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VIA EMAIL: amanugian@dracutma.gov

Dracut Zoning Board
Town Hall
62 Arlington Street
Dracut, MA 01826

Re: The Homes at Murphy's Farm 40B, 231 Wheeler Street, Dracut, Massachusetts

Dear Members of the Board:

I represent the neighbors whose names and addresses are listed below. I previously submitted a letter dated March 20, 2024 related to the dual status of the project as both a pending subdivision and comprehensive permit, which would be required from both Dracut and Methuen. At your last hearing I addressed another issue, which I promised to submit in writing, about the reduction in the size of the project site since MassHousing issued a project eligibility letter. This letter addresses that jurisdictional issue for the Board.

Under Chapter 40B, the government agency that loans funds to subsidize housing construction plays a critical role in vetting potential development projects. Before an application can even be filed with a municipal zoning board, proposed projects must first undergo review for project eligibility by the subsidizing agency. That review entails consideration of several factors, including, appropriateness of the site for residential development, the design of the proposed project, and its financial feasibility. 760 CMR 56.04(4). These determinations, memorialized in a Project Eligibility Letter ("PEL"), are deemed to be "conclusive" evidence of project eligibility, which means no one – including the Board – can reevaluate them. Only the subsidizing agency may reexamine the issues decided in a PEL.

One of the required findings a subsidizing agency must make for project eligibility is the Applicant "controls the site" by ownership, option or contract to purchase. 760 CMR 56.04(4)(g). Establishing site control requires an applicant to prove sufficient legal interests in the land that is the subject of the proposed project. Site control is a jurisdictional prerequisite to submit or maintain an application for a comprehensive permit under Chapter 40B. 760 CMR 56.04(1)(c). If during the course of permit proceedings, site control has been lost, the failure of to maintain site control can be raised by the zoning board of appeals, and the subsidizing agency must determine the validity of any such challenge. 760 CMR 56.04(6). Under that rule, the zoning board's public hearing may be stayed during this review. Id.

In this case involving the Murphy's Farm proposal, the subsidizing agency (MassHousing) issued a PEL dated July 5, 2023 for the "propos[al] to build three hundred (300) units of rental housing (the "Project") on approximately 50 acres of land located at 5 Poppy Lane (the "Site")". (7/5/23 PEL, p. 1) In the PEL, MassHousing found site control for the "entire 50+/- acre Site" by virtue of a purchase and sale agreement between two related entities controlled by Mr. O'Brien:

A related entity to the Applicant controls the entire 50+/-acre Site through a Purchase and Sale Agreement between O'Brien Homes, Inc. and The Homes at Murphy's Farm, LLC. A Purchase and Sale Agreement was dated September 16, 2022, and recorded with the Middlesex North Registry of Deeds in Book 31624 at page 254. (Id. p. 9)

MassHousing's determination of site control and project eligibility were based solely on the Applicant's disclosure of "truthful and complete information", and its PEL could be rescinded if "Applicant failed to disclose any information pertinent to the findings set forth in 760 CMR 56.04, which includes site control:

If at any point prior to the issuance of a comprehensive permit MassHousing determines that the Applicant has failed to disclose any information pertinent to the findings set forth in 760 CMR 56.04 or information requested in the Certification and Acknowledgment of the Application, MassHousing retains the right to rescind this Site Approval letter. (Id. p. 3, n. 1)

On July 12 2023 – a week after the PEL – Mr. O'Brien informed the Dracut Planning Board that he had sold eleven acres of the fifty acre Site (22% of the Site known as "Parcel X") to the abutting quarry owner, Brox Industries, Inc.¹ That admission has since been corroborated by two public filings. In September last year, the Site owner O'Brien Homes Inc recorded the wetlands certificate for the Order of Resource Area Delineation for the Site, which expressly released from certification "Parcel X". (9/26/23 Certificate, p. 2, Bk 38103 Pg 224, Middlesex North Registry, copy attached) Earlier this year, the O'Brien Homes Inc. mortgaged Parcel X for a million dollars (\$1,000,000) to an entity affiliated with Brox, Sunset Rock, LLC. (1/24/24 Mortgage, Bk 38293 Pg 37, copy attached)

At recent meetings with the Conservation Commission and the ZBA, Mr. O'Brien has acknowledged that he has an agreement with Brox for Parcel X. Given these public statements and filings, which are inconsistent with the comprehensive permit application for 300 units on the 50 acre site, a further investigation of site control by MassHousing would be in order. Site control is jurisdictional and exclusive to the subsidizing agency. For that reason, the regulations state "the [a]lleged failure of the Applicant to continue to fulfill any of these project eligibility requirements may be raised by the Board at any time . . . on the grounds that there has been a substantial change affecting the project eligibility requirements". 760 CMR 56.04(6). A reduction in more than ten percent of the site constitutes a "substantial change", which requires a new project eligibility determination by MassHousing. 760 CMR 56.07(4)(c)(3).

¹ The video recording of that hearing can be viewed online here:

Here, the current site plan submitted less than a month ago shows 19 buildings on Parcel X. That 11 acres accounts for twenty-two percent (22%) of the project site, well over the threshold for a “substantial change”. As a result, the Board should refer this matter back to MassHousing for further consideration of project eligibility and site control, and stay the public hearing until that jurisdictional issues has been resolved.

I look forward to addressing these matters further with the Board at your next hearing.

Very truly yours,

/s/ Dennis A. Murphy

Dennis A. Murphy

cc: Colin M. McNiece, Esq.
Donald F. Bornstein, Esq.
Karis North, Esq.
George X. Pucci, Esq.