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BY EMAIL
(PlanningBoard@town.northborough.ma.us)

Kerri A. Martinek, Chair
Northborough Planning Board
Town Hall
63 Main Street
Northborough, MA 01532

Re: 0 Bartlett Street – Gutierrez Company's Definitive Subdivision Application

Dear Chair Martinek and Members of the Board:

As you know, I represent John and Kristen Wixted, who own and live at 2 Stirrup Brook Lane, a neighboring residence to the 0 Bartlett Street location ("Locus") where the Gutierrez Company ("Applicant") has filed a new application for Definitive Subdivision Plan approval. My clients have several concerns about the Applicant's renewed attempt to develop this environmentally-sensitive Locus.

The Applicant's December 17, 2020 Definitive Subdivision application – entitled "PLANS FOR NON-RESIDENTIAL DEFINITIVE SUBDIVISION OF LAND - PARCEL H WAY" – seeks subdivision approval for, at minimum, "Parcel H Way" that would be created under said proposed plan. However, the Applicant does not make clear in its application, or on its proposed subdivision plan, whether under this particular application it also seeks subdivision approval for the four (4) proposed Industrial Lots called Parcels B-1, B-2, H-1, and H-2 depicted on the plan. *See* title page/cover sheet of proposed Definitive Subdivision Plan, which shows the four proposed industrial parcels as well as the proposed Parcel H Way and a proposed drainage easement, but entitles the plan only "Parcel H Way." Unless the Applicant has already clarified to the Board's satisfaction exactly what it is applying for, I respectfully suggest that as a threshold matter the Board insist the Applicant do so. That being said, for reasons explained below, the Board can and should reject this application even if it is confined to Parcel H Way.[1]

[1] The title page of the subdivision plan identifies the two 0 Bartlett St. parcels owned by the Applicant's affiliate (Map 51, Lot 3 &Map 66, Lot 16) that make up a substantial portion of the land proposed to be subdivided. However, importantly, the plan's title page omits reference to the other 0 Bartlett St. parcel making up the proposed subdivision (Map 51, Lot 1), the aqueduct and crossings above it that are owned by the Massachusetts Water Resources Authority (MWRA).

As shown on page 10 of the Definitive Subdivision Plan, part of the Applicant's proposed Parcel H Way plainly includes the MWRA's land, *i.e.,* the right-of-way over the aqueduct. By no conception of this subdivision application, therefore, does land for which the Applicant seeks subdivision include only its own land. My understanding is that this fact is not disputed by the Applicant.

This poses a major, and perhaps insurmountable, obstacle for the Applicant. Under the Northborough Subdivision Regulations, "[t]he 'applicant' or 'applicants' must be the owner or owners of all the land included in the proposed subdivision." *See* Northborough Subdivision Regulations, Definition of "Applicant." But here the Applicant does not own all of the land included in the proposed subdivision, even if the proposed subdivision under this particular application is confined to the proposed Parcel H Way. The application can and should be denied on that basis unless the MRWA joins the subdivision application as a co-applicant.

The Applicant apparently has taken the position that easement rights it purports to hold over the right of way, as well as a Section 8(m) permit that it was once issued by the MWRA (but that may or may not still be in effect), are together sufficient to constitute "ownership" under the Northborough Subdivision Regulations. That contention is baseless under Massachusetts case law, irrespective of whether or not the Section 8(m) permit applies to the Applicant's latest land use proposal for the Locus.[2]

On the contrary, Massachusetts case law unambiguously supports my clients' interpretation of the Northborough Subdivision Regulations' "owners only" requirement. Indeed, as explained further below (*infra* at p. 3), the Land Court has specifically found that the holder of easement rights is not an "owner" for purposes a town subdivision regulation just like Northborough's that restricted subdivision applicants only to the owners of the land proposed to be subdivided.

Regarding the general principle anchoring our position, the Massachusetts Appeals Court held in *Batchelder v. Planning Board of Yarmouth*, 31 Mass. App. Ct. 104 (1991), as follows: "It is settled that a planning board regulation requiring the applicant for definitive plan approval to be an 'owner of record' is a reasonable regulation… . We think it important that the 'owner' of a site be properly identified on a definitive plan to be recorded." *Batchelder*, 31 Mass. App. Ct. at 106-07. The *Batchelder* Court cited as support the Supreme Judicial Court decision in *Kuklinska v. Planning Board of Wakefield*, 357 Mass 123 (1970). "In *Kuklinska*," the Appeals Court explained in *Batchelder*, "plaintiffs sought to overturn a definitive plan on the ground that the applicant did not own all the land included within the plan. Because the planning board regulation at issue in that case required that the 'applicant must be the owner of all the land included in the proposed subdivision,' the court held ***that the definitive plan did not conform to the regulation***

[2] Notably, the old 8(m) permit, to the extent it is even still operative, not surprisingly includes numerous conditions giving the MWRA free rein to, for example, "revoke this permit at any time … [or] cause this permit to terminate without further notice." 8(m) Permit Condition No. 5. Suffice it say, such state-issued permits, even ones less heavily conditioned than this 8(m) permit, hardly bestow unfettered ownership rights on private parties.

and was thus invalid." *Batchelder*, at 107 (emphasis added). The *Batchelder* Court went on to confirm that "[i]mplicit in the [Supreme Judicial Court's] reasoning in the *Kuklinska* decision was the determination that it is reasonable under [the Massachusetts Subdivision Control Law,] G.L. c. 41, § 81M, for a planning board to require that an applicant be an owner of record." *Batchelder*, at 107 n.4.

Applying these principles, the Appeals Court in *Batchelder* went as far as to hold that the Yarmouth Planning Board ***did not even have the authority to waive*** the "owners only" requirement in the Yarmouth Subdivision Regulations. *Batchelder*, at 105 ('the board's purported waiver of the so called 'owner of record' requirement was inconsistent with the intent and purpose of the Subdivision Control Law").

These binding appellate court decisions alone would be enough to invalidate the Applicant's subdivision plan application as non-compliant with Northborough's "owners only" requirement. But a directly-on-point Massachusetts Land Court decision, *Conway v. Westford Planning Board,* 2018 WL 4685977 (Mass. Land Ct. Sept. 27, 2018), leaves absolutely no room for doubt. Echoing the principles set forth in the *Batchelder* and *Kuklinska* decisions, ***this Land Court ruling has specifically ruled out easement rights as "ownership" in the context of subdivision applications.***

In *Conway v. Westford Planning Board*, the Land Court stated the following: "the [Westford Subdivision] Regulations require the 'owners' of 'all land' included in a request for subdivision approval to sign the approval application, and the Conways [owners of land within proposed subdivision over which the applicant held an easement] didn't do that. The Board nevertheless accepted [the applicant's] application as complete, reasoning" that, the Planning Board had the discretion to consider easement rights sufficient to constitute "ownership" under the town subdivision regulations. The Land Court judge strongly disagreed, stating: "The trouble with the Board's conclusion is that it runs contrary to the holdings of *Kuklinska* [and] *Batchelder* ... all of which sustained … require[ments of] the 'owners' of land leading to or part of a proposed definitive subdivision to sign on to or otherwise consent to the subdivision application. … ***[I]t doesn't stand to reason that one can therefore interpret 'owner' as including someone who holds only an easement in affected land. … The plain meaning of 'owner' also doesn't support the Board's conclusion***." *Conway,* at *6-*7 (emphasis added).

These cases make clear that this most recent Definitive Subdivision Plan application is fatally deficient and should be rejected because not all owners of proposed Parcel H Way are co-applicants, in violation of the clear requirement of the Northborough Subdivision Regulations, a requirement that has been upheld by all levels of Massachusetts courts. Indeed, under the *Batchelder* decision, this "owners only" requirement in Northborough could not even be lawfully waived in a circumstance where the Board were inclined to do so.

Thank you for your consideration of this letter.

Sincerely,

Benjamin B. Tymann

Benjamin B. Tymann

cc: Kathy Joubert, Town Planner