September 16, 2015

BY ELECTRONIC MAIL
AND BY HAND

Sherborn Zoning Board of Appeals
Sherborn Town Hall
19 Washington Street
Sherborn, MA 01770

Re: Application for Comprehensive Permit – 247 Washington Street, Sherborn

Dear Members of the Board:

This firm represents neighbors and abutters to the proposed 36-unit residential development located at 247 Washington Street in Sherborn (the "Project" and the "Project Site"), which is the subject of a pending application for a comprehensive permit under General Laws Chapter 40B, Sections 20-23 proposed by The Fields at Sherborn, LLC (the "Developer"). This letter will address the most pressing outstanding concerns with the Project, which have not been adequately addressed by the Developer over the last several months of hearings.

Despite the significant impact the Project would have on the surrounding neighborhood and on the Town of Sherborn in general, the application materials submitted by the Applicant to the ZBA are remarkably thin, and not in conformity with the application submission requirements under Chapter 40B. Specifically and most egregiously, the Developer has failed to provide an itemized list of requested waivers, or to otherwise identify in a comprehensive manner the Project's numerous nonconformities with Town's bylaws and regulations. Further, as discussed below, the Developer's piecemeal and incomplete submissions on the Project's environmental impacts is troublesome, and is hindering the Board's statutory obligation to compile a complete evidentiary record through the public hearing process, on which to make an educated decision balancing the needs of affordable housing against legitimate public health, safety, planning and environmental concerns.

I. The Legal Framework

By way of introduction, I have served as counsel to local zoning boards across the state on numerous Chapter 40B permitting and litigation matters over the last 15 years. I have litigated dozens of Chapter 40B appeals before the Housing Appeals Committee ("HAC"), the state trial courts, the Appeals Court and the Supreme Judicial Court, including the Reynolds v.

Stow Zoning Bd. of Appeals case decided yesterday (September 15, 2015) by the Appeals Court, overturning the issuance of a Chapter 40B permit.

As you know, Chapter 40B developers may seek a "comprehensive" permit from the local zoning board of appeals in lieu of separate approvals from all of the other town boards, commissions and officials that would otherwise have jurisdiction over the project. A significant function of the statute is to empower the zoning board to waive any local bylaw, regulation, policy or procedure that would render the construction of the project "uneconomic." In certain circumstances, the zoning board may be justified in denying a comprehensive permit, or just denying specific waivers, where the project presents unacceptable public safety, health or environmental risks, or is completely abhorrent to the town's rationally-conceived master planning interests. The role of the local zoning board, therefore, is to determine (a) whether such risks exist to justify a denial, and if not, (b) whether the applicant's requested waivers from local bylaws and regulations are justified to make the project economic, and if so (c) whether the granting of any such waivers would, themselves, present any public safety, health or environmental risks.

The primary responsibility of the zoning board under Chapter 40B is to consider whether and to what extent local bylaws and regulations should be applied to a proposed project. In doing so, it must weigh the need for affordable housing against the need to protect the environmental, public health, safety, and planning interests. In the recently-decided case of Reynolds v. Stow Zoning Bd. of Appeals, Appeals Court No. 14-P-663 (Sept. 15, 2015) (copy attached as Exhibit A), the Court ruled that it was "unreasonable" for the zoning board to grant waivers from local bylaws that were more restrictive than state requirements governing septic systems in environmentally-sensitive areas. Specifically, the Court found that the bylaws should have been preserved where it was established that the project would contaminate the private wells of abutters, and the local bylaws were adopted to prevent such contamination by limiting the discharge of wastewater. The Court held that such concerns outweighed the regional need for housing under Chapter 40B, and revoked the comprehensive permit. As discussed below, the fact presented by this Project are strikingly similar to those in Reynolds.

This rationale is echoed by the state Housing Appeals Committee's ("HAC") own view, that "[t]he legislative intent of the entire statute is to permit affordable housing without undue intrusion on local prerogatives." *Cooperative Alliance of Mass. v. Taunton Zoning Bd. of Appeals*, HAC No. 90-05, at 8, n.12 (April 2, 1992). The SJC has similarly held that the legislature intentionally struck a balance "between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements ... while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income." Bd. of Appeals of Woburn v. Hous. Appeals Comm., 451 Mass. 581 (2008), citing, Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 822 (2002).

We respectfully suggest that the Board exercise its authority consistent with this framework, starting with a complete evaluation of how the proposed Project conforms, or

doesn't conform, to the town's local bylaws and regulations, and an assessment of whether the requested or required waivers threaten legitimate local concerns, or if not, are necessary to make the project economically viable.

II. The Requested Waivers

As noted above, the most important task the Zoning Board has in conducting a comprehensive permit application hearing is to evaluate the developer's requested waivers from the local bylaws and regulations, and to determine whether the concerns those waivers may present outweigh the regional need for housing. This importance of this exercise was illustrated in yesterday's Appeals Court ruling in Reynolds. For the first time we have an appellate-level decision affirming the primacy of local environmental protection restrictions where such restrictions are necessary to protect public health. Put simply, Chapter 40B does not abrogate the fundamental right to safe drinking water. Of course, in order to understand whether there are local regulations that are available to protect the public health and to which the Project should be made subject, it is essential to have a complete itemization of bylaws and regulations that the Project does not comply with.

Even if preserving a local bylaw or regulation is not so essential so as to outweigh the need for housing, the Zoning Board can still determine that the requirement is important, and place the burden on the Developer to prove that the waiver is necessary to make the Project "economic." The Zoning Board can, and should, consider this economic defense in its decisionmaking, including checking the veracity of any "uneconomic" claim through an independent peer review of the developer's development budget, or *pro forma*.

The first step is for the Zoning Board to receive from the Developer a list of what it thinks are all the waivers it needs for the Project. Here, the Developer provided a three-page summary of waivers in its application (copy attached as Exhibit B), but failed to provide any citations to specific provisions of the bylaws and regulations. Specifically, despite the Project's numerous nonconformities with the Board of Health's Regulations governing sewage disposal, wells, and environmental impacts, the application fails to identify a single provision within the Board's 97 pages of regulations that it needs a waiver from. Rather, the Developer is inappropriately seeking a "blanket waiver" from all of the regulations, whether they are applicable or not.

Once the Zoning Board has a complete list of waivers, it can then ask its peer reviewers to check to make sure all of the nonconformities evident on the site plans are addressed in the waiver requests, and the Zoning Board can then intelligently solicit opinions from the Town's land use boards and officials, as well as its peer review experts, as to whether the waivers present any significant health, safety, environmental or planning concerns. Only then can the Board make an informed decision whether to grant these waivers, and put the burden on the Developer to justify the waivers from an economic perspective.

Recommendation No. 1 – Require the Developer to itemize the waivers that are necessary for the Project, with citations to the sections of the Bylaws or Regulations for which waivers are being sought.

III. Substantive Issues

A. Water Supply

As your peer review consultant, BETA, correctly recognized in its August 19, 2015 peer review letter, the Project would appear to trigger the requirements of a "public water supply" under the state drinking water regulations, 310 CMR 22.02. Under those provisions, larger water systems are more strictly-regulated, requiring a protective radius ("zone 1") of at least 100 feet around each well to protect the quality of drinking water being pulled from the ground. The radius for each well is determined by pumping rate measured in gallons per day. For smaller systems, wells are not regulated by the state, but septic systems and stormwater infiltration systems generally need to be set back at least 100 feet from wells under other state laws. The rationale for imposing protective radii for larger systems is that these systems are drawing a greater volume of water, and as such the zone of influence to the well is typically larger geographically.

The trigger for classification as Public Water System and the more restrictive requirements is when a community water system serves at least 25 individuals daily. This threshold is far exceeded in this project, where each of the 36 proposed homes can expect to house at least two individuals. Rather than create one or two community wells to serve the proposed condominium, the Developer is proposing 10 wells, one for each building. The Developer's motives are unclear, but it is clearly assuming that the state Department of Environmental Protection ("DEP") will decline to treat the Project as a Public Water System. Given the density of the Project, and the layout of the buildings, roads, septic systems, and other infrastructure, there is no room left for the Developer to provide the require Zone 1 radii around each well.[1] Most of the wells are located within 20 or 30 feet of buildings or stormwater systems.

Apparently DEP has not made a Public Water Supply determination in this case. In a similar Chapter 40B project recently approved in Carlisle, the DEP also refused to provide a determination during the design and permitting stage, to the consternation of all parties concerned. Attached as Exhibit C is a letter sent by Carlisle Town Counsel to DEP, requesting such a determination. DEP has stated, however, that there is a "presumption" that a condominium served by common wells would be a Public Water System, and that a developer would have to persuade DEP that risks to public health are nominal in order to be treated otherwise. In evaluating these projects, DEP is interested in seeing whether the condo unit owners have exclusive control over their own wells, which presumably can be contracted for in the condominium documents. However, it not clear how this factor relates to the inherent public

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1/ See discussion on Density below, under Section D.

health risks associated with wells drawing large quantities of water from the ground in close proximity to large water contamination sources including the mega septic and stormwater infiltration systems. We encourage the ZBA and the Board of Health to call upon DEP to classify this Project appropriately as a Public Water System once and for all, so that precious time and resources is not wasted on a project design that is clearly unviable under such a classification.

> **Recommendation No. 2** – Formally request DEP to make a determination that the Project's wells constitute a Public Water System given all of the environmental risk factors present, not the least of which is the likely impacts from the proposed on-site septic system.

B. Pollution from the Project's Septic System

Even without a comprehensive waiver list, we can tell that the Project's septic system plans filed with the Board of Health do not comply with the Board of Health's wastewater regulations. First, the regulations require a minimum of three test pits within the boundaries of each leaching field. §5.1(c). In Primary Leaching Areas 2 and 3, only two test pits were dug. The regulations require the pits to be dug and data collected between November 1st and April 29th. §5.1(b). Three of the test pits (#3-1, 3-2, and 3-3) were dug and data collected on June 25, 2015.

It is unclear whether the Developer's engineer complied with the regulation's requirements for determining seasonal high groundwater. The regulation, §5.1(b), requires the use of monitoring wells where redoximorphic features are not found in the soils, as was the case here. Under Title 5, 310 CMR 15.103(3), there would at least need to be a correlating exercise with respect to proximate USGS wells. It does not appear that the design engineer employed either of these techniques, but we just received the septic plans on the afternoon of September 11, 2015 and have not had an opportunity to study this in detail, and would request that the Board refer this to BETA. Establishing accurate seasonal high groundwater elevations is critical, as septic systems must maintain a minimum five-foot separation from groundwater under Title 5 (§15.212), and to allow the system to recharge without interference from groundwater.

> **Recommendation No. 3** – Require the Developer to provide a narrative explaining how seasonal high groundwater was determined in the location of the septic system leaching areas, and how this methodology complies with Title 5 and §5.1 of the Regulations.

We concur with BETA that the Developer has not calculated the design flow for the septic systems correctly, under either Title 5 or the Board of Health's regulations. If the Project has 129 total bedrooms in all 36 units as BETA suggested in its August 10, 2015 review letter (which we agree with), the design flow would be 14,190 gallons per day. This is significantly higher than the Developer presumed design flow of 9,240 gpd, and has significant consequences on the design of the Project. First, a design flow of 14,190 gpd would result in an exceedance of the nitrogen loading provisions of Title 5, 310 CMR 214, which preclude the discharge of any

more than 440 gpd/acre. Under Title 5, an acre is defined as 40,000 square feet (not 43,560 sf as it is otherwise defined), and the Project Site has 19.11 "Title 5" acres. This would ordinarily permit a flow of up to 8,409 gpd (19.11 x 440), but the Developer proposes an enhanced nitrogen removal septic system, for which it can adjust the load to 550 gpd/acre. With this system, the Developer's maximum septic flow is 10,510 gallons per day. More significantly, because the Developer's design flow exceeds 10,000 gallons per day, it not eligible for a permit under Title 5, but instead must obtain a groundwater discharge permit under 310 CMR 5. See, 310 CMR 15.006. The treatment of wastewater in treatment plants regulated by discharge permits is generally much better than septic systems, which would reduce the risk of contamination of the Project's wells and the neighbors' wells.

Section 3.4.1 requires the plan to show the locations of all water sources within 200 feet of the proposed septic systems. The Septic Plans only show the area approximately 10 feet to the east of the septic systems, and approximately 50 feet to the north of the septic systems. Thus, it is impossible to know whether there are any additional water sources within the 200 foot radius of the septic systems aside from the two that the Developer selectively shows on the plans. None of the wells serving the residents of Knollcrest Lane, across Washington Street from the septic systems and which could be downgradient from the systems, are shown on the plans.

> **Recommendation No. 4** – Require the Developer to submit a plan showing the location of all wells within 200 feet of the proposed septic systems.

Section 10.1 requires a minimum set back of 150 feet between septic systems and wells, 175 feet if the well is downhill from the septic system.[2] The well at 247 Washington Street is approximately 100 feet from leaching field #1 (there is no topographical information concerning the abutting property, so we cannot determine whether the well would be "downhill"). The well at 257 Washington Street is approximately 120 feet from the septic system, and is downhill from the septic system according to the Developer's plans. The systems appear to be within 20 feet of the Project Site's property boundaries with 247 and 257 Washington Street, which is the minimum setback under Section 10.2.

The Project's septic systems are perilously close to the wells of certain abutters, as well as the wells of the Project itself. It is our understanding that wells in the vicinity of the Project Site are bedrock wells. It is common knowledge that groundwater flows through fractured bedrock at rates much faster than through sand or other soils, and therefore has the ability to carry pathogens, bacteria, and other pollutants faster, and in greater distances, before they are diluted or attenuated. Further, groundwater flow *direction* in bedrock is often unpredictable, as fractures can be oriented in directions opposite of surface contours.

This Project would infiltrate a large quantity of domestic sewage in a relative small geographic area, where groundwater flow speed and direction is unknown. The inability to

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[2/] The setbacks would be 125 and 150 feet respectively, except that the percolation rate is less than 3 minutes per inch, which dictates the greater setback pursuant to §10.1(c).

accurately model or otherwise predict where groundwater contaminants, such as what is found in wastewater and stormwater, may end up is probably the reason the Town of Sherborn has adopted much stricter septic and well standards than under state law. Sherborn astutely requires an "environmental health impact report" for large residential projects, such as this, which must evaluate, among other things, groundwater flow directions and identify the "zones of contribution" for each proposed well. See, regulation excerpt attached as Exhibit D. A "hydrogeological evaluation" is required to study the potential impacts of water supplies from septic systems. Given the density of this Project and the proximity to existing and proposed wells, as well as the Zone II to Holliston's public wells, it would be prudent to require the Developer to comply with this section of the Board of Health's regulations, which were design specifically for a project like this.

I note the Board of Health has a set of regulations governing "small wastewater treatment facilities." The term is not defined, and it is not clear what distinguishes such facilities, and ordinarily, shared septic systems governed by Title 5. Clarification should be sought from the Board of Health whether these regulations apply to projects like this, and if not, what the distinction is.

Under Title's 5's Nitrogen Sensitive Area regulations and guidance, septic systems within Nitrogen Sensitive Areas (which this is, due to the presence of systems and wells), the Board of Health may require a mass balance analysis that predicts the concentration of nitrogen in the groundwater at nearby "sensitive receptors" such as wells.[3] This type of analysis was likely contemplated to be part of required information in an Environmental Health Impact Report, under Section 8.0(2) of the Board of Health's regulations. Thus, the Zoning Board is well within its authority, and should, require a mass balance analysis from the Developer, as was recommended by BETA in its August 19, 2015 letter. Under Title 5, a project proponent must demonstrate that its septic systems will not cause a concentration of nitrogen in excess of 10 mg/l at the property boundaries or nearby wells. This is the water quality standard under the state Clean Water Act. Predictions of nitrogen levels based on a mass balance analysis provide a marker for other pollutants common to septic systems, such as pathogens, viruses, and pharmaceuticals. However, such analyses may <u>underestimate</u> the actual impact to groundwater resources, since the analysis assumes the transport of pollutants by groundwater moving through soils, not through fractured bedrock.

It does not appear that the Developer has provided a mass balance analysis to the Zoning Board or the Board of Health for peer review. In order to perform this analysis, groundwater flow direction on and abutting the site must be determined, or in the absence of such data, one would need to make assumptions. In its August 27, 2015 submittal to the Conservation Commission, the Developer's engineer stated that "we plotted ground water contours for high water season condition, which in general follows the surface topography." See, p. 5, note "W6."

3/ Where a project will require aggregation under Title 5, as this Project will when adjustments are made to the daily flow, the mass balance analysis is not optional.

We did not see this groundwater contour map attached to the August 27th correspondence, but this should be provided with a mass balance analysis.

> **Recommendation No. 5** – Require the Developer to submit a complete Environmental Health Impact Report as required under the Board of Health's Regulation, specifically including a "hydrogeological evaluation" as contemplated under Section 7.0 of the regulation, identifying groundwater flow directions and "zones of contribution" to the wells. The hydrogeological evaluation should also comply with Section 8.0(2) of the regulation, including a mass balance analysis to predict concentrations of nitrogen at downgradient property boundaries. The Developer should provide to the Board the groundwater contour "plotting" that the Developer cited in its August 27th submittal.

Incidentally, in the recent Reynolds Appeals Court decision, it was this kind of mass balance analysis that predicted excessive nitrogen concentrations, which justified the application of the Town of Stow's more stringent health regulations to the Chapter 40B project. The Court held that the Stow Zoning Board's waiver of those regulations was "unreasonable" in light of this evidence, and that the need to prevent such exceedances outweighed the regional need for housing (the Chapter 40B "balancing test"). The Neighbors have retained Scott Horsley, an experienced hydrologist and water quality consultant, to evaluate the impacts of this septic system on the wells, including by running a nitrogen loading model. His analysis will be provided to the Zoning Board under separate cover.

Finally, the Project's stormwater runoff should not be overlooked as a contributor of groundwater pollution. Importantly, there appears to be a point source discharge from the Project's consolidated stormwater infiltration system approximately 30 feet from a jurisdictional wetland (near flag WF-A24) that is located within the Zone II wellhead protection area for Holliston's municipal wells. As such, we believe that DEP stormwater management standard #6 is applicable. Vehicles are known sources of runoff contamination, from tire rubber to gas and oil leaks. The introduction of vehicles serving 36 homes, and its potential impact on groundwater, should be carefully evaluated.

C. Density and Lack of Useable Open Space

We are particularly concerned with the apparent disregard of "low impact development" guidelines and practices. Under the current Chapter 40B regulations and guidelines, projects are supposed to conform to "sustainable development" principles. The subsidizing agency (in this case, MassHousing) is supposed to make a finding that that "the conceptual project design is generally appropriate for the site ... taking into consideration ... the proposed use, building massing, topography, environmental resources, and integration into existing development patterns." 760 CMR 56.04(c). Specifically, under the Chapter 40B project design guidelines:

- The massing of the Project should be modulated and/or stepped in perceived height, bulk and scale to create an appropriate transition to adjoining sites.

- Where possible, the site plan should take advantage of the natural topography and site features, or the addition of landscaping, to help buffer massing; and
- Design may use architectural details, color and materials taken from the existing context as a means of addressing the perception of mass and height.

DHCD 40B Guidelines, §IV(A)(3).

The Housing Appeals Committee has recognized that a project can be so abhorrent to generally-accepted residential design principles to warrant a denial. Dennis Housing Corp. v. Dennis Board of Appeals, HAC No. 01-02 (May 7, 2002) (zoning board's denial of a 50-unit apartment building on a 3.2-acre site was consistent with local needs because "the proposed design over-utilizes the site"). Here, many factors contribute to an overall judgment that the Project over-utilizes the site and presents unacceptable risks to the public health, safety, and environment as discussed above.

Significantly, the Project leaves no areas for recreational opportunities or "back-yard" spaces for residents. In an apparent effort to maximum the profit from this development, the Developer has used virtually every square foot of land area for buildings, driveways, parking lots, drainage infrastructure and other utilities. This over-utilization of this Site is excessive even under Chapter 40B standards, and is one of the most aggressively-designed site plans that I have seen in my fifteen years of representing clients in Chapter 40B matters. The Developer is clearly confined by the 800-foot vernal pool buffer areas delineated on the plans, which the Developer has built right up to, but has not crossed. Although it's not stated explicitly in MassWildlife's August 14, 2015 letter to the Developer, we assume that MassWildlife's approval of the Project under the state Endangered Species Act is predicated on the Project staying outside of the 800-foot buffer areas. Thus, while the overall Project Site consists of approximately 17.6 acres, most of that land is unusable, for housing units or accessory recreational areas.

Recommendation No. 6 – Require the Developer to identify the active and passive recreation areas it is proposing for the Project, and to confirm that construction or any land alteration within the 800-foot vernal pool buffer delineated on the plans is prohibited under MassWildlife's MESA decision.

D. Site Control

The Project Site was the beneficiary of a so-called "Section 4.4 Special Permit" issued by the Sherborn Planning Board on September 20, 2012. The special permit allowed the Developer's predecessor-in-title to create three buildable house lots on a 25.6-acre tract of land without going through the formal, and more cumbersome, subdivision process, allowing a significantly shorter lot frontage on Washington Street (50.7 feet) for one of the lots than would otherwise be required under the Zoning Bylaw. The Planning Board's decision was not appealed, and was recorded with the Registry of Deeds on October 15, 2012 in Book 60250, Page 4. A copy of the Decision is attached as Exhibit E.

As its name implies, the special permit was issued under the provisions of Section 4.4 of the Sherborn Zoning Bylaw. That section contains strict requirements when a Section 4.4 lot is created. Specifically, no more than one single-family dwelling may be located on the Section 4.4 lot, and the lot cannot ever be further divided to create additional building lots. Importantly, that requirement must be embodied not only as a condition of the special permit, but as part of a "recorded restriction," constituting a title encumbrance. An excerpt of Section 4.4.6 is reproduced below. The Planning Board's special permit decision made a finding that the proposed 2012 3-lot subdivision met this requirement: "[t]here are conditions against further subdivision and limiting the Section 4.4 lot to one single family dwelling unit so the proposal meets this requirement."

4.4.6 Minimum Requirements. The Planning Board shall not grant a special permit under this section unless all of the following requirements are satisfied:

a) **Frontage and Width** The Section 4.4 Lot shall have at least 50 feet of frontage on a public street and shall be at least 50 feet wide at every point.

b) **Building Limitations** Not more than one single family dwelling is to be located on each of the Section 4.4 Lot and the Complying Lot. No such single family dwelling may be located on the proposed Section 4.4 Lot at the time of application or approval of the special permit. The special permit shall contain a recorded restriction against further division of the Section 4.4 Lot creating any additional building lots.

The Zoning Bylaw imposes other restrictions on Section 4.4 lots. The lot must have double the required lot area as required in the zoning district – in this case 2 acres. This has the effect of decreasing the density of the lot from one unit per 2 acres, to one unit per 4 acres. Further, buildings on Section 4.4 lots must be set back at least 125 feet from the street and lot lines in the Residence B zoning district.

e) **Additional Setbacks** Each building greater than 160 gross square feet on the Section 4.4 Lot shall have the following minimum setback from each street and lot line (in lieu of those specified in Section 4.2):

1) 100 feet in Residence A
2) 125 feet in Residence B
3) 150 feet in Residence C

Having obtained the critical zoning relief to create three lots, the Developer's predecessor was entitled to a "subdivision approval not required" endorsement from the Planning Board on a plan showing the division of land into three lots, the recording of which plan enabled to predecessor to sell off Lot "1," now known as 247 Washington Street. The plan was recorded with the Registry of Deeds on October 15, 2012 as Plan 743 of 2012 (the "ANR Plan") (attached as Exhibit F). Not coincidentally, Lot 1 was conveyed to its current owner, Tai Chee-Chong, on

October 15, 2012 for $352,500. Without the Planning Board-endorsed plan, the deed to Lot 1 could not have been recorded in the Registry of Deeds, and without the special permit, the Planning Board would not have been able to endorse the ANR Plan.

The current proposal to construct 36 housing units on the Section 4.4 lot (shown as "Lot 2" on the ANR Plan) and an adjoining 4.2-acre parcel violates the plain and unambiguous conditions set forth on the Special Permit Decision as well as Section 4.4 of the Bylaw itself. In passing upon this comprehensive permit application, the Zoning Board has no authority to disregard or waive the conditions on the 2012 Special Permit restricting more than one dwelling unit and requiring 125' building setbacks. The facts of this case are distinguishable from rulings made by the state Housing Appeals Committee in *Woodridge Realty Trust v. Ipswich ZBA*, HAC No. 00-04 (June 28, 2001) and *Sandwich Hous. Partners, LLC v. Sandwich ZBA*, HAC No. 07-02 (June 13, 2011). In those cases, the HAC held that if conditions on a prior special permit or subdivision approval affecting the project site are capable of being modified by the issuing authority, then the local zoning board of appeals can step into the shoes of the original issuing authority and waive those conditions as part of the Chapter 40B process. Here, however, the density and setback conditions could not be modified by the Planning Board because they are mandated by the Bylaw.

Moreover, the density restriction is not merely a zoning bylaw provision, but a title encumbrance, and under no authority can the Zoning Board or the HAC "waive" a restriction on the title to the project site.

IV. Conclusion

I expect that the Neighbors will have more comments to share on the merits of this comprehensive permit application as the hearing progresses. In the meantime, we appreciate the Board's diligence in deploying the best available resources to study this application and the significant impacts the proposed Project will have on the neighborhood and the Town generally.

Very truly yours,

Daniel C. Hill

Enc.

cc: Sherborn Board of Health
Sherborn Conservation Commission
Sherborn Board of Selectmen
Mark Kablack, Esq.