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BY EMAIL

TO: Brookline Zoning Board of Appeals; Kathryn Murphy  
FROM: Jay Talerman  
RE: Chestnut Hill Realty – c. 40B Application  
CC: Town Counsel, Brookline Fire Chief  
DATE: November 28, 2014  
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Attorney Murphy and the members of the Zoning Board of Appeals:

I am writing to address concerns related to emergency access to the proposed project. The comments herein echo the comments I made to the Board at its November 12<sup>th</sup> hearing.

It is my understanding that concerns regarding emergency access were discussed again at the Board's hearing on November 25<sup>th</sup>. The concerns were thoroughly laid out by the Brookline Fire Chief on November 12<sup>th</sup>. It is also my understanding that the Board and counsel discussed the impact of the Sunderland v. Housing Appeals Committee decision (as it applied to concerns for emergency access) on the Board's review CHR's proposed project. As Town Counsel to dozens of Town on c. 40B matters and, more specifically, as counsel to the Town of Sunderland for the above referenced appeal, I would like to ensure that the Board has confidence regarding the scope of its authority on this vital topic. It also strikes me, that as framed by the Brookline Fire Chief, the Sunderland decision has no adverse impact on the scope of the Board's authority in this matter.

As you will recall, the Fire Chief raised a number of concerns when he spoke at the Board's hearing on November 12<sup>th</sup>. One issue he raised was an ongoing concern over access to units that are aligned on narrow dead end driveways. Another issue he raised is the anticipated delay in responding to fires at the project, principally the project's large, multi-story apartment building. He also opined that his concerns as to the large building may be somewhat mitigated if the building was reduced in height and density.

While I was not at the hearing on November 25<sup>th</sup>, it is my understanding that one concern raised was whether the Board could require the Applicant to improve the Fire Department's facilities near the project. That concern is not germane to this matter, in my opinion, and I would agree

that the applicant cannot likely be compelled to undertake such infrastructure improvements, even if it may be advisable for it to do so. Rather, the issue is whether, under c. 40B and the regulations promulgated thereunder, the Board's decision or conditions of approval may be due to concerns over emergency access. In my opinion, the answer to that is unequivocally "yes," as I stated to the Board on November 12<sup>th</sup>. Moreover, my opinion in this regard is unaffected by the fact that, at present, delays in access may already be an issue in the area of Town where the Project may be proposed.

Local concerns regarding emergency vehicle access are influenced and shaped by several sources, three of which are particularly relevant to this matter. First, building construction and public safety are well within the scope of the Board's authority. Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee, 457 Mass. 748, 756 (2010). Second, at 760 CMR 56.07(3)(d)(4), the adequacy of fire protection is a local concern which is to be addressed in c. 40B proceedings. Third, in HAC cases such as Lexington Woods v. Waltham (HAC No. 02-36) and OIB Corp. v. Braintree (HAC No. 03-15) the HAC considered emergency personnel access to be a valid local concern and ultimately concluded that "the concern for emergency access outweighs the regional need for affordable housing." In these cases, the HAC upheld zoning board denials based upon concerns for emergency access. Indeed, concern over emergency access is one of the few areas where the HAC has deferred to a presiding Board's discretion. In OIB, the HAC found that 100 units of housing would be located beyond the safe reach of the Braintree Fire Department and therefore concluded "that the concern for emergency access outweighs the need for affordable housing." No. 03-15 at p. 11. In Lexington Woods, the HAC noted the importance of sprinklers but ultimately found that "sprinklers are not a substitute for access to the site for firefighting." No. 02-36 at p. 16. Nothing in the Sunderland decision stands for a proposition that runs counter to these authorities. In fact, while the Court in Sunderland ultimately concluded (albeit erroneously in my opinion) that provisions for emergency access were adequate, the importance of such issue was underscored. To this end, the Sunderland court concluded that "the safety of the project's residents and local firefighters in the event of a fire at the project is properly a local concern that must be weighed" by the presiding Board.

Based upon the above referenced authorities, there can be no doubt that the Board has the requisite jurisdiction and discretion to base their decision on the adequacy of the proposed project's means by which the Brookline Fire Department may access the project. In the present matter, it is irrelevant that, due to longstanding development patterns, which are largely influenced by grandfathered and by-right uses, the Fire Department has expressed a concern over delays associated with accessing structural fires in this area of Town. The fact that such concerns already exist does not mean that the Board is *condemned* to exacerbate the situation by allowing new development that would have less than adequate provisions for emergency access. In other words, the Board is not required to *make a bad situation worse*. It is also highly relevant that the proposed project proposes a type of construction that does not exist in this area of Brookline – specifically a large multi-story apartment building. To that end, it was suggested by the Board and confirmed by the Fire Chief that a reduction of the height of that building may mitigate (although not eliminate) concerns over access. I strenuously suggest that the Board explore such mitigation, an action that is plainly supported by the above-cited regulations and HAC cases.

As I mentioned to the Board on November 12<sup>th</sup>, there is no better authority on this subject than the Brookline Fire Chief. After all, he is solely responsible for ensuring that his trucks and firefighters can respond to a fire. As the Fire Chief has stated, he may be delayed in responding to a fire. He has also confirmed that delays could result in additional and severe injury to persons or property. I submit that, on the basis of these findings the Board is under a virtual imperative to either deny the project or condition it upon changes that mitigate the Chief's concerns to the maximum feasible extent. There is nothing under any caselaw that indicates that the Board cannot or should not act in such a fashion. Moreover, even if the caselaw provided support for inaction – which it doesn't – I would argue, as I have already done, that the Board should hold true to its principles.

As always, please do not hesitate to contact me with any questions that you may have.

Sincerely,

A handwritten signature in black ink, appearing to read 'JR Talerman', with a stylized flourish at the end.

Jason R. Talerman