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July 31, 2023

Patrick Costello
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10 Post Office Square, Suite 1330
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Re: Willowbend Special Permit Modification

Dear Pat:

Southworth Mashpee Properties LLC has engaged me to provide advice and assistance with its pending application to the Mashpee Planning Board to modify the 1987 special permit for Willowbend Country Club, including any appeals or other court actions that may ensue. I'm working with Troy Miller, Southworth's Chief Development Officer, and Jack McElhinney, Southworth's local counsel, on this matter and am writing this letter on their behalf as well as my own. The purpose of this letter is to open a constructive dialogue on legal issues the Planning Board has raised in connection with Southworth's application, in hopes of reaching a resolution that works for all and avoids the time and expense of litigation.

Though I'm new to this particular controversy I've been poring over the background materials and have reviewed video recordings of the recent Planning Board hearings. I understand that the Board views the reference in the 1991 special permit modification to "the maximum number of 853 bedrooms . . . originally contemplated" as a cap that remains in force even though the Board, for a period of over 30 years, not only has never treated it as such, but has never once (until now) even mentioned it, granting modification after modification of the permit without regard to the total number of bedrooms at the project. Southworth has reasonably and in good faith relied on the Board's longstanding course of conduct in not treating that 1991 language as a still-enforceable bedroom cap as it invested millions of dollars developing, permitting, and selling to third parties scores of lots at Willowbend.

As the 1991 modification indicates, the 853-bedroom figure didn't start out as a cap. It was simply a function of the original Willowbend developers'

proposal to build a total of 338 units under the town's then-operative (1985) cluster development bylaw, which purported to limit the number of bedrooms in each residential unit. Importantly, under the 1985 bylaw, the original developer could have developed well over 400 units. The number of bedrooms was capped at 853 because that was the figure used to design the capacity of the private sewage treatment plant that was proposed as part of the MEPA review of the project in 1987. In 1991, the Planning Board agreed to a proposed reduction in the number of units to 287 "provided that the maximum number of 853 bedrooms (excluding dens, studies and family rooms) originally contemplated shall not be exceeded." The Board acknowledged that in referring to a maximum of 853 bedrooms it was "interpret[ing] the bedroom limit contained within Section 9.322 [of the cluster bylaw] as a density limit which was intended to establish a maximum number of bedrooms within the development when applied in conjunction with the maximum number of units established under the permit." In that context, the condition ensured that the size of the development could not exceed the design capacity of the sewage treatment plant as permitted by DEP.

Southworth's position is that if the 853-bedroom figure ever was enforceable as a cap on the number of bedrooms at Willowbend, it plainly no longer is. While the Board's 1991 interpretation of the language of Section 9.322 as "a density limit which was intended to establish a maximum number of bedrooms within the development" may be plausible, such a limit would be unenforceable. It's settled law that, other than reasonable bulk restrictions (such as maximum floor-area ratios), zoning can't be used to regulate the interior of single-family homes. G.L. c. 40A, § 3, titled "Subjects which zoning may not regulate . . . ," states in relevant part, "No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building" The reason for this prohibition is that the police power on which all zoning regulation is based is limited to the protection of public health, safety, and welfare; regulation of the interior layout of a single-family home doesn't implicate these concerns. See Barney & Casey Co. v. Town of Milton, 324 Mass. 440, 445 (1949) (where application of zoning regulation to a particular parcel has "no real or substantial relation to the public safety, public health or public welfare," it will be struck down). A zoning bedroom limit is especially problematic because it can effectively limit the number of children a family can have.

Of course, limits on the number of bedrooms in a single-family home can be imposed and enforced by local Boards of Health and, for larger systems, by DEP, under Title 5 of the State Environmental Code. However, as Southworth has emphasized at the recent hearings, the Willowbend sewage treatment plant has far more capacity than is currently needed, even at times

of peak flows, even with well more than 853 bedrooms already connected. There's been no suggestion that, when the development is fully built out to 287 units, the plant even then will approach its design capacity. DEP closely monitors the plant and has approved all applications for sewer extension permits to date. DEP would not grant an approval if there was any reason for concern over the plant's function or capacity.

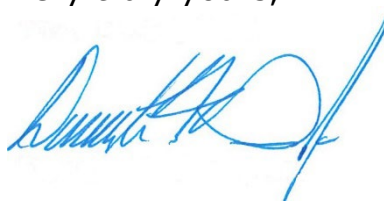
Even if the 853-bedroom figure was enforceable as a cap in 1991, as a result of the Planning Board's consistent conduct over a span of more than 30 years and Southworth's reasonable, good-faith reliance on the Board's non-enforcement of that provision, I believe a court presented with all the facts will conclude that the Board is estopped from enforcing it now. The elements of equitable estoppel are (1) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (2) an act or omission by the person to whom the representation is made in reasonable reliance on the representation, and (3) detriment to the person who relied on the representation. Bongaards v. Millen, 440 Mass. 10, 15 (2003). Pertinent to the current situation, silence may satisfy the first element where it constitutes a representation of consent. Reading Co-Op. Bank v. Suffolk Constr. Co., Inc., 464 Mass. 543, 556 (2013). Moreover, "The linchpin for equitable estoppel is equity – fairness." Silverwood Partners, LLC v. Wellness Partners, LLC, 91 Mass. App. Ct. 856, 863 (2017).

While as a general rule equitable estoppel isn't applied to government acts, there's an important caveat to that rule: estoppel is not applied "where to do so would frustrate a policy intended to protect the public interest." Weston Forest and Trail Ass'n, Inc. v. Fishman, 66 Mass. App. Ct. 654, 660 (2006). Here, given the Planning Board's three decades of non-enforcement of the 853-bedroom figure as a cap, Southworth's longstanding and substantial reliance on the Board's consistent non-enforcement, and, most importantly, the lack of any connection between the Board's sudden decision to enforce the supposed cap and any policy intended to protect the public interest, there is no reason for a court not to hold the Board estopped from now enforcing an 853-bedroom cap. As regards fairness, I understand that over the years Southworth has, at the Town's request and with the Planning Board's consent – and with no legal obligation to do so – connected to the Willowbend sewage treatment plant three developments that were on septic systems (one of which was failing) and that were not subject to the special permit. In the aggregate, these developments add a substantial number of bedrooms, and thus flow, to the plant. Given this background, the Planning Board's attempt to now enforce the 853-bedroom figure as a cap and thereby thwart the build-out of the remaining developable parcels at Willowbend is especially unfair.

One final point. When I watched the video recording of the Planning Board's June 21, 2023 hearing, I noted the enthusiasm of some Board members for attempting to document the total number of bedrooms currently at Willowbend by knocking on doors and asking homeowners to allow town officials into their homes to count bedrooms. Unless a homeowner were to provide their informed consent, this type of administrative search – like any search of someone's home – requires a warrant issued by a judge upon a showing of probable cause to search that particular dwelling. Camara v. Municipal Court, 387 U.S. 523, 534 (1967); City of Boston v. Ditson, 4 Mass. App. Ct. 323, 327-329 (1976). Because the point of such an exercise would be to determine how many bedrooms there are at the development as a whole, no probable cause could or would exist to search any individual home. Besides this constitutional problem, the whole notion of counting bedrooms is pointless: there's no dispute that the 853-bedroom figure was surpassed – likely years ago – with the Planning Board's tacit approval, and in the meantime many non-Willowbend bedrooms have been connected to the sewage treatment plan at the Town's request. Whether there are currently 853, or 953, or any greater number of bedrooms at Willowbend is irrelevant. The only possible relevance of that number is to the capacity of the sewage treatment plant, and regular monitoring by Southworth – overseen by DEP – shows the plant is operating well and has a large amount of capacity to spare. For these reasons, Southworth is unwilling to participate in, or contribute financially to, any effort to count or document the number of bedrooms at Willowbend.

As our goal is to open a constructive dialogue on these issues, Southworth's management would appreciate if you would consult with the Planning Board and get back to us with your thoughts. If you think it would be productive we're open to a sit-down with counsel, a representative or two of Southworth, and representatives of the Planning Board and other interested Town officials, to discuss these issues and how to resolve them without litigation. We look forward to hearing from you.

Very truly yours,



Donald R. Pinto, Jr.

DRP/gmy
cc: Troy Miller
Jack McElhinney, Esq.