

# THE LAW OFFICES OF BELLO & MORTON, LLC

184 Main Street Wareham, Massachusetts 02571 · 508-295-2522

April 13, 2021

Nazih Elkallassi, Commissioner  
Wareham Zoning Board of Appeals

Re: Legal Memorandum – Institutional Use is allowed in Commercial Strip District

Dear Mr. Elkallassi:

I am writing to you in response to the Building Commissioner's letter to the Board dated January 21, 2021 characterizing this project as "multi-family residential building". My client and I are of the strong opinion that this is a mischaracterization of the project. My client is seeking an Institutional Use for this property which is allowed in the Commercial Strip zone per our Bylaws. In support of this, I have extensively reviewed both our Zoning bylaws and the Massachusetts State Building Code.

**1. The Wareham Zoning bylaws:**

First looking to Article 3 of our by-law re the Use of this project:

***313 PROHIBITED USES***

*A use listed as prohibited in Section 320 shall not be permitted in the district for which it is so specified. In addition, a use which is not specifically authorized in a district and which is inconsistent with the intent of that district shall be prohibited.*

There are two requirements here: Being if the use is not specifically allowed it is prohibited *AND* it is inconsistent with the intent of this district.

**2. Institutional Use is allowed in the CS district and it is consistent with the intent of the district.**

The fact is that this area of Town is zoned for Institutional Use including hospitals, intermediate care centers, and nursing homes. The mere fact that the specific words “Assisted Living Facility” are not in our code does not prohibit this use in the CS district. My client’s project from the very onset of his proposal was for an institutional use on this property not residential. 340.5 of our Bylaw lists EDUCATIONAL AND INSTITUTIONAL USES.

Second, the intent of the Commercial Strip Zone per our bylaw 211.3: Strip Commercial (CS): The CS district is intended to promote large-scale retail and service development in defined areas along Cranberry Highway. The intent of this area designated by the Town is for development such as this. For further guidance, I have reviewed the State Building Codes.

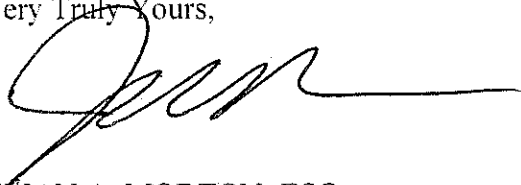
**3. The State Code determination that Assisted Living Facility is an Institutional Use**

We then look to the State laws re “Use and Occupancy” for further clarification in: 780 CMR 3.00. In *Exhibit A* attached hereto, 308.2 Group I-1, I-2, lays out the definition of the assisted living facility my client is looking to provide for Wareham. The use is Institutional and more than five but not more than 16 occupants, excluding staff, as being Residential. Therefore, we respectfully disagree with the analysis from the Commissioner in his letter that this project should be deemed “Residential” and have to follow the guidelines for a residential use. Per state code, 780 CMR 310.0 RESIDENTIAL GROUP R- Residential Group R. includes, among others, the use of a building or structure, or a portion thereof, for sleeping purposes when not classified as an Institutional Group I. As indicated here, our use is (See attached hereto *Exhibit B*)

All things considered, including the intent of the nature of Commercial Strip Zone here in Wareham, the relevant definitions provided to you here in your materials, we request a determination from the Zoning Board that an institutional use is allowed here at this site and to

focus on the relief we are seeking from the Board of Appeals on the height variance and site plan review. It is crucial to the next steps in the process.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'Julian A. Morton', with a long horizontal flourish extending to the right.

JULIAN A. MORTON, ESQ.

Cc

Mr. Kenneth Buckland, Town Planner

Mr. David Riquinha, Building Commissioner

# Exhibit A

## 308.2 Group I-1

This occupancy shall include buildings, structures or parts thereof housing more than 16 persons, on a 24-hour basis, who because of age, mental disability or other reasons, live in a supervised residential environment that provides *personal care services*. The occupants are capable of responding to an emergency situation without physical assistance from staff. This group shall include, but not be limited to, the following:

- Alcohol and drug centers
- Assisted living facilities
- Congregate care facilities
- Convalescent facilities
- Group homes
- Halfway houses
- Residential board and care facilities
- Social rehabilitation facilities

A facility such as the above with five or fewer persons shall be classified as a Group R-3 or shall comply with the *International Residential Code* in accordance with Section 101.2. A facility such as above, housing at least six and not more than 16 persons, shall be classified as Group R-4.

Residences such as the above with five or fewer occupants that are operated or licensed by the Massachusetts Department of Developmental Services shall comply with the 780 CMR One- and Two-family Dwellings.

For assisted living facilities also see the *residential care/assisted living facilities* definition in Section 310.2.

## 308.3 Group I-2

This occupancy shall include buildings and structures used for medical, surgical, psychiatric, nursing or custodial care for persons who are not capable of self-preservation. This group shall include, but not be limited to, the following:

Child care facilities  
Detoxification facilities  
Hospitals  
Mental hospitals  
Nursing homes

A building or structure such as above subject to licensure pursuant to 104 CMR 28.00: Licensing and Operational Standards for Community Programs or operated by the Department of Mental Health, housing no more than 12 people, shall be classified as Group R-4.

### 308.3.1 Definitions

The following words and terms shall, for the purposes of this section and as used elsewhere in this code, have the meanings shown herein.

**CHILD CARE FACILITIES.** Facilities that provide care on a 24-hour basis to more than five children, two years nine months of age or less.

**DETOXIFICATION FACILITIES.** Facilities that serve patients who are provided treatment for substance abuse on a 24-hour basis and who are incapable of self-preservation or who are harmful to themselves or others.

**HOSPITALS AND MENTAL HOSPITALS.** Buildings or portions thereof used on a 24-hour basis for the medical, psychiatric, obstetrical or surgical treatment of inpatients who are incapable of self-preservation.

**NURSING HOMES.** Nursing homes are long-term care facilities on a 24-hour basis, including both intermediate care facilities and skilled nursing facilities, serving more than five persons and any of the persons are incapable of self-preservation.

# Exhibit B

## 310.1 Residential Group R

Residential Group R includes, among others, the use of a building or structure, or a portion thereof, for sleeping purposes when not classified as an Institutional Group I or when not regulated by the *International Residential Code* in accordance with Section 101.2. Residential occupancies shall include the following:

**R-1** Residential occupancies containing *sleeping units* where the occupants are primarily transient in nature, including:

*Boarding houses* (transient)

Hotels (transient)

Motels (transient)

*Congregate living facilities* (transient) with 10 or fewer occupants are permitted to comply with the construction requirements for Group R-3.

**R-2** Residential occupancies containing *sleeping units* or more than two *dwelling units* where the occupants are primarily permanent in nature, including:

Apartment houses

*Boarding houses* (nontransient)

Convents

Dormitories

Fraternities and sororities

Hotels (nontransient)

Live/work units

Monasteries

Motels (nontransient)

Summer Camps for Children (*see* section 426)

Vacation timeshare properties

*Congregate living facilities* with 16 or fewer occupants are permitted to comply with the construction requirements for Group R-3.

*Child care facilities* which comply with M.G.L. c. 15D, and that provide accommodations for ten or fewer children of any age for less than 24 hours are permitted in dwelling units of an R-2 building.

R-2 occupancies include facilities regulated by the Department of Mental Health that are in conformance with the occupant safety requirements of 115 CMR 7.00: *Standards for All Services and Supports*.

For assisted living facilities also *see* the *residential care/assisted living facilities* definition in Section 310.2.

**R-3** Residential occupancies where the occupants are primarily permanent in nature and not classified as Group R-1, R-2, R-4 or I, including:

Buildings that do not contain more than two dwelling units.

Adult care facilities that provide accommodations for five or fewer persons of any age for less than 24 hours.

*Child care facilities*, which comply with M.G.L. c. 15D, which provide accommodations for ten or fewer children of any age for less than 24 hours, in a dwelling unit of a one or two dwelling unit building. Such dwelling units for child care facilities are permitted to comply with the 780 CMR One-and Two-Family Dwellings.

Congregate living facilities with 16 or fewer persons.



Adult care and child care facilities and residences within a one family dwelling or units of a two family dwelling are permitted to comply with the 780 CMR One-and Two-Family Dwellings.

Townhouses (three or more attached dwelling units) more than three stories in height. Height and area and fire protection requirements for townhouses shall be restricted to those for R-2 uses. (Note: Townhouses three stories or less are also classified as R-3 but shall comply with the 780 CMR One-and Two-family Dwellings.)

Residences with five or fewer occupants that are operated or licensed by the Massachusetts Department of Developmental Services shall comply with the 780 CMR One-and Two-family Dwellings.

R-3 occupancies include facilities regulated by the Department of Mental Health that are in conformance with the occupant safety requirements of 115 CMR 7.00: Standards for All Services and Supports

**R-4 Residential occupancies shall include buildings arranged for occupancy as residential care/assisted living facilities including more than five but not more than 16 occupants, excluding staff.**

Group R-4 occupancies shall meet the requirements for construction as defined for Group R-3, except as otherwise provided for in this code or shall comply with the *International Residential Code* provided the building is protected by an *automatic sprinkler system* installed in accordance with Section 903.2.7.