Karis L. North
knorth@mhtl.com

January 14, 2025

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

RE: The Homes at Murphy's Farm 40B Application/Notice of Intent – Hill Law letter dated January 8, 2025

Dear Chair Mallory, Chair Sutherland and Members of the Zoning Board of Appeals and Conservation Commission:

You have asked me to provide my opinion concerning January 8, 2025 letter provided by Attorney Daniel Hill from Hill Law (the "Hill Law 1.8.25 letter"), alleging that the Conservation Commission has no jurisdiction to review the Notice of Intent for the Homes at Murphy's Farm ("Murphy's Farm") in light of the fact that the Murphy's Farm application for a comprehensive permit is still pending with the ZBA.

In preparing this opinion, I have reviewed the letter from Hill Law, the Wetlands Protection Act ("WPA") and its regulations, and the applicable regulations for 40B Comprehensive Permit applications and other relevant documents.

On or about January 2, 2025, Norse Environmental, on behalf of Murphy's Farm, filed a Notice of Intent ("NOI") seeking to remove, fill, dredge, or alter an area subject to protection under the WPA, in this case, the application that these activities will take place within the 100 foot buffer zone of Bordering Vegetated Wetlands.[1]

Attorney Hill alleges that the applicant may only file its NOI application after the ZBA has, at least, ruled on the pending question of waivers related to the Comprehensive Permit application.

The pertinent WPA regulations state as follows:

[1] Attorney Hill takes issue with this allegation/characterization. Because these are factual and not legal questions, I do not address them here.

> (4) Notices of Intent.
> (a) Any person who proposes to do work that will remove, fill, dredge or alter any Area Subject to Protection under M.G.L. c. 131 § 40 shall file a Notice of Intent on Form 3 and other application materials in accordance with the submittal requirements set forth in the General Instructions for Completing Notice of Intent (Form 3).
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> (e) The requirement under M.G.L. c. 131, § 40 to obtain or apply for all obtainable permits, variances and approvals required by local by-law with respect to the proposed activity shall mean only those which are feasible to obtain at the time the Notice of Intent is filed. Permits, variances, and approvals required by local by-law may include, among others, zoning variances, permits from boards of appeals, permits required under floodplain or wetland zoning by-laws and gravel removal permits. They do not include, among others, building permits under the State Building Code, M.G.L. c. 23B, § 16, or subdivision control approvals under the State Subdivision Control Law, M.G.L. c. 41, §§ 81K through 81GG, which are issued by local authorities. 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.

310 CMR 10.05(4)(a), (e)(emphasis added).

There are no applicable provisions of the 40B regulations (760 CMR 56.00).

Attorney Hill argues that the language of 310 CMR 10.05(4)(e) is controlling here, and that the Dracut Conservation Commission cannot consider the NOI until the applicant has "obtain[ed] or appl[ied] for" its 40B Comprehensive Permit, and that "obtained" or "applied for" is the equivalent of receiving, at a minimum, ZBA rulings on waivers and possibly a decision up or down on the full comprehensive permit application. In support of this argument, Attorney Hill relies upon a 2021 Middlesex Superior Court decision on a Motion to Dismiss. In that decision, Lise Revers et al v. Department of Environmental Protection et al, No. 2081-CV-01447 (March 11, 2021), the Court found that where an applicant which filed an NOI had not yet received a final determination from a local zoning board, it could not yet proceed with the NOI application.

The Revers decision is not persuasive law. It is a Superior Court decision, at the earliest procedural stage, where all facts are found in favor of the Plaintiff (Revers). It has not been cited with authority in any other case, and the underlying action is still not yet complete. It is also interesting that neither the Judge in that decision, nor Attorney Hill in his letter cite any persuasive law in support of the decision, or consistent with that decision. Specifically, neither addresses the distinct separation under the 40B process between local authority (such as local wetlands bylaws) and state authority (such as the WPA). While the ZBA has the authority to regulate local concerns and the 40B process subsumes local regulations into one comprehensive permitting process, the state WPA regulations are separate. See Zoning Bd. of Appeals of Amesbury v. Hous. Appeals Comm., 457 Mass. 748, 756 (2010) (affirming that local zoning boards have the authority to waive local regulations but emphasizing that the comprehensive permitting process under Chapter 40B does not give the ZBA authority over state environmental regulations).

The plain language of the regulations does not support the Revers interpretation. "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... said applicant shall be deemed to have applied for all permits obtainable at the time of filing." 310 CMR 10.05(4)(e), nowhere in this language, is there a requirement to wait for the ZBA's decision before filing the NOI.

I do acknowledge that Revers provides some weight towards the arguments in favor of ceasing review of the pending NOI application. There is no clear answer here; in my opinion, the arguments on behalf of ceasing review of the NOI are internally inconsistent, including the arguments advanced by the Judge in the Revers decision. Those arguments also fail to recognize the many local proceedings where a conservation commission considers an NOI application in parallel with a zoning board of appeals considering a 40B comprehensive permit application. Nowhere have those proceedings been found to be invalid, or untimely.

Sincerely,
/s/ Karis L. North
Karis L. North

cc: Alison Manugian, Acting Town Manager
Attorney Don Borenstein
Joseph D. Peznola