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BOARD OF HEALTH
CARLISLE

Town of Carlisle
Board of Selectmen
Town Hall
66 Westford Street
Carlisle, MA 01741

November 5, 2014

RE: ZBA Hearing on Lifetime Green Homes, LLC
Application for a Comprehensive Permit under MGL Chapter 40B

Dear Members of the Board:

I am writing to urge, in the strongest possible terms, that the Board of Selectmen expressly authorize the funding for presentation of the following evidence and for independent consultants at the above-referenced 40B hearing:

1. The RKG Associates study dated April 8, 2014, which is available at the Carlisle Affordable Housing Trust website, and testimony by the author(s) of the study to the ZBA;
2. Evidence regarding the costs, from all sources, and occupancy data regarding the "friendly" 40B development known as Benfield Farms;
3. Retention of hydrogeology expert, Scott Horsley, to test and evaluate the groundwater risks to the potential new occupants of the proposed development. (This expert has been retained by the abutters, but his testing and analysis would be important to protect the health and safety of potential new occupants in this single lot subdivision.);
4. Retention of a subdivision project expense expert to independently evaluate the Applicant's pro forma and other data regarding the profitability of the proposed development;
5. Retention of an independent real estate appraiser to evaluate the costs of the proposed new – subsidized – houses in relation to the "Deck House" neighborhood.
6. Evidence regarding Mr. Brem's potential conflicts of interest and close ties to town boards, previous 40Bs, and peer reviewers should be formally placed before the ZBA.

cc BDA 11/5/14

I. IF THE LACK OF MIXED-INCOME RENTAL DEVELOPMENT IS DUE TO REASONS OTHER THAN THE ZONING BYLAWS, THEN THE HOME RULE AMENDMENT SHOULD CONTROL

In the seminal case of *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339 (1973), the SJC set out the framework for analyzing MGL Chapter 40B, sections 20-23 ("40B") in relation to two fundamentals of zoning law. First, the Court discussed the relationship between the Home Rule Amendment to the Massachusetts Constitution. Then, it analyzed the principle of illegal spot zoning. Under the circumstances more than forty years ago, the Court concluded that 40B did not violate either of these principles. However, things have changed.

Article 89 of the Commonwealth's constitution, the Home Rule Amendment, authorizes towns to enact zoning laws as an expression of municipal police power to promote the general welfare. The *Hanover* Court noted that local power would be in full force and effect so long as it was "not inconsistent" with state law. *Hanover* stated that the purpose of 40B was to "provide relief from exclusionary zoning practices which **prevented** the construction of badly needed low and moderate income housing." (bold added) To the extent that zoning bylaws were standing in the way of such construction, the local bylaws were inconsistent with the statute and could be overridden without violating the Home Rule principle.

The RKG Associates study shows that it is a low "capture rate" of the regional rental market, and resulting lack of financial feasibility, that keeps multi-family apartment buildings from being constructed in Carlisle – not exclusionary zoning. The Benfield Farms experience shows that such construction here is not only financially imprudent (more than \$377,000 per 560 square foot unit) but also that there is weak demand for low income housing. More than a year after completion, the facility is still not fully occupied. Even if zoning bylaws are relaxed, mixed-income rental buildings would not be economical. Zoning bylaws are not the obstacle.

II. ILLEGAL SPOT ZONING MAY BE AVAILABLE AS AN ARGUMENT IN THE LONG RIDGE ROAD 40B APPLICATION

Hanover addressed the issue of illegal spot zoning. This illegal use of regulation occurs when zoning for one parcel is different from that accorded to similar surrounding land and the different treatment is "all for the economic benefit of the owner of that lot." (italics added) *Hanover* compared 40B, especially under the facts before the Court, to Fall River's conversion of land from single family into a multi-family rental housing district. The Court observed that "construction of multi-family residences in cities with housing shortages promotes the public welfare." *Hanover* set out the central question: Does the difference in zoning treatment serve the public welfare or merely afford an economic benefit to the owner of the land receiving special treatment?

One may ask whether a subdivision of twenty homes costing more than the surrounding Deck Homes could possibly serve the public welfare, especially when it is that neighborhood that will bear the entire burden and risk of the subdivision. But, there is a deeper concern in this case.

We are only now emerging from a crisis in which an effort to allow more families of modest means to become home owners went wrong. A good idea became a tragedy when predatory lenders got people into homes and then left the scene with profits in hand. When rates adjusted upward or a large expense threatened to sink the family, there was little to do. Home ownership became a potential trap, with harm – both economic and emotional – to those whom we wanted to help.

It may be that the same sort of scenario is being staged for Long Ridge Road. The developer will sell these homes with a promise of latest design of septic and grinder pumps. The barest limits will be reached on road widths and turnaround areas. The least distance between dwellings is being proposed for a dense construction at the dead end of a dead end road. Most importantly, the site design is based on a single lot— with all of the land issues, including septic maintenance and repair or replacement, handled through a condominium financial structure.

A. Rather than Serving the Public Welfare, the Single Lot Design with a Condominium Financial Structure Puts the Low and Moderate Income Owners in Jeopardy

During a housing boom, the idea of buying an apartment as an investment seems like a good idea. But, when housing prices are not rising quickly, the hidden costs of this financial structure can cause incredible stress – both economic and emotional. There are the simple maintenance issues, which people on tight budgets find stressful. For example, there may be arguments over how often the private driveway must be plowed. More importantly, the potential for financial distress regarding the septic and water issues is significant.

Benfield Farms has evidently been having problems with the septic system. The exact problem is unclear from newspaper reports, but whether it is the septic or the filter, the problem is being handled by the landlord. If this were a condominium structure, the occupants would be under severe stress. [I believe that Mr. Brem was chair of the Technical Advisory Group on Benfield and that the peer reviewer for Long Ridge Road, Steve Smith, was groundwater expert on Benfield.]

The health and safety issues *to the occupants* are too important to leave to a peer reviewer paid by review fees. An independent hydrogeologist should also be working for the ZBA. Scott Horsley, who was deemed qualified by the ZBA and has been retained by the abutters, is the natural choice.

B. The Landowner May Be Exploiting Low Income Families for the Sole Purpose of Maximizing Profits

The condominium financial structure is only necessary because the subdivision site has been designed as a single lot. This complicated financial and ownership design is necessary so that the landowner can place more dwellings on the property than is prudent for health and safety. If each house had its own septic and well, the added risks of shared ownership would be eliminated. Allowance for more homes than would be acceptable without the condominium structure is solely for the landowner's profit.

A very thorough and independent analysis of the groundwater, fire protection, and maintenance questions of this subdivision must be made. At some point, there will be more houses proposed than can fairly be said to serve the public welfare. At that point, the exemption from zoning laws is "all for the economic benefit of the owner of that lot" and, thus, it is illegal spot zoning.

I would be happy to volunteer my time to assist the town's attorney with these arguments. In the meantime, it is essential to get all of the relevant facts into the hearing record on the Long Ridge Road 40B application.

Thank you very much for your attention to these issues.

Sincerely,



Lyn Lemaire

cc: Planning Board, Board of Health, Conservation Commission, and others