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January 13, 2025

Via Email ~ amanugian@dracutma.gov

Conservation Commission
c/o Alison Manugian, Acting Town Manager
62 Arlington Street
Dracut, MA 01826

Re: The Homes at Murphy's Farm, LLC – Notice of Intent

Dear Chair Sutherland and Members of the Commission,

I write on behalf of the Homes at Murphy's Farm, LLC ("Homes") to respond to the letter from Attorney Daniel C. Hill to the Commission dated January 8, 2025 ("Letter"). For the reasons provided herein, *infra*, Homes respectfully requests the Commission determine that it has jurisdiction to consider Homes' Notice of Intent dated January 2025 ("Notice"), and that it should therefore begin its substantive consideration of the Notice at its meeting scheduled for January 15, 2025.

I. The Commission Has Jurisdiction to Consider the Notice

Simply put, the Letter fails to cite any legal authority that expressly supports the drastic position that the Commission lacks jurisdiction over the Notice. Instead, the Letter relies solely on: 1) a limited, legally erroneous reading of certain regulatory language; and 2) unpersuasive "practical reasons" and a non-precedential Superior Court opinion.

A. The Letter Improperly Interprets the Wetlands Protection Regulations to Conflict with the Plain Language of the Wetlands Protection Act

Regarding the regulatory language cited in the Letter, it is accurate that 310 CMR 10.05(4)(e) provides,

> *When an applicant for a comprehensive permit (under M.G.L. c. 40B, §§ 20 through 23) from a board of appeals has received a determination from the board granting or denying the permit and, in the case of a denial, has appealed to the Housing Appeals Committee (established under M.G.L. c. 23B, § 5A), said applicant shall be deemed to have applied for all permits obtainable at the time of filing.*

However, this regulatory language cannot be read in a vacuum, and it must be interpreted in harmony with the Massachusetts Wetlands Protection Act a/k/a Mass. Gen. Laws ch. 131, § 40 ("Act"). See Pepin v. Div. of Fisheries & Wildlife, 467 Mass. 210, 221-22 (2014) (*internal citations omitted*) (providing that regulations may not "validly be promulgated where they 'are in conflict with the statutes'"). Under the Act,

> *No [Notice of Intent] shall be sent before all permits, variances, and approvals required by local by-law with respect to the proposed activity, which are obtainable at the time of such notice, have been obtained, except that* ***such notice may be sent, at the option of the applicant, after the filing of an application or applications for said permits****, variances, and approvals; provided, that such notice shall include any information submitted in connection with such permits, variances, and approvals which is necessary to describe the effect of the proposed activity on the environment.* **Emphasis added.**

The language of the Act is plain and unambiguous. See Sullivan v. Town of Brookline, 435 Mass. 353, 360 (2001) (holding, "A fundamental tenet of statutory interpretation is that **statutory language should be given effect consistent with its plain meaning** and in light of the aim of the Legislature unless to do so would achieve an illogical result"). **Emphasis added.** Under the broad language of the Act, which does not contain any limitation relating to comprehensive permits, where an applicant has filed all required local applications for a project, the applicant is expressly permitted to proceed to file a Notice of Intent, without waiting for any final decisions on its pending applications.

The language of 310 CMR 10.05(4)(e), which notably does not explicitly contradict the Act by stating that a filed application for a comprehensive permit is insufficient to entitle a party to proceed to file a Notice of Intent, must be interpreted harmoniously with the plain language of the Act. See Pepin, 467 Mass. at 221-22. The regulatory language should therefore be read as providing conservation commissions positive guidance that: 1) an obtained comprehensive permit satisfies the Act's requirement that all obtainable local permits, variances, and approvals required by local law be applied for or obtained before the filing of a Notice of Intent; and 2) appealed

comprehensive permit denials are still considered "applied for" permits under the Act. The regulatory language should not additionally be read, as is suggested in the Letter, to conflict with the Act by providing conservation commissions negative guidance that a filed application for a comprehensive permit is insufficient to qualify an applicant to file a Notice of Intent.

B. Unpersuasive "Practical Reasons" and an Erroneous Superior Court Opinion Do Not Constitute Valid Legal Cause to Disregard Supreme Judicial Court Precedent

Even if the Commission agrees there are "practical reasons" for the Letter's proffered interpretation of 310 CMR 10.05(4)(e), such "practical reasons" would not constitute valid legal cause to ignore the Supreme Judicial Court precedent cited herein and established canons of statutory construction. The Commission simply cannot interpret the regulations inconsistently with the Act. Regardless, the Letter's "practical reasons" are unpersuasive.

The Letter advances the argument that because "through the course of permitting and sometimes litigation, projects can change in size, scope and scale", a comprehensive permit should be obtained or denied and appealed before a Notice of Intent may be filed. This argument immediately collapses on itself, as a denied and appealed comprehensive permit could result in an outcome where a comprehensive permit is subsequently approved following changes to size, scope, and scale of the related project. Additionally, despite potential changes to size, scope, and scale of projects, the Act and regulations merely require that obtainable local permits and approvals be applied for, not obtained, before a Notice of Intent is filed, and the Letter does not explain why comprehensive permit projects are unique in this context.

Of final note, the erroneous and non-precedential Superior Court opinion enclosed with the Letter does not affect the legal analysis provided herein, which is premised on Supreme Judicial Court precedent concerning statutory and regulatory interpretation.

As such, the Commission should determine that it has jurisdiction to begin its substantive consideration of the Notice at its meeting scheduled for January 15, 2025.

II. Homes Does Not Contest the Commission's Scope of Review

The Letter correctly cites 310 CMR 10.05(4)(d) as providing,

> *In the event that only a portion of a proposed project or activity lies within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone, and the remainder of the project or activity lies outside those areas, only that portion within those areas must be described in the detail called for by the General Instructions and Form 3 and 4; provided, however, that in such circumstances the Notice of Intent shall also contain a description and calculation of peak flow and estimated water quality characteristics of discharge from a point source (both closed and open channel) when the point of discharge falls within an Area*

Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone.

Additionally, the Letter is correct that there are "stormwater discharges shown on [Homes' multifamily residential development ("Project")] plans that are within the Buffer Zone, but which originate outside the Buffer Zone."

As such, Homes does not contest the Commission's jurisdiction to review the Project's stormwater drainage system for compliance with stormwater standards and protection of wetland resource area.

III. A Note Concerning the Project Plans and Bylaw Compliance

Of note, the Letter's contention that "the Project violates numerous requirements of the state Stormwater Handbook" is premised upon previous plans for the Project, not the amended plans filed with the Notice. Importantly, the Project's drainage system has been updated in response to the review comments enclosed with the Letter, as well as review comments from the Zoning Board's peer reviewer.

Separately, regardless of the Letter's selective quotation of the Notice, the Project is proposed to generally comply with the Dracut Wetlands Protection Bylaw. Where there is potential noncompliance, Homes has requested waivers from the Zoning Board pursuant to its comprehensive permit authority.

IV. Homes Requests Review of the Notice

Homes respectfully requests the Commission begin its substantive review of the Notice at its meeting scheduled for January 15, 2025.

Should you have any questions or concerns relating to the content of this letter or the enclosed report, please do not hesitate to contact me for further information or documentation. Thank you for your attention to this matter.

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**