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VIA EMAIL

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**Re: Ocean Pines Condominium – Sagamore Beach, Bourne, Massachusetts
Ocean Pines Development Phases I & II**

Dear Sir/Madam:

Pursuant to the upcoming Planning Board Review Hearing scheduled for November 9, 2023 (the “Hearing”) before the Town of Bourne Planning Board (the “Planning Board”), our office, on behalf of the Ocean Pines Condominium Trust (hereinafter referred to as “Ocean Pines Condominium” or “the Condominium”), provides this memorandum explaining our position as to the Planning Board’s authority to address and remediate the numerous violations presented and referenced during the October 26, 2023 Planning Board Review Hearing regarding the above-referenced development project.

I. Violations

For ease of reference, the following is a summary of issues relating to the Ocean Pines Condominium – Sagamore Beach, Bourne, Massachusetts Ocean Pines Development Phases I &

II. For more detailed information, please refer to our October 20, 2023 letter and October 26, 2023 presentation to the Planning Board.

- ***Special Permit Noncompliance***

- The Condominium’s expert engineer, Karlis Skulte, P.E., of Civil & Environmental Consultants, Inc. (“CEC”) has provided a report noting that the current development includes numerous deviations from the design included in the original 1987 Special Permit Approval. (Oct. 26, 2023 Presentation, Ex. 1, at 9 & SP03¹).

- ***Noncompliance with Bourne Zoning Bylaw***

- § 1238.A.1(b): A site plan shall not be approved that fails to protect abutting properties;
- § 1238.A.2(c): A site plan shall not be approved that lacks proper drainage/stormwater design;
- § 1238.A.3(b): A site plan shall not be approved that impacts flood plains and wetlands;
- § 3490 *et seq.*: Requiring a (1) Stormwater Management Plan that complies with the Massachusetts Stormwater Management Standards as further defined in the Massachusetts Stormwater Handbook, (2) Sediment and Erosion Control Plan, and (3) Long-Term Operation and Maintenance Plan;
- § 3498: Bond, surety, or other security required for stormwater management
- § 4644: Drainage standards before occupancy permits may be issued
- § 4645: Common Open Space trust requirement;
- § 4700(b)(7): Development resulting in more than 15% or 2,500 sq. feet on any lot, unless a system for artificial recharge of precipitation is provided that will not result in degradation of groundwater quality (*see also* §§ 4722(a), 4734).

II. Applicable Law

“[T]he Zoning Act, G.L. c. 40A, and the subdivision control law, G.L. c. 41, §§ 81K-81GG, share a similar purpose, which is ‘to regulate the use of land to ensure the safety, convenience, and welfare of the inhabitants of municipalities.’” *Kitras v. Zoning Adm’r of Aquinnah*, 453 Mass.

¹ Attached at Exhibit A to this submission is a revised copy of Exhibit SP03 to Karlis Skulte’s October 20, 2023 report. The Exhibit was revised to include the Overall Development Plan overlay missing from the originally submitted exhibit.

245, 251, 901 N.E.2d 121, 126 (2009) (quoting *McElderry v. Planning Bd. of Nantucket*, 431 Mass. 722, 726, 729 N.E.2d 1090 (2000)).

Although the Planning Board issued Special Permit #38 on May 4, 1987, as amended September 26, 1988 as #38A, Special Permit #38/38A is no longer subject to the zoning laws in effect at that time and must comply with **current** law. *Lobisser Bldg. Corp. v. Plan. Bd. of Bellingham*, 454 Mass. 123, 132 n.12, 907 N.E.2d 1102, 1109 (2009). Generally, the right to a permit vests “at the time the applicant is unconditionally entitled to its issuance.” *Albahari v. Zoning Bd. of Appeals of Brewster*, 76 Mass. App. Ct. 245, 250 (2010). The Zoning Act provides, however, that “[a] zoning ordinance or by-law shall provide that construction or operations under a building or special permit shall conform to any subsequent amendment of the ordinance or by-law . . . in cases involving construction, **unless such construction is continued through to completion as continuously and expeditiously as is reasonable.**” Mass. Gen. Laws ch. 40A, § 6; *see also* Bourne Zoning Bylaw § 2330 (“Construction or operations under a building or Special Permit shall conform to any subsequent amendment of this Bylaw . . . in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable.”).²

The Supreme Judicial Court has stated that these “permit freeze” provisions “should be interpreted so as to afford protection from zoning changes to good faith holders of . . . permits taken out before the first zoning notice who proceed with some diligence to build under such permits.” *Smith v. Bd. of Appeals of Brookline*, 366 Mass. 197, 202, 316 N.E.2d 501, 504 (1974). On facts similar to those presented here involving decades-long delays between approval and construction, courts have held that the developer did not proceed “continuously and expeditiously” as a matter of law. *See, e.g., Falcone v. Zoning Bd. of Appeals of Brockton*, 7 Mass. App. Ct. 710,

² Section 11 of the Zoning Act also included similar language as far back as 1954. *Murphy v. Bd. of Selectmen of Manchester*, 1 Mass. App. Ct. 407, 407, 298 N.E.2d 885, 886 (1973).

714, 389 N.E.2d 1032, 1034 (1979); *Franchi v. Salvidio*, No. 156577, 1995 WL 17215319, at *6 (Mass. Land Ct. July 11, 1995). In such circumstances, the Supreme Judicial Court has affirmed that “[a] developer thus may be required to comply with, and conform the project to, any changes in the applicable bylaws.” *Lobisser Bldg. Corp.*, 454 Mass. at 132, 907 N.E.2d at 1109.

Further, “[i]f a definitive plan . . . is submitted to a planning board for approval under the subdivision control law, and written notice of such submission has been given to the city or town clerk before the effective date of ordinance or by-law, **the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law, if any, in effect at the time of the first such submission** while such plan or plans are being processed under the subdivision control law, **and**, if such definitive plan or an amendment thereof is finally approved, **for eight years from the date of the endorsement of such approval . . .**” Mass. Gen. Laws ch. 40A, § 6 (emphasis added). The Planning Board issued a “Certificate of Approval of a Definitive Subdivision Plan” relative to this development on April 30, 1987. Consequently, significantly more time than eight years has passed, and the land shown on the definitive plan, including the subject Lots 61-66, must comply with the current Bylaw.

III. Planning Board’s Authority to Address These Violations

1. Bourne Zoning Bylaw § 1240

Pursuant to § 1240 of the Bourne Zoning Bylaw (“Zoning Bylaw”):

“Upon notification of a violation of a site plan – special permit approval the Planning Board shall confer with the Inspector of Buildings as to the extent of the infraction. If determined that the site is in violation of the Zoning Bylaw or conditions of approval the Planning Board may upon its own motion or on the recommendation of the Inspector of Buildings or a petition of any interested person notify the grantee by certified mail, return receipt requested, at least seven days prior to the meeting to appear before the Board to rectify the violation. In event the violation cannot be rectified then the Planning Board may rescind approval.”

As to rescission, “[t]he Planning Board, on its own motion or on the petition of any person interested, shall have the authority to rescind the approval of a Site Plan –Special Permit if, after notice to the grantee and a hearing held thereon, it determines that one or more of the conditions stated for its approval has not been satisfied or complied with by said grantee.” Bourne Zoning Bylaw § 1241.³

2. Bourne Zoning Bylaw § 4644

“Access, drainage, utilities, and grading shall meet functional standards equivalent to those established in the Planning Board’s adopted Subdivision Regulations. Prior to issuance of building permits within an Open Space Community, the Planning Board shall certify to the Inspector of Buildings that a detailed site plan has been submitted to them and meets those standards, and before occupancy permits for any structure are issued, the Planning Board shall certify to the Inspector of Buildings that improvements to meet such standards have either been completed to serve such structure, or security for their completion has been received.” Bourne Zoning Bylaw § 4644.

3. Bourne Zoning Bylaw § 3498

The Planning Board serves as the Town’s Stormwater Authority. *See* Bourne Zoning Bylaw § 3491E. “The Stormwater Authority or its agents may require from the developer a surety or cash bond or other means of security acceptable to the Town prior to the issuance of any building permit for the construction of a development requiring a stormwater management facility. The bond so required in this section shall include provisions relative to forfeiture for failure to complete work specified in the approved stormwater management plan, compliance with all of the

³ Indeed, the Planning Board has previously exercised its authority pursuant to this section. Town records indicate that the Planning Board voted on September 13, 2007 to render Special Permit #38/38A “null and void.” *See* Jan. 24, 2008 Meeting Minutes, at 3. The Planning Board then voted “to rescind the vote that the special permit isn’t valid.” *See* Mar. 24, 2011 Meeting Minutes, at 1. In March 2011, the then-Planning Board Chairman stated that the Board had “found the conditions we originally rescinded the special permit have been fulfilled.” *Id.*

provisions of this By-law and other applicable laws and regulations, and any time limitations.”

Bourne Zoning Bylaw § 3498.

4. Bourne Zoning Bylaw § 1260

In addition, “[t]he Inspector of Buildings/Chief Zoning Enforcement Officer, the Enforcement Officer(s) and any Assistant Inspector of Buildings shall take such action as may be necessary to enforce full compliance with the provisions of the Zoning Bylaw and of permits and variances issued hereunder, including notification of noncompliance and request for legal action through the Town Administrator to the Town Counsel.” Bourne Zoning Bylaw § 1262; *see also* Mass. Gen. Laws c. 40A, § 7; *Barkan v. Zoning Bd. of Appeals of Truro*, 95 Mass. App. Ct. 378, 384-85, 126 N.E.3d 1008, 1014 (2019) (to “challenge[] the validity of a building permit” an aggrieved party may “request[] town enforcement of the zoning bylaw pursuant to G. L. c. 40A, § 7”). This option is available when “the structure was built in a manner that exceeded the scope of a permit.” *Barkan*, 95 Mass. App. Ct. at 384-85 (citing *Connors v. Annino*, 460 Mass. 790, 797-798 & n.9, 955 N.E.2d 905 (2011)).

IV. Requested Relief

1. Pursuant to the Planning Board’s authority under §§ 1240 and 4644 of the Zoning Bylaw, we respectfully request that the Planning Board rescind Special Permit #38/38A or restrain further construction under such Permit until:

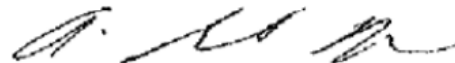
- a. The drainage/stormwater issues have been remediated and brought into compliance with Zoning Bylaw § 3490, including the Massachusetts Stormwater Management Standards as further defined in the Massachusetts Stormwater Handbook;
- b. The Planning Board is satisfied that this development complies with the Open Space Community trust requirements of § 4645;
- c. Existing driveway and walkway issues in the Phase I development of Lots 62-66 are remediated; and

- d. The roadway bond is increased to cover the actual estimated cost of repair and extension.
2. Pursuant to the Planning Board's authority under § 3498, we respectfully request that the Board require from the developer a surety or cash bond relative to completion of work required under an approved stormwater management plan.
3. We respectfully request that the Planning Board instruct the Building Inspector that no further permits shall be issued that fail to conform to the Special Permit and/or the "Certificate of Approval of a Definitive Subdivision Plan" and related "Subdivision Plan and Plan and Profile of a Subdivision called Ocean Pines at North Sagamore, dated 16 December 1986 Revised 1 April 1987 designed by Wilson Hill Associates Inc."
4. Finally, pursuant to the Planning Board's authority under § 4644 of the Zoning Bylaw, we respectfully request that the Planning Board instruct the Building Inspector not to issue any new certificates of occupancy relating to this development until such time as the Planning Board certifies that the site plan meets the drainage requirements of the Zoning Bylaw.

V. Conclusions

Given the inordinate delay in the continuation and completion of this construction since 1987, any statutory "freeze" provisions are inapplicable and development must conform to current law. The Planning Board and the Inspector of Buildings/Chief Zoning Enforcement Officer have the authority pursuant to numerous provisions of the Zoning Bylaw to address Special Permit #38/38A noncompliance and Bylaw violations relating to this condominium development and to grant the relief requested in Section IV above.

Very truly yours



A. Scott Marra

ASM/kem
Enclosures
cc: Ocean Pines Condominium Trustees