

Mark C. O'Connor, Esq.
34 East Road Unit #5
Mashpee, MA 02649
781-801-0400
moconnor@richmaylaw.com

August 29, 2024

Sandwich Board of Appeals
c/o Christopher Neeven, Chairman
100 Route 6A
Sandwich , MA 02563

Re: Village Green, Sandwich
G.L.c. 40B Comprehensive Permit
Applicant: NSG Village Green-1, LLC

Dear Chairman Neeven:

Reference is made to the Project Eligibility letter dated August 19, 2022 from the MassHousing Finance Agency to NSG Village Green-1, LLC, as the Applicant for a Comprehensive Permit pursuant to G.L.c. 40B for the development of 144 units of rental housing in Sandwich, Massachusetts, and the Comprehensive Permit Application filed by NSG Village Green-1, LLC with the Sandwich Board of Appeals (the "Board").

Reference is also made to my letter to the Board dated August 8, 2024, a copy of which is enclosed herewith for your convenience. Such letter informed the Board that the Applicant, "NSG Village Green-1 LLC", is a non-existent entity and, because it is legally non-existent, it does not have any legal capacity to apply for a 40B Comprehensive Permit from the Board and it fails to comply with the mandatory Project Eligibility requirement of being an existing entity (a "Limited Dividend Organization") as required by 760 CMR 56.04(1)(a) in order to be eligible to file a Comprehensive Permit Application with the Board and to obtain a 40B Permit.

The governing regulations are set forth in 760 CMR 56.00. The regulations are controlling and binding, and they must be complied with by the Applicant and the Board as they have the "force of law". *Purity Supreme, Inc. v. Attorney General*, 380 Mass. 762, 768-769 (1980).

Sandwich Board of Appeals
c/o Christopher Neeven, Chairman
August 29, 2024
Page 2

In unmistakably mandatory language, 760 CMR 56.04(1)(a) provides, in relevant part, that “[t]o be eligible to submit an application to a Board for a Comprehensive Permit . . . the Applicant . . . shall fulfill . . . the following project eligibility requirements: (a) The Applicant shall be . . . a Limited Dividend Organization” (defined as an entity other than a public agency or a non-profit organization). (Emphasis added)

Accordingly, a prerequisite to an application to a zoning board of appeals for a comprehensive permit is that the applicant must be a legal entity. This Project Eligibility requirement is not discretionary or waivable, but mandatory. Absent compliance, “NSG Village Green-1 LLC” is not eligible to submit its Comprehensive Permit Application to the Board. It follows that on this basis alone the Board must deny the Comprehensive Permit Application.

At the public hearing held before the Board on August 13, 2024, the Applicant argued that it could satisfy the Limited Dividend Organization requirement of 760 CMR 56.04(1)(a) by incorporating at some later date. This is legally untenable and a tortured interpretation of 760 CMR 56.04(1)(a) because the Project Eligibility requirement mandates that the Applicant “shall” be a Limited Dividend Organization “to be eligible to submit an application to a Board for a Comprehensive Permit.” (Emphasis added) The Applicant is, therefore, required to be an existing legal entity *at the time* of the submission of its Comprehensive Permit Application to the Board.

Additionally, the August 19, 2022 Project Eligibility letter from the MassHousing Finance Agency to NSG Village Green-1, LLC states, in relevant part, that its “approval will be effective for a period of two (2) years from the date of this letter.” This two-year period has already elapsed and, therefore, its approval has expired and it is no longer in effect as of August 19, 2024.

The Applicant is required to have a valid Project Eligibility letter from the MassHousing Finance Agency in order to file its Comprehensive Permit Application with the Board. 760 CMR 56.05(2)(g). In order to obtain Project Eligibility, the Applicant must be an *existing* Limited Dividend Organization. 760 CMR 56.04(4)(f). The Applicant was not an existing entity at the time that it applied for Project Eligibility before the MassHousing Financing Agency, and incorporating at some later date will not cure the Applicant’s failure to comply with the Limited Dividend Organization requirement of 760 CMR 56.04(4)(f) when it applied for Project Eligibility.

Sandwich Board of Appeals
c/o Christopher Neeven, Chairman
August 29, 2024
Page 3

As of August 19, 2024, the MassHousing Finance Agency's approval automatically expired. The Applicant did not request the MassHousing Finance Agency to extend the effective period of its approval prior to its automatic expiration. It is too late now for the Applicant to request the MassHousing Finance Agency to extend its automatic expiration date because its approval has *already* expired. Once the MassHousing Finance Agency's approval has expired, without prior application for an extension, it is no longer in effect and cannot be lawfully extended. *See, Milton Legion Post No. 114 v. Milton Board of Appeals*, 2011 WL 2347631 (MA Land Court, June 6, 2011) (Cutler, J.) (holding that the Board lacked authority to renew a special permit where the application for renewal was not filed until *after* the original special permit had already expired). The August 19, 2024 deadline cannot, therefore, be retroactively extended for an additional period beyond its original automatic expiration date of August 19, 2024.

It follows that the Applicant cannot incorporate at some future date (post-expiration of the MassHousing Finance Agency's August 19, 2024 deadline) in order to then be eligible for a Project Eligibility determination from the MassHousing Finance Agency or to be eligible to file and obtain a Comprehensive Permit from the Board because the MassHousing Finance Agency's approval deadline has *already* expired.

For the foregoing reasons, the Board of must deny the Village Green Comprehensive Permit Application. Absence compliance with 760 CMR 56.04(1) at the time that it filed its Comprehensive Permit Application with the Board, "NSG Village Green-1 LLC" does not have any legal standing, authority or legal capacity to apply for a 40B Comprehensive Permit, it was not eligible to file its Comprehensive Permit Application with the Board to obtain a 40B Permit, and the Board does not have any authority to grant its Comprehensive Permit Application even if the Applicant incorporates and becomes a Limited Dividend Organization at some later date.

Respectfully,



Mark C. O'Connor

Encl.

cc (w/out encl.): James J. Killion, Former Chairman
Amy E. Kwesell, Esq., Counsel for Town of Sandwich
Colin McNiece, Esq., General Counsel, MassHousing Finance Agency
Jonathan D. Fitch, Esq., Counsel for the Applicant