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September 18, 2018

Mark Robidoux  
Building Commissioner  
Town of Southborough  
Town House  
17 Common Street  
Southborough, MA 01772

**Re: Legal Opinion Request, Special Permit Application, Mixed-Use Business Village  
District, Residential Rental Use, TCO #18-3073**

Dear Mr. Building Commissioner:

We acknowledge your opinion request above-referenced. Your request specifies that an applicant Watershed Investment Corporation, a duly organized and existing Massachusetts business corporation, as determined by this office, applied for a Special Permit from the Zoning Board of Appeals ("ZBA") pursuant to Chapter 174, Section 174-8(C)(2) of the Zoning Code as to Schedule of Use Regulations which allows, by special permit, "several different uses, *if otherwise permitted* (emphasis added) in the district, or several buildings on the same lot, if such uses or buildings are deemed compatible, meet the requirements of Section 174-9 and result in improved circulation and land use patterns."

Specifically, you indicate applicant seeks a mixed-use to include a business use on the first floor and a residential use, i.e. a non-transient motel/facility on the second floor, referencing Section 174-8.4(B)(3) and 174-8.4(B)(4). A historical use description for the subject lot has been furnished relative to a laundry and blacksmith shop use. Reference is also made as to the last known use as a service station. These uses are of no legal consequence, at this time, as all structures have been demolished and all uses abandoned.

The other historical information furnished is of no legal effect as to the status of historical uses on other properties in the Town.

On August 2, 2018, applicant submitted plans to construct a mixed-use building at 2 East Main Street consisting of two business uses on the first floor and four, one (1) bedroom apartments on the second floor. (See Building Commissioner correspondence to Applicant dated August 2, 2018 attached.) To the limited extent applicable under the Zoning By-law, the requirement for a mixed-use special permit, generally, is appropriate, however, so long as uses specified are clearly permitted under the by-law.

There was also attached applicant's consultants summary submitted in an effort to support and clarify the proposed mixed use. At a recent ZBA session where you were present, as Building Commissioner, it was indicated, according to a newspaper report and cable vision video, that the project was mixed-use which included an office use and a hotel/motel use, not otherwise defined under the Town Zoning By-law. Your office, apparently, then went on to conclude that the State Building Code, for clarification of definition, relied, in part, on the definition of *transient v. non-transient* deciding that this residential use is a "non-transient motel" which you concluded is the same definition as an apartment building.<sup>1</sup>

As to this opinion request, you have identified three legal issues to be addressed. The first is whether a mixed-use building is allowed in the Business Village District. Relative to this inquiry, we conclude that a mixed-use building is permissible in the Business Village (BV) District via Special Permit per Section 174(C)(2) so long as the different uses proposed are permitted in the District; that uses and buildings are compatible, the proposal conforms to the requirements for a special permit under the By-law Section 174-9 and state statute on the subject as may be applicable i.e. M.G.L. c.40A, Section 9 and that the proposal results in improved circulation and land use patterns.

Before going into the two other issues to be addressed, we need to analyze what constitutes uses permitted in the BV Zoning District. It is acknowledged that apartments, motels and hotels are not defined in Section 174-2 of the Zoning By-law, although accessory apartments are clearly defined as a subsidiary dwelling unit to a single family dwelling with separate cooking, sleeping and bathroom facilities.

To determine whether certain uses are permissible in the Zoning District, the schedule of uses permitted must be reviewed. In this regard, although accessory apartments are a permitted use, subject to a special permit, no reference is made to apartments as an affirmative zoning use in the

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<sup>1</sup> That ministerial determination is somewhat different than your denial letter of August 2, 2018 where you reference the four (1) bedroom uses as apartments on the second floor.

Business Village District. Hotels and motels, without definition, are allowed.

By operation of law, apartments are not allowed. In this regard, legal analysis, under Zoning By-law provisions starts with State statute, local ordinance, by-law and case law cited thereunder. To clarify definitions, courts tell us, if necessary, to go to common usage found in Black's Law Dictionary or international recognized dictionaries.

There are also several fundamental canons of zoning law interpretation developed under case law. Applicable canons are that provisions cannot be viewed in isolation and must be interpreted as a consistent and harmonious whole so far as practicable. This was cited more recently in relevance to Southborough in a 1997 case of *Livoli v. Southborough Zoning Board of Appeals*. Also, the most important canon restated in Livoli as cited by the Court is that "*inclusio unius et exclusio alterius*", that is, inclusion of one use is exclusion of another or uses not listed are prohibited.

In this regard, we conclude, as a considered legal opinion, that since apartments are not listed as a permissible use in the BV Zoning District, they are prohibited and only accessory apartments which are listed are permissible.<sup>2</sup>

You also asked to define the difference between an apartment building and a non-transient motel. An *apartment* in Webster's Dictionary is defined as "a similar set of rooms fitted especially with housekeeping facilities and usually leased as a dwelling"<sup>3</sup>. Non-transient motel is not defined in either the by-law nor state statute, Webster or Black's dictionary but as you point out, in the State Building Code together with apartment houses defined as "occupancies containing sleeping units on more than two dwelling units where occupants are primarily permanent in nature". The problem with attempting to use this definition "non-transient" is that it is not included as a use in the By-law with Livoli case legal logic cited above as prevailing.

The use of the Building Code's definition (created as part of construction detail in conjunction with Building permits) is not applicable. One cannot read Building Code definitions into a Zoning Code by implication or convenience. See 780 CMR 201 and 780 CMR 310.4 as cited.

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<sup>2</sup> If the Town of Southborough, by its legislative body, Town Meeting, had wanted or wants to add apartments as a use, then it can be by Zoning By-law Amendment.

<sup>3</sup> By way of comparison, an apartment hotel is defined as a hotel that rents furnished apartments or suites suitable for housekeeping on a weekly or permanent basis and usually is supplying hotel services. This is also not allowed under Southborough's current Zoning provisions.

By comparison, if apartments, apartment houses or non-transient motels were specifically included in the applicable By-law provision, then they would be allowed.

Accordingly, both apartments and non-transient motels are not allowed in the Business Village District as currently codified. Words not included in the clear definitions like *hotel* and *motel* cannot be added without legislative enactment. This property is subject to and enjoys the benefit of seeking permissible uses in a mixed-use format subject to the grant of a special permit as specified in the schedule of uses for the Business Village District under the application currently pending as indicated above.

If you have any questions in this regard, please advise.

This opinion is rendered solely upon facts of this particular case and should not be applied to any other fact situation without the proper consultation or counsel.

Very truly yours,



Aldo A. Cipriano, Esq.  
Town Counsel

AAC/fc

Cc: Craig Nicholson, ZBA Chairman  
Mark Purple, Town Administrator