorney Hill relies on 760 CMR 56.07(4)(c), which is not the section of the 40B regulations which governs project eligibility. While I agree with Attorney Hill that section provides guidance on how to determine whether an applicant is proposing a substantial change, it has to be read in context with the rest of section 56.04, which governs project eligibility.



R. Scott Mallory
September 17, 2024
Page 2

1. The Request for a Stay and Referral to MassHousing based on the Changes to the Project.

Project Eligibility is governed by the Comprehensive Permit regulations at 760 CMR Part 56. Section 56.04(1) sets out the initial requirements:

(1) Project Eligibility. To be eligible to submit an application to a Board for a Comprehensive Permit or to file or maintain an appeal before the Committee, the Applicant and the Project shall fulfill, at a minimum, the following project eligibility requirements:

- (a) The Applicant shall be a public agency, a nonprofit organization, or a Limited Dividend Organization;
- (b) The Project shall be fundable by a Subsidizing Agency under a Low or Moderate Income Housing subsidy program; and
- (c) The Applicant shall control the site.

Compliance with these project eligibility requirements shall be established by issuance of a written determination of Project Eligibility by the Subsidizing Agency that contains all the findings required under 760 CMR 56.04(4), based upon its initial review of the Project and the Applicant's qualifications in accordance with 760 CMR 56.04.

MassHousing issued a Project Eligibility Letter for Murphy's Farm on July 5, 2023 (attached hereto as Exhibit A). That letter states, in part:

MassHousing staff has determined that the Project appears generally eligible under the requirements of the Program, subject to final review of eligibility and to Final Approval. As a result of our review, we have made the findings as required pursuant to 760 CMR 56.04(1) and (4). Each such finding, with supporting reasoning, is set forth in further detail on Attachment 1 hereto. It is important to note that Comprehensive Permit Rules limit MassHousing to these specific findings in order to determine Project Eligibility. If, as here, MassHousing issues a determination of Project Eligibility, the Applicant may apply to the Zoning Board of Appeals ("ZBA") for a comprehensive permit. At that time local boards, officials and members of the public are provided the opportunity to further review the Project to ensure compliance with applicable state and local standards and regulations.

This Site Approval is expressly limited to the development of no more than three hundred (300) rental units under the terms of the Program, of which not less than

R. Scott Mallory
September 17, 2024
Page 3

seventy-five (75) of such units shall be restricted as affordable for low- or moderate-income persons or families as required under the terms of the Guidelines. It is not a commitment or guarantee of financing and does not constitute a site plan or building design approval. Should you consider, prior to obtaining a comprehensive permit, the use of any other housing subsidy program, the construction of additional units or a reduction in the size of the Site, you may be required to submit a new Site Approval application for review by MassHousing. Should you consider a change in tenure type or a change in building type or height, you may be required to submit a new site approval application for review by MassHousing.

760 CMR 56.04(5) discusses substantial changes after a determination of Project Eligibility is received. It states:

If an Applicant desires to change aspects of its proposal that would affect the project eligibility requirements set forth at 760 CMR 56.04(1), after it has received a determination of Project Eligibility, it shall notify the Subsidizing Agency in writing of such changes, with a copy to the Department, the Chief Executive Officer of the municipality, and the Board. The Subsidizing Agency shall determine within 15 days whether such changes are substantial with reference to the project eligibility requirements. Failure to respond shall be deemed a finding that the change is not substantial.

If the Subsidizing Agency finds that the changes are substantial, it shall ordinarily defer any review (except if the Applicant, the Chief Executive Office of the municipality, or the Board request otherwise) until either the Board has issued a Comprehensive Permit or the application has been denied and the Applicant has lodged an appeal with the Committee, at which time the Subsidizing Agency shall reaffirm, amend, or deny its determination of the project eligibility requirements. Only the changes affecting the project eligibility requirements set forth at 760 CMR 56.04(1) shall be at issue in such review.

In reviewing the Hill Law letter and being informed of the proposed changes, I note that it is my opinion that none of the proposed changes affect the project's eligibility under 760 CMR 56.04(1), which are limited to the legal format of the Applicant, the fundability of the project, and site control. Nor do the proposed changes impact the findings made by MassHousing under 760 CMR 56.04(4). However, I note that MassHousing's Project Eligibility determination states that should the applicant "consider, prior to obtaining a comprehensive permit, . . . a reduction in the size of the Site, you may be required to submit a new Site Approval application for review by MassHousing."

R. Scott Mallory
September 17, 2024
Page 4

In combination with the required notice to the subsidizing agency of proposed changes, and that the proposed changes include reduction in the size of the site, I recommend that the ZBA instruct the applicant to submit notification to MassHousing of the proposed site changes (decrease in acres) and the reduction in the number of units and number of bedrooms. I do not think that such notification requires a stay of the ongoing Comprehensive Permit hearing, unless, after receipt of such notice, MassHousing determines that the changes are substantial, and it decides to re-evaluate the project's eligibility.

I have attached a draft letter to the Applicant from the Board, directing same.

With respect to the remainder of Attorney Hill's letter, I note that these requests have been made by the Board and discussed with the Applicant. As discussed at the August 29, 2024 hearing, more detailed information concerning the project impacts, and in particular, more detailed waiver request are necessary for the Board to consider the project and the requested waivers. The applicant should also consider a further extension of the deadline for review of this project, to provide the Board and its consultants, and the abutters and interested parties sufficient time to review this information.

I hope this opinion is useful.

Sincerely,

/s/ Karis L. North

Karis L. North

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