Baker, Braverman & Barbadoro, P.C.

ATTORNEYS AND COUNSELORS AT LAW
300 CROWN COLONY DRIVE
SUITE 500
QUINCY, MASSACHUSETTS 02169-0904

WARREN F. BAKER
PAUL N. BARBADORO
GENE J. GUIMOND
CHRISTOPHER J. SULLIVAN
THERESA BARBADORO KOPPANATI**
LISA BOND
GARY M. HOGAN*

LAWRENCE A. DINARDO
SUSAN M. MOLINARI
KIMBERLY K. KROHA***

RICHARD C. ASH
KASSANDRA C. TAT

*ALSO ADMITTED IN RI
**ALSO ADMITTED IN NY & CA
***ALSO ADMITTED IN FL

TELEPHONE
(781) 848-9610

TELECOPIER
(781) 848-9790

INTERNET ADDRESS
WWW.BBB-LAWFIRM.COM

JONATHAN BRAVERMAN (Retired)

OF COUNSEL
DUANE G. SULLIVAN
DOUGLAS C. PURDY (1943-2016)

October 28, 2021

Via E-Mail: schilcott@townofpembrokemass.org
And First Class Mail

Frederick Casavant IV, Chairman
c/o Sabrina Chilcott
Pembroke Zoning Board of Appeals
100 Center Street
Pembroke, MA 02359

Re: River Marsh – Comprehensive Permit Application
Water Street, Pembroke, MA
Site Control and Easements

Dear Ms. Chilcott, Chair Casavant, and members of the Board:

This letter is sent in response to Attorney Murphy's letter dated October 21, 2021, which raised questions of continued site control with respect to an easement reserved for 248 Water Street in a 1985 deed, which is located in the area of the southern driveway. There is no merit to the allegations in Attorney Murphy's letter from a procedural or substantive standpoint.

As a preliminary matter, the Chapter 40B regulations do not allow the Zoning Board to challenge MassHousing's determination of site control. Under 760 Code Mass. Regs. § 56.04(6), "Issuance of a determination of Project Eligibility shall be considered by the Board or the Committee to be conclusive evidence that the Project and the Applicant have satisfied the project eligibility requirements of 760 CMR 56.04(1)," which include site control. Although the Board may challenge "failure of the Applicant to *continue to fulfill* any of these project eligibility requirements," the Board cannot challenge the determination itself (emphasis added). Attorney

Murphy's entire argument is based on language in a 1985 deed. In issuing Site Approval, MassHousing found that the Applicant had site control based on a Purchase and Sale Agreement. The Agreement includes "all easements, restrictions, and rights of way being a part thereof" and therefore is subject to any restrictions applicable from the 1985 deed. The Applicant acknowledges that the scope of these restrictions and ability to relocate the driveway is disputed by the clients of Attorney Murphy, but the dispute does not affect site control.

Furthermore, complex title disputes are not within the purview of site control or the Board's deliberations, especially where the dispute affects access and not the underlying property. Instead, an Applicant need only demonstrate a "colorable claim of title" to the site. Meadowbrook Estates Ventures, LLC v. Amesbury Bd. of Appeals, No. 02-21, slip op. at 17 (Mass Housing Appeals Committee Dec. 12, 2006) ("we have long held that even where not simply access but actual control of the site is at issue, the developer need only establish a colorable claim of title, and that adjudication of complex title disputes or similar matters are best left to the expertise of the courts").

An Applicant need only make a "reasonable claim that it has the right to use" the ways accessing its site. See Autumnwood, LLC v. Sandwich Zoning Board of Appeals, No. 05-06, slip op. at 3 (Mass Housing Appeals Committee Nov. 4, 2005). In Autumnwood, the developer claimed prescriptive rights over two roads that were undeveloped and that would be used for access to the development. The Board of Appeals argued that the developer lacked site control because of a dispute regarding the claimed prescriptive rights and any rights to improve the ways. The Committee concluded that the Applicant satisfied the preliminary obligations of a Comprehensive Permit application by demonstrating a reasonable claim to access.[1]

The Board does not have jurisdiction to address the issues raised by Attorney Murphy. 760 Code Mass. Regs. § 56.05(4) states: "The Board shall not address matters in the hearing that are beyond its jurisdiction under M.G.L. 40B, §§20 through 23 and 760 CMR and that lie solely within the authority of the Subsidizing Agency."

In addition to the procedural reasons why Attorney Murphy's arguments are not within the Board's jurisdiction, the arguments also do not have merit. As stated in our letter dated August 3, 2021, the owner of property burdened by an easement "is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created." MPM Buildings v. Dwyer, 442 Mass. 87, 90-91 (2004). Under this rule, River Marsh is entitled to modify the

[1] This conclusion was upheld in a more recent appeal concerning the same development: "We need not address this matter in more detail, since we have long held that where access is at issue, the developer need only establish a colorable claim of title, and that the adjudication of the complex title or other issues will be left to the expertise of the courts." Autumnwood, LLC v. Sandwich Zoning Board of Appeals, No. 05-06, slip op. at n.6 (Mass Housing Appeals Committee Mar. 8, 2010).

driveway to 248 Water Street as set forth on its plans. Alternatively, as offered previously, River Marsh would agree to reconstruct the 248 Water Street driveway entirely on that property. Attorney Murphy also raises a question of a well shown on 260 Water Street, which is outside of the paved area of the southern driveway and would not interfere with fire truck access.

Please let me know if the Board is requesting anything further on this matter.

Respectfully yours,

RIVER MARSH, LLC
By its Attorney,

WARREN F. BAKER

WFB:amg
Cc: Amy Kwesell, Esq.
Client