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July 22, 2014

Carlisle Zoning Board of Appeals  
Carlisle Town Hall  
66 Westford Street  
Carlisle, MA 01741

Re: Application for Comprehensive Permit – 100 Long Ridge Road

Dear Members of the Board:

This firm represents neighbors and abutters to the proposed 20-unit residential development off Long Ridge Road in Carlisle (the "Project"), which is the subject of a pending application for a comprehensive permit under General Laws Chapter 40B, Sections 20-23 proposed by Lifetime Green Homes, LLC (the "Applicant"). The purpose of this letter is to raise the Neighbor's initial concerns with the proposed Project and the completeness of the Application.

Despite the significant impact the Project would have on the surrounding neighborhood and on the Town of Carlisle in general, the application materials submitted by the Applicant to the ZBA are remarkably thin, and not in conformity with the application submission requirements under Chapter 40B and the Board's own Rules and Regulations. We would urge the Board to immediately address these deficiencies with the Applicant (the Board is under a state-mandated 180-day deadline to close the public hearing under 760 CMR 56.05(3)), and then proceed immediately with a thorough independent peer review of the Project's design elements.

#### **I. The Legal Framework**

By way of introduction, I have served as counsel to local zoning boards across the state on numerous Chapter 40B permitting and litigation matters over the last 13 years. I have litigated dozens of Chapter 40B appeals before the Housing Appeals Committee ("HAC"), the state trial courts, the Appeals Court and the Supreme Judicial Court.

As you know, Chapter 40B developers may seek a "comprehensive" permit from the local zoning board of appeals in lieu of separate approvals from all of the other town boards, commissions and officials that would otherwise have jurisdiction over the project. A significant function of the statute is to empower the zoning board to waive any local bylaw, regulation, policy or procedure that would render the construction of the project "uneconomic." In certain

circumstances, the zoning board may be justified in denying a comprehensive permit, where the project presents unacceptable public safety, health or environmental risks, or completely abhorrent to the town's rationally-conceived master planning interests. The role of the local zoning board, therefore, is to determine (a) whether such risks exist to justify a denial, and if not, (b) whether the applicant's requested waivers from local bylaws and regulations are justified to make the project economic, and if so (c) whether the granting of any such waivers would, themselves, present any public safety, health or environmental risks.

The primary function of the zoning board under Chapter 40B is to consider whether and to what extent local bylaws and regulations should be applied to a proposed project. In doing so, it must weigh the need for affordable housing against the need to protect the environmental, public health, safety, and planning interests. Since the initial burden in an appeal is on the developer to establish that the application of local bylaws to its project renders it uneconomic, it is reasonable to grant only those waivers that are necessary to make the project financially viable. As the HAC has noted, "[T]he legislative intent of the entire statute is to permit affordable housing without undue intrusion on local prerogatives." *Cooperative Alliance of Mass. v. Taunton Zoning Bd. of Appeals*, HAC No. 90-05, at 8, n.12 (April 2, 1992). The SJC has echoed this sentiment, observing that the legislature intentionally struck a balance "between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements ... while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income." *Bd. of Appeals of Woburn v. Hous. Appeals Comm.*, 451 Mass. 581 (2008), citing, *Zoning Bd. of Appeals of Wellesley v. Ardmore Apartments Ltd. Partnership*, 436 Mass. 811, 822 (2002).

We respectfully suggest that the Board exercise its authority consistent with the framework discussed above, starting with a thorough evaluation of how the proposed project conforms to the town's local bylaws and regulations, and an assessment of whether the requested or required waivers are necessary to make the project economically viable.

## II. Procedural and Substantive Issues

### A. The Comprehensive Permit Application is Incomplete.

First, the Board's Rules and Regulations sensibly require proof that the Applicant has the right to acquire title to the Project Site, a jurisdictional pre-requisite under Chapter 40B that is often referred to as "site control." See, 760 CMR 56.04(1)(c). The Applicant states on page 8 that "the applicant owns the property and has owned it for over 9 years." This is false. The record title owner of Project Site is Jeffrey Brem and Lisa Brem, as tenants by the entirety. See, Deed recorded in Middlesex North District Registry of Deeds in Book 18814, Page 278. The Applicant has identified itself consistently throughout the Application as "Lifetime Green Homes, LLC," and in fact must be a legal entity in order to conform to the limited dividend organization requirements under Chapter 40B. While we understand that Mr. Brem may control the LLC, these legal distinctions are not trite and must be honored. A purchase and sale

agreement was provided to MassHousing as part of the project eligibility application, but was not included as far as we can tell with the comprehensive permit application.

Second, we question whether the Application contains all of the components that are required under Section 3.01 of the Board's Rules and Regulations. The Regulations require the site plans to be of a scale of no less than 1" = 40', yet the Application only references plans reduced to 11" x 17" in size. The Board and all of the local boards, commissions, and officials need full-sized plans in order to adequately review the details of the proposal. An electronic file is not an adequate substitute if the Town does not have the capacity to print over-sized plans.

Surprisingly, the 100-foot jurisdictional wetland buffer zone adjacent to the bordering vegetated wetlands ("BVW") on the Project Site is not delineated on either of the two plans submitted by the Applicant, although it is clear from the Plan that destruction of this buffer zone is proposed as part of the Project. The Board should require the Applicant to delineate the buffer zone on the next set of design plans. There is no legend on the site plans that explains what the dashed and dotted lines represent, and there does not appear to be any delineation of the intermittent stream that is located within the boundaries of the BVW. Under your regulations, all wetland resource areas must be shown on the plans. Further, the area of BVW apparently delineated on the plans is substantially smaller than the BVW area shown in this location on MassGIS plans, and therefore the delineation should be reviewed by the Conservation Commission through the resource area delineation approval process under the state Wetlands Protection Act.

There is a conservation restriction area on the Project Site that is referenced in the Deed to Jeffrey and Lisa Brem, but which is not delineated on the site plans. Your regulations require the delineation of all conservation restriction areas, and therefore you should require this detail on the next iteration of plans.

Critically, neither of the two plans submitted appear to show all of the septic systems and wells within 200 feet of the Project Site, as required by the Board's Rules and Regulations. Some off-site wells are shown, but no septic system or well information is provided for most of the abutters and proximate neighbors to the Site. This detail is particularly important, where the Applicant is proposing to discharge sewage from 20 homes on a relatively small 9.84-acre site, in close proximity to neighbors who rely on private wells for their drinking water. Protection of water resources is of utmost concern to Carlisle residents, who do not have the benefit of a public water system. For this reason, Carlisle's two-acre minimum lot size requirement is strictly enforced. While we understand that the Applicant is proposing "alternative technology" septic systems, it has not yet provided details on those systems, and the Neighbors remain skeptical that the Project will have no adverse impact on the quality of their drinking water. We expect the Board will be as vigilant in protecting this crucial natural resource as it has in previous comprehensive permit applications.

Finally, the Board's regulations require a detail *pro forma* for the Project, with realistic estimates of Project costs and revenues. The Application states that this is provided in

Attachment F, but Attachment F is a letter to the Massachusetts Historical Commission. It is critical for the Board to have the Applicant's projected costs and profit, as it is the Board's duty under the statute, as discussed above, to weigh whether conditions it imposes on a comprehensive permit (or waivers it may deny) render the Project "uneconomic." The Board has the undeniable right to have this information, and to have it reviewed professionally if necessary. The Application is not complete until the *pro forma* is provided.

B. Application Fee Waiver Request

The Applicant is seeking a waiver from the filing fee requirements in your Comprehensive Permit Rules and Regulations, §3.02, from \$24,000 to \$4,000. As a preliminary matter, the application fee for this project would be \$25,000, not \$24,000. The Project will consist of 20 units, not 19 units as the Applicant seems to suggest.

Concerning the waiver request, the Applicant has offered no justification for why he should receive special treatment vis-à-vis other Chapter 40B applicants, or for that matter, a developer of a conventional subdivision in Carlisle who would have to pay the same amount in application fees. Given the complexity of this project and the breadth of review that will be required given the significant amount of waivers from local bylaws that are being requested, we strongly urge the Board not to reduce its reasonable fees.

C. Civil Engineering Peer Review

It is common in Chapter 40B hearings for zoning boards to retain a peer review engineer to review the technical design aspects of a proposed project. Having represented the Board in a previous Chapter 40B proposal, I understand that the Board's practice is to retain independent peer review consultants, and this is specifically contemplated under Section 4 of your Comprehensive Permit Rules and Regulations. We respectfully request that the Board engage a civil engineering peer review consultant as soon as practical, given the 180-day deadline. Given the importance of the hydrology issues discussed below, we think it advisable for the engineer to have a background or expertise in hydrology.

We expect that the Board will request the peer review engineer to carefully scrutinize the Project's compliance with all of the Town's thoughtfully-conceived and rational land use bylaws and regulations. We note that the Board of Selectmen, in its comment letter to MassHousing earlier in this review process, highlighted several areas of nonconformity, including:

1. The proposed access road's nonconformity with the Carlisle Planning Board's Subdivision Rules and Regulations, specifically the provisions governing the construction of roads;
2. The number of homes proposed to be served by the single, dead-end road is double the maximum number of homes allowed under the Planning Board's Subdivision Rules and Regulations;

3. The typical side yard setbacks are half the minimum distance required under the Zoning Bylaw (20 feet, compared to 40 feet required); and
4. The length of the access road, when combined with the length of Nowell Farme Road, exceeds the maximum length of a dead-end road under the Subdivision Rules and Regulations by a factor of four.

We suspect there are numerous other nonconformities with local bylaws and regulations, which may be disclosed by the Applicant list of requested waivers. The peer review engineer should be helpful in identifying any other nonconformities for which waivers would be required.

D. Traffic Impacts

The Neighbors are particularly concerned with traffic generated by the proposed Project flowing through the narrow roads within the Neighborhood. As noted above, Long Ridge Road is a dead-end road, and when added to Nowell Farme Road, constitutes one, very long dead-end road until it reaches River Road, a connector street. The Board of Selectmen has estimated the length of these road segments to collectively be 4,300 feet. Adding 19 new homes to this road presents public safety concerns that must be thoroughly reviewed by the Board. We strongly urge the Board to retain a qualified traffic engineer with experience in performing peer review assignments for municipalities, to advise the Board on traffic-related issues.

The Applicant states in its Application that the Project will generate 192 vehicle trips per day, and that the one, existing single-family home on the Site currently generates 22 trips per day. He characterizes this 773% increase in traffic to be a "very small increase." Regardless, while we are not traffic engineers ourselves, we find the Applicant's suggestion that the proposed Project will generate only 192 vehicle trips per day unbelievable. If each of the additional 19 homes generates the same number of trips as the existing home generates, the total number of trips generated by the 19 new homes would be 418 trips, not 192. We are naturally skeptical that the accessory horse farm adjacent to the existing home makes up the difference between 418 and 192. The Board should, with assistance from peer review, understand exactly how many vehicle trips can be reasonably anticipated, and then study whether this increase in traffic will have any detrimental impacts on the Neighborhood.

E. Protection of Groundwater

As noted above, the Project's potential impacts on the groundwater on and abutting the Project Site is of utmost concern. Carlisle has historically been vigilant in protecting drinking water resources, since the Town lacks a public water distribution system. Under Title 5 of the State Environmental Code, any development of land on which on-site sewage disposal and on-site wells are proposed, the project's wastewater generation cannot exceed 440 gallons per day, per acre (which is defined, uniquely, as 40,000 square feet). Using Carlisle local septic regulation's design flow standard of 495 gallons per day per 3-bedroom house, the Project's 20

three-bedroom homes will generate 9,900 gallons of wastewater per day. The Project Site consists of 10.72 acres under Title 5's definition. Therefore, the Project will generate 923.5 gallons of wastewater per acre, more than double the limit under Title 5.

The Board of Health's septic regulations require a setback of at least 150 feet between private wells and septic systems that are designed for more than 2,000 gallons per day. The massive septic system located in the northwest corner of the Project Site, on the property boundary shared with two abutters, is designed to serve 12 homes. Under Carlisle's design standard, this equates to 5,940 gallons per day. This system is only 100 feet from the private well on Judith Berkes' property at 132 Long Ridge Road, and only 100 feet from the proposed well to serve Units 10 and 11 in the Project. The other septic system on the Project Site, near the entrance, is about 125 feet from the proposed well serving Units 5 and 6. It's not clear whether this septic system is set back at least 150 feet from the well at 68 Garnet Rock Lane, because the well on that property is not shown on the site plan.

Importantly, the Board of Health's regulations require a hydrogeological evaluation for any septic system larger than 2,000 gallons per day. Since both septic systems would qualify, we expect that the ZBA will require this as part of its review of this Application. If a waiver from this requirement is requested, it should be denied. A hydrogeological evaluation will give both the ZBA and Board of Health relevant data on the direction of flow of groundwater on the Project Site, which will better predict whether the Project's septic systems will contaminate nearby wells.

Notably, there is no provision in the local regulation for reducing the design flow when alternative technology systems are proposed. The Board of Health regulation was adopted in 2013, when the Applicant's principal, Jeffrey Brem, was the Board of Health chairman.

Under Title 5's Nitrogen Sensitive Area regulations and guidance, septic systems within Nitrogen Sensitive Areas (which this is, due to the presence of systems and wells), the Board of Health may require a mass balance analysis, that predicts the concentration of nitrogen in the groundwater at nearby "sensitive receptors" such as wells. As part of its review of this Application, the Board should require the Applicant to demonstrate that the shared septic systems will not cause a concentration of nitrogen in excess of 10 mg/liter at the Berkes well, or any other nearby well. Of course, compliance with this standard will be a moot point unless the Applicant can somehow reduce its septic design flow to comply with the Title 5 standard. Even applying the more relaxed Title 5 design flow standard of 110 gpd/bedroom, the Project still generates 616 gallons per day, per acre (6600 gpd/10.72 acres), which is still in excess of the 440 gallon per day, per acre limit.

Finally, the Project's stormwater runoff should not be overlooked as a potential contributor of groundwater pollution. Vehicles are known sources of runoff contamination, from tire rubber to gas and oil leaks. The introduction of vehicles serving 20 homes on 10.72 acres, and its potential impact on groundwater, should be carefully evaluated.

IV. Conclusion

I expect that the Neighbors will have more comments to share on the merits of this comprehensive permit application at a later date, particularly after peer review has been engaged. In the meantime, we sincerely appreciate the Board's diligence in deploying the best available resources to study this application and the significant impacts the proposed Project will have on the neighborhood and the Town generally.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read "Daniel".

Daniel C. Hill

cc: Melissa Robbins, Esq.  
Thomas Harrington, Esq.  
Board of Selectmen  
Planning Board  
Conservation Commission  
Clients