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November 29, 2006

BY FACSIMILE: (781) 545-8704  
AND FIRST CLASS MAIL .

Zoning Board of Appeals  
Scituate Town Hall  
600 Chief Justice Cushing Highway  
Scituate, MA 02066

Re: Herring Brook Meadow Comprehensive Permit Application

Dear Members of the Zoning Board of Appeals:

You have requested that Town Counsel review an application for a comprehensive permit (the "Application") dated November 6, 2006 and stamped received by the Town Clerk on November 8, 2006. The Application was submitted by Stockard Engler Brigham, LLC on behalf of Herring Brook Meadow, LLC (the "Applicant"). You have informed me that the public hearing on the Application is scheduled to commence on November 29, 2006 (i.e., within thirty days of receipt of the Application, as required).

Below I review (1) the Application's satisfaction of c. 40B jurisdictional requirements, (2) the Application's satisfaction of the Comprehensive Permit Rules of the Scituate Zoning Board of Appeals ("ZBA Comprehensive Permit Rules"), (3) the proposed project and aspects of the Application that the Board may wish to explore further, and (4) standards applicable to an approval with conditions or a denial by the Board of the Application.

**1. Satisfaction of Jurisdictional Requirements**

There are three jurisdictional requirements for submitting an application for a comprehensive permit to the Board. First, 760 CMR 31.01(1)(a) requires that the Applicant be a public agency, non-profit organization or a limited dividend organization. The Applicant states in its Application (Application, Tab 2) that it will comply with the limited dividend requirements of the Massachusetts Housing Finance Agency ("MassHousing") "Housing Starts" program as set forth in a proposed Regulatory Agreement among the Town, the Applicant and MassHousing.

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The draft Regulatory Agreement is included in the Application (Application, Tab 2) and provides that the Applicant shall limit the aggregate profit from the Project which is payable to the Applicant, its partners, shareholders or owners, and other owners of the project, to twenty percent of the "Total Development Costs" of the project. In my opinion, the Application satisfies the jurisdictional requirement of 760 CMR 31.01(1)(a).

Second, 760 CMR 31.01(1)(b) requires that the project be fundable by a subsidizing agency under a low and moderate income housing subsidy program. The Application includes a so-called "site approval letter" dated May 26, 2006 from MassHousing to the Applicant (Application, Tab 3), indicating preliminary approval of the project for funding under MassHousing's "Housing Starts" program or the New England Fund ("NEF") Program of the Federal Home Loan Bank of Boston. Funding by either Housing Starts or NEF satisfies the second jurisdictional requirement.

Third, 760 CMR 31.01(1)(c) requires that the Applicant control the site proposed for the project. The Application includes a Quitclaim Deed (the "Deed") (Application, Tab 5) dated April 30, 2004 and recorded with the Plymouth County Registry of Deeds in Book 28101, Page 233, from James L. Watson, Executor under the Will of Josephine Watson, to the Applicant. The Deed satisfies the third jurisdictional requirement.

**2. Satisfaction of the ZBA's Comprehensive Permit Rules**

Section 3.01(a) – (h) of the ZBA Comprehensive Permit Rules sets forth the required initial contents of a comprehensive permit application as noted below.

*3.01(a): Preliminary site development plans showing the locations and outlines of proposed buildings; the proposed locations, general dimensions and materials for streets, drives, parking areas, walks and paved areas; and proposed landscaping improvements and open areas within the site. [provisions for 4 or fewer units] All structures of five or more units must have site development plans signed by a registered architect.*

The Application contains at Tab 6 site development plans prepared by SITEC Environmental dated October 6, 2006, consisting of an Existing Conditions & Wetland Resource Areas Plan, Site Plan, Grading Plan, Stormwater Management Plan, Utility Plan, Landscape Planting Plan, Open Space Plan, and 3 Detail Sheets. This set of plans conforms to the requirements of 3.01(a), with the exception that they are not signed by a registered architect.

*3.01(b): A report on existing site conditions and a summary of conditions in the surrounding areas, showing the location and nature of existing buildings, existing street elevations, traffic patterns and character of open areas, if any, in the neighborhood. This submission may be combined with that required in section 3.01 (a) above.*

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The site development plans referenced above and two reports prepared by SITEC Environmental, Inc. titled "Proposed Open Space & MA Wetlands Protection Act Compliance Measures" and "Environmental Setting, Stormwater Flood Analysis & Mitigation," respectively, address the items listed in section 3.01(b) with the exception of traffic conditions. Traffic conditions are addressed in the "Traffic Impact Study for the Herring Brook Meadow Residential Development" prepared by McMahon Transportation Engineers & Planners, and included in the Application at Tab 10.

3.01(c): *Preliminary, scaled, architectural drawings. For each building the drawings shall be signed by a registered architect, and shall include typical floor plans, typical elevations, and sections, and shall identify construction type and exterior finish.*

The Application contains at Tab 6 architectural drawings prepared by Phung/Porzio dated 1/26/05. These drawings include Proposed Typical Floor Plans, Proposed First Floor Plan, Proposed Second Floor Plan, Proposed Third Floor Plan, Proposed Attic Plan, Proposed Roof Plan, Proposed Long Section, and two Proposed Elevations. The architectural drawings address all the items in 3.01(c) with the exception that they are not signed by a registered architect.

3.01(d): *A tabulation of proposed buildings by type, size (number of bedrooms, floor area) and ground coverage, and a summary showing the percentage of the tract to be occupied by buildings, by parking and other paved vehicular areas, and by open areas.*

The Application does not include such a tabulation and summary.

3.01(e): *Where a subdivision of land is involved, a preliminary subdivision plan.*

Not applicable.

3.01(f): *A preliminary utilities plan showing the proposed location and types of sewage, drainage, and water facilities, including hydrants.*

The Application contains a Utility Plan in the site development plans.

3.01(g): *Documents showing that the applicant fulfills the jurisdictional requirements of 760 CMR 31.01.*

As discussed above, the Applicant has satisfied the jurisdictional requirements.

3.01(h): *A list of requested exceptions to local requirements and regulations, including local codes, by-laws or regulations.*

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Section 3.02 requires a filing fee to accompany the application. The filing fee for Limited Dividend Organizations is \$50 per unit. The Application includes a check in the amount of \$3,000, or \$50 for each of the proposed 60 units.

As concerns the above items that are not included in the Application (signed plans, tabulation and summary pursuant to section 3.01(d)), the Board may wish to advise the Applicant of such omissions during the hearing.

**3. The Project**

The Application proposes construction of a 60-unit condominium development containing 53 two-bedroom units and 7 three-bedroom units on a 17.68 acre<sup>1</sup> parcel of land located on Chief Justice Cushing Highway (Route 3A) in Scituate, and known as the Watson Farm. Twelve of the units are to be affordable units restricted to sale to households earning no more than 80% of the area median income. The plans included in the Application (Tab 6) show that the units will be grouped in five (5) buildings, containing 9, 9, 15, 12 and 15 units, respectively. The buildings share one common driveway with a single access to Chief Justice Cushing Highway. The buildings contain four (4) stories. Based upon my review of the Application, I note the following issues which the Board may wish to explore during the public hearing:

1. Project Design Issues. According to the MassHousing site approval letter (Application, Tab 3), the Town has previously noted a number of concerns regarding the need for a Route 3A green buffer, increased parking and nitrogen treatment for the septic system, and a preference for looped water lines and underground utilities. In addition, the site approval letter notes concerns regarding financial feasibility of the garden-style units, potential traffic problems, presence of sensitive natural areas on the site, and proximity of a railroad right of way. The site approval letter also recommends "Smart Growth" features, including preservation of open space, enhanced pedestrian amenities, additional access ways and reduction in the number of units. I recommend that the Board require complete responses from the Applicant to all these issues and obtain technical advice from Town employees, Town boards and/or outside consultants to the extent necessary to answer all Board questions.

The Requested Waivers and Exceptions (Application, Tab 9) indicate that the extent to which this project varies from the applicable zoning requirements and other bylaws and rules and regulations. I note that among the requested waivers, the Applicant requests seeks waivers from zoning requirements that are particular to the Chief Justice Cushing Highway, concerning frontage, parking areas, visual and acoustical buffering, tree removal and alternate egress. I recommend that the Board require complete explanations from the Applicant for each requested waiver and as part of its evaluation, analyze the cost to the Applicant of not granting such

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<sup>1</sup> The Deed recites an area of "about 15.34 acres" while the Application states that the property contains 17.68 acres. I recommend that the Board ask the Applicant to explain this discrepancy.

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waivers. The Board may wish to obtain technical advice from Town employees, Town boards and/or outside consultants to assist in its review and analysis.

2. Traffic. The Application includes a Traffic Impact Study report (Tab 9). This report concludes that the project will have "little, if any, traffic impact on the study area roadways and intersections." I recommend that the Board obtain technical review of this report from Town employees, Town boards and/or outside consultants to the extent necessary to answer all Board questions.

3. Open Space. The Application includes a report entitled "Proposed Open Space & MA Wetlands Protection Act Compliance Measures" dated October 11, 2006 and prepared by SITEC Environmental, Inc. ("Open Space Report"). According to the Open Space Report, the Applicant would limit development to 3.93 acres, transfer 1.49 acres of upland maritime habitat to the Town and place 4.58 acres of corn field and meadow under a conservation restriction. I recommend that the Board obtain technical review of this report from Town employees, Town boards and/or outside consultants to the extent necessary to answer all Board questions.

4. Stormwater. The Application includes a report titled "Environmental Setting Stormwater Flood Analysis and Mitigation" dated October 10, 2006, prepared by SITEC Environmental, Inc. I recommend that the Board obtain technical review of this report from Town employees, Town boards and/or outside consultants to the extent necessary to answer all Board questions.

5. Related Party Activity. The Development Team described in Tab 4 of the Application does not state whether any other Applicant's contractors, subcontractors, brokers or lenders are entities related to the Applicant. I recommend that during the hearing the Board require documentation of all related party activities, including any financing arrangements. The Board should explore the effect payments to these related parties has on determining compliance with the required profit limitations, including associated overhead, general conditions and profit built into these relationships. Particular scrutiny is warranted because related party transactions are entered into without the benefit of competitive bidding, and higher development costs provide an opportunity for higher profits to be retained by the Applicant, rather than returned to the Town for affordable housing use. I recommend that the Board obtain technical review of related party activity from Town employees, Town boards and/or outside consultants to the extent necessary to answer all Board questions.

6. Site Acquisition Cost. According to the Deed (Application, Tab 5), the Applicant acquired the site in 2004 for \$830,000 from James L. Watson, as executor under the Will of Josephine Watson. On its face, it appears that this transaction was an arm's length transaction. In that event, the total site acquisition cost would be the purchase price plus reasonable, verifiable carrying costs.

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7. Pro Forma. The Application does not include a pro forma estimating the project costs and income. As I discuss further below, the Board may grant a comprehensive permit with conditions, provided the conditions do not render the project uneconomic. The Board may evaluate the economic impact of its conditions by undertaking a thorough review of the project pro forma and evaluating the assumptions on which the pro forma is based. Thus, I strongly recommend that the Board require a pro forma from the Applicant during the hearing. I also recommend that the Board obtain technical review of such pro forma from Town employees, Town boards and/or outside consultants to the extent necessary to answer all Board questions.

8. Site Approval Letter. The Site Approval Letter from MassHousing (Application, Tab 3) contains a paragraph on page 5 headed "Further Opportunities for Assistance from MassHousing." In this paragraph, MassHousing states that it will not issue "Final Approval if the comprehensive permit contains any conditions that are inconsistent with the regulatory requirements of the applicable housing subsidy program ..., as reflected in the applicable regulatory documents (see [www.masshousing.com](http://www.masshousing.com) for forms)." In my opinion, the Board may impose conditions that are stricter than the requirements of the housing subsidy program, for example, with respect to limited dividend and affordability. This is a matter of dispute between many municipalities and MassHousing for which currently there is no Housing Appeals Committee, Superior Court or appellate court decision to provide guidance.

#### 4. Decision Standards

Whether the Board may approve the Application with conditions or deny the Application is governed in the first instance by whether or not the Town has met the statutory minimum of low and moderate income housing or current affordable housing land area, or whether the proposed project would result in annual affordable housing land area in excess of the statutory minimum, as set forth in set forth in G.L. c. 40B, §20 and 760 CMR 31.04. According to the Application, the Department of Housing and Community Development's Subsidized Housing Inventory ("SHI") for Scituate dated June, 2006 shows that 4.6% of Scituate's housing stock is affordable (Application, Tab 7). Based on this statement, the Town has not met the statutory minimum of affordable housing. Unless there is evidence that affordable housing is located on sites comprising one and one-half percent or more of the total land area zoned for residential, commercial or industrial use, or there is evidence that development of affordable units proposed by the Applicant would result in the commencement of construction of such housing on sites comprising more than three tenths of one percent of such land area, then there is a presumption that a substantial housing need outweighs local concerns. 760 CMR 31.07(e).

The effect of the presumption that housing needs outweigh local concerns is that the Board may not deny the Application unless there is a valid health, safety, environmental, design, open space or other local concern that outweighs the regional housing needs, or if existing municipal services or infrastructure is inadequate and the installation of adequate services is not technically or financially feasible. 760 CMR 31.06(6); 760 CMR 31.06(8). However, the Board may approve the Application with conditions, so long as the conditions do not render the project

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uneconomic. 760 CMR 31.06(3). These are complex issues that often require in-depth factual analysis, with the assistance of technical and legal consultants.

I am available to work with the Board during the public hearing on the Application. If you have further questions regarding this matter, please do not hesitate to contact me.

Very truly yours,



Ilana M. Quirk

IMQ/LHP/ja

cc: Board of Selectmen  
Town Administrator

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