



April 18, 2019

**BY ELECTRONIC MAIL: MAntonellis@lanasterma.net
AND FIRST-CLASS MAIL**

Michael Antonellis, Planning Director
Town of Lancaster
Prescott Building
701 Main Street, Suite 4
Lancaster, MA 01523

Re: Goodridge Brook Estates, Lancaster, MA

Dear Mr. Antonellis:

Thank you for forwarding to me a copy of the document entitled “Amendment to Purchase and Sale Agreement to Extend Closing Date,” concerning the property that is the subject of the above-referenced comprehensive permit application. As you know, we raised a question as to whether the applicant, Crescent Builders, Inc. (“Applicant”), maintained “site control” for purposes of this application, given that the date of performance (closing) had expired and the Applicant had not yet provided proof of a valid extension agreement.

Under the terms of the purchase and sale agreement between the seller, David Kilbourn, and the buyer, the Applicant, the closing was to take place on July 12, 2018, but that date could be extended for up to 240 days by the Applicant if permitting for the Project was incomplete. Assuming that the Applicant properly and timely exercised its option rights to extend the closing date, the last date on which the closing could occur was March 9, 2019 (240 days from July 12, 2018). The P&S Agreement provided that “time is of the essence,” meaning that the parties were strictly bound by the deadlines in the agreement. See, Owen v. Kessler, 56 Mass. App. Ct. 466, 469 (2002). Title to the Project Site had not passed to the Applicant by March 9th, and the Applicant had not provided any proof of a further agreement to extend the date between Mr. Kilbourn and the Applicant.

The purported “Amendment” you forwarded to me today is problematic. Because the parties agreed that time was of the essence, once the extended closing date passed without a closing, the P&S Agreement expired by its own terms. The Amendment is dated April 8, 2019, a month after the expiration date of the P&S Agreement. Parties to a real estate contract may waive the “time is of the essence” condition in a contract by continuing to negotiate beyond the closing date, Maltais Enters., LLC v. Salt Marsh, LLC, 19 LCR 196 (2011), but that is not what happened here. The Amendment was not signed by Mr. Kilbourn, but rather by his attorney.

During the life of the P&S Agreement, Mr. Kilbourn's attorney had the authority to execute amendments to extend contract deadlines (see, ¶18), but he did not have the authority to act on Mr. Kilbourn's behalf after the P&S Agreement expired – when the Agreement expired so too did any authorizations contained within the P&S Agreement.¹ The only exception to this would be if the attorney had a Power of Attorney to act on behalf of Mr. Kilbourn. If he had one, we have not seen it, and regardless he did not sign it “under power of attorney.”

Compounding this dilemma, Mr. Kilbourn died on April 8, 2019 at Clinton Hospital, the same day on which the Amendment was allegedly signed. This unfortunate event casts further doubt on the attorney's authority or ability to act on Mr. Kilbourn's behalf.

In sum, the problem with the Amendment is that it was executed after the P&S Agreement had already expired, and was not signed by Mr. Kilbourn but rather by his attorney, whose authority lapsed when the Agreement expired. Title to the Project Site is now held by Mr. Kilbourn's heirs, free, from what we can tell, from any contractual obligation to sell to the Applicant (because the P&S Agreement's closing date was not effectively extended). We request that the Zoning Board put the Applicant on notice that it does not consider the Applicant to have site control, and report this deficiency to MassHousing pursuant to 760 CMR 56.04(6).

Thank you for your attention to this matter.

Very truly yours,


Daniel C. Hill

cc: Adam Costa, Esq.
Paul Haverty, Esq.
Clients

^{1/} The Amendment references an email exchange “on or about March 12, 2019,” in which the parties' attorneys allegedly discussed extending the closing date. Setting aside the oddity that the attorneys could not be more precise with the date of their email exchange, the exchange took place after the P&S Agreement expired, so that even if one were to suggest that the P&S Agreement was amended on March 12th, it was still after the P&S Agreement has already expired.