

"Preserving public trust and providing professional services"



Rodney C. Collins
Town Manager
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Office of the Town Manager
Mashpee Town Hall
16 Great Neck Road North
Mashpee, MA 02649

September 21, 2023

Mashpee Planning Board Chair Karen Faulkner
Town Hall
16 Great Neck Road North
Mashpee, MA 02649

Dear Madam Chair:

It has been brought to my attention that a letter addressed to Town Counsel has been questioned. The letter was dated July 31, 2023 and was addressed to Town Counsel. The letter (See attached) was sent by Attorney Donald R. Pinto, Jr. and referenced the Willowbend Special Permit Modification. Attorney Pinto represents Southworth Mashpee Properties, LLC. I was made aware of the letter on July 31, 2023 via email. (See attached)

A zoom meeting was arranged for August 22nd between the Town Planner, yourself, Town Counsel and Attorney Pinto. Town Counsel understood the matter in question involved a public hearing that had been continued. My understanding is Town Counsel wanted to make you and the Town Planner aware of legal aspects, especially regarding the issues that may be challenged. Town Counsel further wanted to formally request an executive session with the entire Planning Board for the purposes of discussing the strengths and weaknesses of legal arguments, as well as legal strategy in protecting the Town's interests.

Town Counsel expected the possibility of an executive session to be discussed at your September 6th meeting. However, it was not placed on the agenda for the September 6th meeting and so the matter lingered. On September 20, 2023, the Planning Board met and as I understand it, have no appetite for an executive session without a written explanation from Town Counsel to justify such action. I have further received an email from Planning Board member Mary Waygan, expressing concerns about any ex-parte communications. I trust that Town Counsel's actions were legal and in good faith in an effort to protect the Town's interests. However, I am extremely concerned about the transparency of the process at this point and the public perception that could follow.

I fully understand that legal strategy is a legitimate purpose to enter executive session. Yet the threat of litigation appears premature because the Planning Board has not even rendered a decision. I also do not want any parties to think that they can circumvent a regulatory authority by threatening legal action directly to Town Counsel.

The purpose of this letter is to inform you that I have spoken to Town Counsel today. I informed him there will be no executive session. Upon review of the enclosed letter from Attorney Pinto, if the Planning Board wishes to consult with Legal Counsel, the board may obviously make the request known to the Town Planner and I will make the Town Attorney available for consultation at the board's request.

I also understand the board's frustration that the letter was dated July 31 but the entire Planning Board was not discussing it until September 21. After meeting with the Town Planner earlier today, I have no explanation. Yet it is fair to presume that I will be discussing with staff the importance of resolving outstanding issues in a reasonable and timely manner, regardless of the outcome.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Rodney C. Collins', with a long, sweeping horizontal stroke extending to the right.

RODNEY C. COLLINS
Town Manager

Attachments

Cc: Town Planner

Town Attorney

Re: Willowbend

Rodney C. Collins <rccollins@mashpeema.gov>

Mon 7/31/2023 3:48 PM

To: Patrick Costello <pcostello@lccplaw.com>; Wayne E. Taylor <wtaylor@mashpeema.gov>

Hi Pat,

I am not trying to answer your question with a question but I want to get your professional opinion. My take on this letter is the Southworth Group is trying to work out an agreement to avoid litigation. However, I am concerned that such discussions would usurp the Planning Board's authority.

I also don't generally take too kindly to the threat of litigation. However, the letter is not overly aggressive so I would seek to resolve if we can. My other concern is that Willowbend knew or should have known they had reached the bedroom limit. The only excuse they have given us is that the Town didn't say anything in recent years. That is like blaming the beat cop for standing beside a store being burglarized and the cop didn't stop the burglar because he thought it was the owner. When the burglar gets finally caught, he blames the cop.

Is it legal for an executive session with the Planning Board? If so, is that how you would recommend that we proceed?

Rodney C. Collins | Town Manager

Town of Mashpee

16 Great Neck Road North, Mashpee, MA 02649

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"Preserving public trust and providing professional services."

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From: Patrick Costello <pcostello@lccplaw.com>

Sent: Monday, July 31, 2023 12:32 PM

To: Rodney C. Collins <rccollins@mashpeema.gov>; Wayne E. Taylor <wtaylor@mashpeema.gov>; Terrie Cook <tmcook@mashpeema.gov>

Subject: Fwd: Willowbend

Attention!: : Links contained herein may not be what they appear to be. Please verify the link before clicking! Ask IT if you're not sure.

See below/ attached. Please advise what, if any, action you want me to take in this regard.

Pat

Patrick J. Costello
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Begin forwarded message:

From: Donald Pinto <dpinto@pierceatwood.com>
Date: July 31, 2023 at 12:17:22 PM EDT
To: Patrick Costello <pcostello@lccplaw.com>
Cc: Troy Miller <tmiller@southworthdevelopment.com>, jmcclhin@aol.com
Subject: Willowbend

Hi Pat, I hope you've been well. Attached is a copy of a letter on behalf of Southworth Mashpee Properties LLC concerning Willowbend and recent proceedings before the Mashpee Planning Board. I've put a paper copy of the letter in the mail to you today. I look forward to working with you on this matter. Regards, Don Pinto

Donald Pinto[PIERCE ATWOOD LLP](#)

100 Summer Street
22nd Floor
Boston, MA 02110

PH 617.488.8175
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dpinto@PierceAtwood.com**BIO > [TWITTER](#) > Admitted in MA**

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July 31, 2023

Patrick Costello
Mashpee Town Counsel
Louison, Costello, Condon & Pfaff, LLP
10 Post Office Square, Suite 1330
Boston, MA -2109

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.

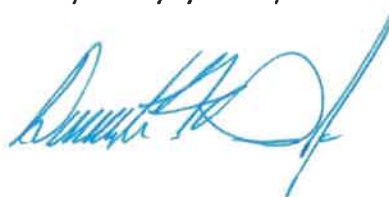
Even if the 853-bedroom figure was enforceable as a cap in 1991, as a result of the Planning Board's consistent conduct over a span of more than 30 years and Southworth's reasonable, good-faith reliance on the Board's non-enforcement of that provision, I believe a court presented with all the facts will 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.