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November 14, 2017

Town of Newbury
Zoning Board of Appeals
12 Kent Way
Byfield, MA 01922

Re: Application of Byfield Estates LLC
Chapter 40B Comprehensive Permit
55 Pearson Drive, Newbury

Dear Board Members:

This firm represents Byfield Estates LLC in connection with certain questions that have arisen in connection with the above-referenced application for a Comprehensive Permit. The questions are:

1. Did the two parcels comprising the project locus merge?
2. If the parcels did merge, can the larger back lot be split off to develop the affordable housing project?
3. Does the easement have any negative effect of the lot area for the 1.28-acre lot fronting on Pearson Drive (Lot 40 as shown on Plan recorded in Plan Book 152, Page 63, "Lot 40")?

Lot Merger

I have been given copies of two deeds: 1) one for Lot 40 recorded 09-28-2005 in Book 24882, Page 254, to Jeffrey J. Smith; and 2) one for Parcel B containing 15.08 acres recorded 10-07-2015 in Book 34428, Page 106 ("Parcel B") to Jeffrey J. Smith and Michael S. McLaughlin. Although there is one common owner, Michael S. McLaughlin does not own Lot 40, and thus there is separate ownership of Lot 40 and Parcel B and they have not merged.

Splitting Off

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Even if they could be deemed to have merged based on title, the doctrine of merger would still not apply. If the Board were to grant a Comprehensive Permit for the development of Parcel B, and either recognize Parcel B as a separate lot (as it apparently still is on the Town Assessor Records) or split it from Lot 40, if necessary, the remaining Lot 40 would be just the same as it is prior to any merger, and thus there would be no increase in its non-conformity to present zoning requirements. The so-called doctrine of "infectious invalidity" would not apply. Under the Newbury Zoning Bylaw, Section 97-10 A (1) (a), Lot 40 and the structure on it are allowed to continue; this section states: "The lawful use of any structure or land existing at the time of enactment or subsequent amendment of this By-Law *may be continued, although such structure or use does not conform to the provisions of this Bylaw."* This section might not be applicable if the Comprehensive Permit resulted in an increase of the non-conforming nature of Lot 40. But it does not. (See below for discussion of the easement.)

The leading case on "infectious invalidity" is *81 Spooner Road, LLC v. Zoning Board of Appeals of Brookline,* 464 Mass. 692 (2012). However, in that case, an existing house lot with a house already built on it was split to create a new, separate buildable lot. The new lot met the zoning requirements. But because the lot with the existing house was reduced in size, the lot no longer met the FAR requirement of the zoning bylaw. The court ruled that the failure of the lot with the existing house to meet the FAR requirement after the splitting infected the validity of the newly created separate lot: "A property owner may not create a valid building lot by dividing it from another parcel *rendered nonconforming by such divisio*n" (at p. 694, n.6), emphasis added. Those facts are distinguishable from the facts in this matter, as Lot 40 remains as it was and as stated above, it is allowed to continue under the Newbury Bylaw. As stated above, the proposal in this matter does not *create* a non-conformity in Lot 40 or *render* it nonconforming as in the *Spooner Road, LLC* case.

In the event that one believes that the infectious invalidity doctrine does apply to this matter, for whatever reason, such doctrine is of no consequence under Chapter 40B, ss. 20-23. Both the Housing Appeals Committee and the Supreme Judicial Court have ruled that a zoning board of appeals has the power to create lots regardless of whether there might be an infectious invalidity issue under Chapter 40A zoning. In *Taylor Cove Development, LLC*, Housing Appeals Committee Docket No. 09-01 Ruling on Motion for Summary Decision July 7, 2009, the Zoning Board of Appeals had raised the infectious invalidity argument as to a proposed further subdivision of an existing subdivision. The Committee ruled, even if infectious invalidity might normally apply, that a zoning board of appeals could waive all local regulations and bylaws that created such a situation:

"Public policy as reflected in the Comprehensive Permit Law suggests that an affordable housing developer should be permitted to assemble a parcel in the manner employed here. The law is a remedial statute that is to be construed broadly to realize its purposes. See Town of Middleborough. V. Housing Appeals Committee, 449 Mass. 514, 530 (2007). All of the legal impediments argued by the Board – whether in the zoning bylaw, cluster development bylaw, subdivision regulations, or elsewhere – are local requirements and restrictions that may be waived to facilitate the construction of affordable housing. Mahoney v. Board of Appeals of Winchester, 366 Mass. 288, 232-233 (1974)."

More recently, the same holding in another Housing Appeals Committee case was upheld by the Supreme Judicial Court. In *Zoning Board of Appeals of Lunenburg v. Housing Appeals Committee & another,* 464 Mass. 38 (2013), the court also discussed the doctrine of infectious invalidity and upheld the Committee's conclusion "that this local concern was insufficient to outweigh the regional need for affordable housing, and waived any zoning and planning board violations on the Electric Avenue parcel so that the proposed parcel so that the proposed project may proceed." At p. 54.

Therefore, even if considered merged, Lot 40 can be split from Parcel B.

Easement

The lot size of Lot 40 is not being reduced. The easement across it for access to Parcel B does not reduce the lot size. The Table of Dimensional Requirements in the Newbury Zoning Bylaw, Section 97-6 B in setting Lot Area requirements does not indicate that Lot Area shall be reduced by easement areas.

Conclusion

Under any analysis, as discussed above, there are no legal impediments based on infectious invalidity or merger or the proposed access easement preventing the division of the land as proposed by the Applicant and the continued viability of Lot 40.

Very truly yours,

Peter L. Freeman