BLATMAN, BOBROWSKI, MEAD & TALERMAN, LLC
ATTORNEYS AT LAW

9 DAMONMILL SQUARE, SUITE 4A4
CONCORD, MA 01742
PHONE 978.371.3930
FAX 978.371.3928

MARK BOBROWSKI
Mark@bbmatlaw.com

September 1, 2016

Katharine Lacy
Massachusetts Housing Finance Agency
One Beacon Street
Boston, MA 02108

Re: Town of Winchester's Comments
Krebs Investor Group, LLC - Application for Project Eligibility ("Application")

Dear Katy:

Please be informed that I represent the Town of Winchester (Town) with regard to Chapter 40B matters. I am filing this Comment regarding the Application at the Town's request after consultation with the administration and staff.

Project Description

Krebs Investor Group, LLC ("Krebs") proposes to build two hundred ninety six (296) units in a single apartment building on 581,280 square feet of land (13.34 acres) located off of Forest Circle in Winchester (the "Project"). The Project is proposed as a rental product, with at least 25% of the units rented at a price affordable to households earning 80% or less of area median income, adjusted for household size. Access to the Project will be via Fallon Road in neighboring Stoneham. Fallon Road is a private way. There will be gated access for emergency vehicles and pedestrian access to Forest Circle in Winchester. School buses will use Forest Circle in Winchester to pick up any school-aged children.

The following comments have been submitted by staff in response to Town Manager Richard Howard's request for information. MassHousing is respectfully requested to consider the Town's comments when deciding to issue or deny a Project Eligibility Letter (PEL). In addition, the voluminous comments received from abutters and other interested parties are attached in a second appendix.

Town Comments

Krebs has No Standing to apply for the PEL

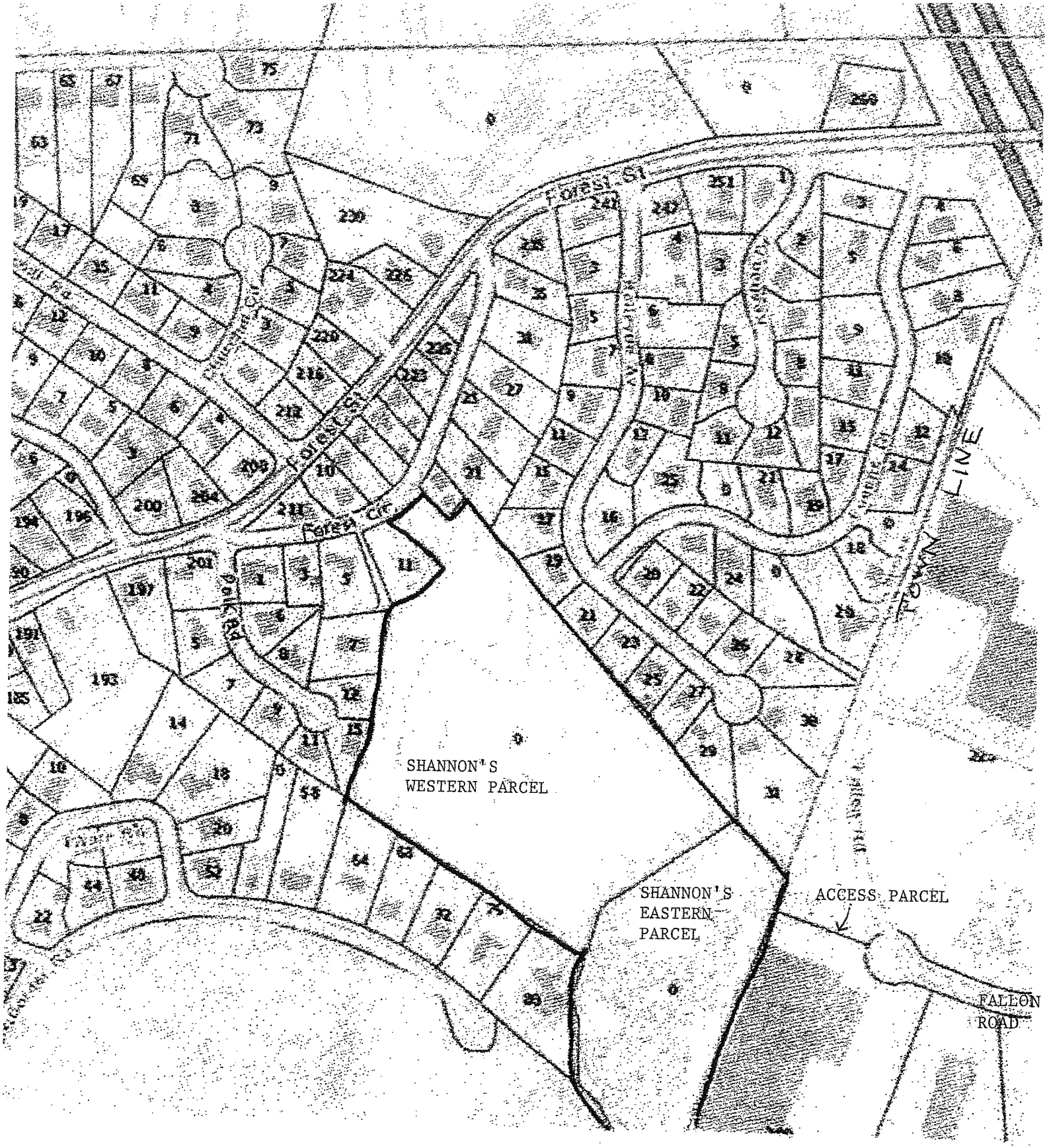
Krebs has not yet demonstrated standing to apply for the PEL. The Application contains a Purchase & Sale Agreement by and between the Trustees of The Shannon Investment Trust ("Shannon") and Joseph A. Marino, James F.X. Marino, and Anthony G. Marino (together "Marino"), dated August 28, 2013. The Purchase & Sale Agreement was amended on March 28, 2016, to extend the time for Marino's performance. The 2016 Amendment does not mention assignment of Marino's rights to Krebs, nor is there a free-standing document in the Application otherwise assigning Marino's rights to Krebs. Until such time as Krebs demonstrates an equitable interest in the Locus sufficient to "control" the site, there is no standing to make the Application.

Krebs has No Legal Right to Access Fallon Road in Stoneham

As set forth in the Application to MassHousing, access to the development site ("Locus") will be from Fallon Road, a private way in Stoneham. Shannon owns the 13.34 acre Locus today. See Exhibit 1 for the layout of the western portion of Fallon Road, excerpted from a 2015 ALTA plan. See Exhibit 2 for the proposed connection between the development site ("Locus") and the western end of Fallon Road.

The Locus is primarily comprised of two parcels in Winchester. The plan on the next page shows there parcels. Assessor's Parcel 1-273-0, consisting of 4.26 +/- acres on the Stoneham town line, was acquired by Shannon in 2002 (the "Eastern Parcel"). The 2002 Deed is recorded in the Middlesex Registry of Deeds ("Registry") at Book 37644, Page 043, and is attached hereto as Exhibit 3. The 2002 Deed references three separate parcels (1) a parcel of land in Winchester with 4.26 acres bounded by the Stoneham-Winchester town line; (2) a fifty (50') foot wide "Access Parcel" in Stoneham extending from the Stoneham – Winchester town line to Fallon Road; and (3) a small parcel of land in Winchester with "about 8000 square feet" again on the Stoneham – Winchester town line. As recited in Shannon's deed, the Eastern Parcel conveyed is described as shown on a "Plan of Land in Stoneham and Winchester, Mass." recorded in the Registry at Book 9601, Page 557, attached hereto as Exhibit 4.

The Access Parcel was created in a 1968 deed from the Trustee of the Fallon Land Trust to the Trustees of the Spot Pond Trust, recorded with the Middlesex South Registry of Deeds in Book 11552, Page 537, Exhibit 5 hereto. Pursuant to the 1968 Deed, the Spot Pond Trust acquired an approximately 15.5 acre parcel in Stoneham, which is now substantially the same land that comprises the property known as 225 Fallon Road. The grantor retained title to a small quarter-acre strip of land extending from the end of Fallon Road to the edge of the grantor's "remaining land in Winchester." This is the Access Parcel. It is today owned by Shannon in fee. It runs fifty feet in width from the Stoneham – Winchester town line for approximately 209 feet to the cul-de-sac at the end of Fallon Road. It connects the "remaining land in Winchester" - specifically described in the 1968 Deed as a 4.62 acre parcel shown on the recorded plan from


Forest St
Forest St
Forest Cir
Polk Rd
TOWN LINE
SHANNON'S
WESTERN PARCEL
SHANNON'S
EASTERN
PARCEL
ACCESS PARCEL
FALLON
ROAD

1960 – to Fallon Road. Additionally, the grantor reserved the right to use Fallon Road "for all purposes for which roads may from time to time be used" in Stoneham for service to said "remaining land" across the quarter-acre Access Parcel. This constitutes the reservation of an easement. No reference is made to any additional land that the grantor may have owned in Winchester in 1968. Therefore, the dominant estate benefitted by the easement to use Fallon Road as set forth in the 1968 Deed is the 4.62 acre parcel – the Eastern Parcel – as described in the Deed and the Access Parcel in Stoneham.

Assessor Parcel 1-202-0 is a 9.15 acre parcel (Shannon's "Western Parcel") that was separately acquired by Shannon in 2002. The deed to the Western Parcel is recorded in the Registry at Book 37644, Page 038, and is Exhibit 6 hereto. The Western Parcel comes from a completely unrelated chain of title, having nothing to do with the Eastern Parcel. At the time the Access Parcel and the benefit of the easement to reach and use Fallon Road were created in the 1968 Deed, the benefit ran to the dominant estate – the "remaining land in Winchester" – and not to the Western Parcel, which was owned by other persons or entities.

It is black letter law in Massachusetts that an easement cannot be used to serve additional land or "after-acquired" property that is added to the dominant estate after the easement is created. *McLaughlin v. Board of Selectmen of Amherst*, 422 Mass. 359, 364 (1996); *Murphy v. Mart Realty of Brockton, Inc.*, 348 Mass. 675, 678-79 (1965) ("A right of way appurtenant to the land conveyed cannot be used by the owner of the dominant tenement to pass to or from other land adjacent to or beyond that to which the easement is appurtenant"). This rule is ancient. In *Davenport v. Lamson*, 21 Pick. 72 (Mass. 1838)(cited in *Murphy*, 348 Mass. at 679), the Supreme Judicial Court ruled that a landowner who had a right of way to access a three-acre lot could not use the right to way to access his contiguous nine-acre lot, despite the fact that in using the way he passed through the three-acre lot. As a general rule, unless the document creating the easement indicates that additional land may be benefitted by the easement, certain conditions need to be satisfied in order to lawfully expand the scope of the easement. As set forth by the Supreme Judicial Court in *McLaughlin*, after-acquired property can only benefit from an easement if the easement is "in gross" or personal to the grantee (rather than linked to a specific parcel of land) or if the owner of the burdened property consents to the expanded use of the easement.

Therefore, Krebs (if Krebs has standing to apply) cannot use Fallon Road to serve any part of the Western Parcel. The Project plans show that the Western Parcel has both buildings and parking areas thereupon. The Access Parcel and the easement only benefit the "remaining land" in Winchester. The Deed does not contain any ambiguity on this point. The language in the Deed describing the use of the easement "for all purposes for which roads may from time to time be used" does not expand the scope of the right of way. *McLaughlin*, 422 Mass. at 365. Use of the easement by the Western Parcel would impermissibly increase the burden on 225 Fallon Road, owner of the servient estate. *See Boudreau v. Coleman*, 29 Mass. App. Ct. 621, 633-34 (1990). Nor is the easement an easement in gross; the benefit is specifically appurtenant to the "remaining land in Winchester." Finally, neither Shannon, Marino, or Krebs has shown that the owner of 225 Fallon Road has consented to the use of the easement to benefit the additional 9.15 acre parcel. Therefore, any reliance on the Access Parcel and the easement to

serve Western Parcel would constitute an "overburdening" of the right of way.

MassHousing should not dismiss this deficiency as just another private property dispute between competing claimants. The Appeals Court has held that "ownership of access rights on which the proposed subdivision depends" *must* be reviewed by a local board, not swept under the rug. *Parker v. Black Brook Realty Corp.*, 61 Mass. App. Ct. 308 (2004). In the context of Chapter 40B, failure to demonstrate legal rights of access to Fallon Road for the entire 13.34 acre parcel is tantamount to a lack of site control. See 760 CMR 56.04(1)(c).

Stoneham's Zoning By-Law Bars Use of the Access Parcel to Cross the C-1 Zoning District

The Stoneham Zoning By-law and Zoning Map classify the fifty foot Access Parcel as C1 – Commercial District 1. The Access Parcel has not been included in the Senior Residential Overlay District. The C-1 regulations, attached hereto as Exhibit 7, prohibit all multifamily residential uses. This has been confirmed by Stoneham's Building Commissioner, Cheryl Noble, in an email dated July 26, 2016. Thus, the private roadway proposed in this Application, owned entirely by Shannon, connecting the Eastern Parcel via the Access Parcel to Fallon Road, takes a multifamily residential use into and across a Commercial 1 District.

In *Harrison v. Building Inspector of Braintree*, 350 Mass. 559 (1966). the Supreme Judicial Court reviewed access within split lots. The lot in question was primarily zoned for industrial purposes, but a small portion extended into an adjacent residential district. The owner constructed a factory on the industrially zoned portion of the lot. The only access to public ways from the factory was via the residentially zoned portion of the lot. When 400 employees and service vehicles began using the residential portion to enter the premises, neighbors complained that use of the residentially zoned portion to access the interior, industrially zoned portion was a violation of the more restrictive district's use limitations.

The court held that "[t]he use of land in a residential district, in which all aspects of industry are barred, for access roadways for an adjacent industrial plant violates the residential requirement." In essence, the court ruled that the access strip assumes the land use category of the use it serves. Since "all aspects of industry" were prohibited in the residential district, industrial access was tantamount to a barred industrial use.

Our courts have applied the *Harrison* rule in a variety of contexts. In *DuPont v. Town of Dracut*, 41 Mass. App. Ct. 293 (1996), the Appeals Court ruled that an access road to a multi-family housing project across a business district was not permissible. *DuPont* is attached as Exhibit 8. *DuPont* precisely controls the instant matter. Stoneham's zoning rules do not allow multifamily uses to traverse the Commercial District 1 where no aspect of multifamily use is permitted. The Applicant would need zoning relief from Stoneham. None has been requested. It is doubtful that any relief would be granted.

Appraisal

The purchase price in the 2013 Purchase & Sale Agreement is redacted. Under Chapter 40B rules, the purchase price cannot exceed the certified appraised value of the Locus without using Chapter 40B in conducting the valuation. Standard principles of appraisal require that the highest and best use of the land "as of right" forms the basis for the valuation.

The Application contains a "By-Right Site Plan," showing thirty one (31) building lots. The By-Right Site Plan is pure fantasy. As the correspondence of the Planning Department to the Board of Selectmen, Exhibit 9, indicates, the development of a thirty one lot subdivision on the Locus would require at least eight (8) waivers of the Planning Board's Subdivision Rules and Regulations ("R&R").

These waivers are not likely to be granted. Krebs failed to mention, in its original Application, that the same Locus was the subject of an application for approval of a ten lot subdivision in 2007. The definitive plan was denied, primarily because the Planning Board found that the applicant did not meet the standards in the R&R for road construction - including grade and other AASHTO standards - and stormwater management. A copy of the definitive plan denial is attached as Exhibit 10. The 2007 applicant – Marino - voluntarily dismissed the appeal, with prejudice and without costs. If the 2007 Planning Board would not grant waivers for a 10 unit proposal, it can be safely predicted that the 2016 Planning Board would be skeptical about granting the eight waivers required to give a green light to a 31 lot proposal. Thus, the "By-Right Site Plan" - the basis for the certified appraisal - is fiction.

760 CMR 5.04((4)(e) states that MassHousing must consider land valuation before a PEL can be issued. This Application brings the issue into perspective. The Town has grave doubts that the purchase price will be consistent with a certified appraisal. That appraisal should be completed ***now*** (and the results provided to the Town) before the PEL is issued, if at all.

Otherwise, the Town has no choice but to go to the barricades, at enormous expense of time and resources, to fight this Project. If the appraisal does not pan out, that will all be wasted effort.

Preliminary Traffic Impacts Assessment

Because of significant concerns regarding traffic, the Town has taken the unusual step of engaging a traffic engineer ***before*** a PEL is issued.

Gary Hebert, of Stantec Consulting Services, Inc., is one of the Commonwealth's leading traffic engineers. He reviewed the 2007 definitive plan application for the same property for the Planning Board. His Preliminary Traffic Impacts Assessment, Exhibit 11, describes the many

problems this Project would cause.

There are two main areas of concern. First, the primary proposed access is across the access Parcel to Fallon Road to Stoneham.[1] Mr. Hebert reported that traffic on Fallon Road is already a problem. "If developed, Forest Ridge will add nearly 2,000 trips per day to an already congested and hazardous roadway system that will soon have another 2,000 trips per day," added by the new Fells 2Twenty5 Apartment complex in Stoneham, located just east of the proposed site.

Second, access to the Project driveway via Forest Circle in Winchester is even more deficient. Mr. Hebert was concerned about steep access to and from Forest Circle for emergency vehicles. The steepest stretch of the proposed driveway from Forest Circle to the apartment building will be "uncomfortable" for bicycles and non-ADA compliant for pedestrians. These issues helped to kill the earlier ten lot subdivision proposal.

Even more troubling is the limited maneuverability for buses and emergency vehicles on Forest Circle. The Project's secondary driveway, proposed for emergency and pedestrian access, will intersect with Forest Circle. Additionally, school buses will pick up children at the Project driveway via Forest Circle.

Gary Hebert determined that a Town snow plow and fire truck would have turning radii comparable to that of a single-unit 30-foot wheelbase vehicle. This would require at least a 28 foot inner radius to negotiate a right turn. At least a 30 foot inner radius is required when a snow plow is attached. Forest Circle is woefully short of these radii measurements. The narrow pavement width and inadequate turning radii would make it nearly impossible for a large fire truck to access Forest Circle and then go up the gated Project driveway. Mr. Hebert is sure that a standard municipal plow and a large fire truck cannot be used to access the site driveway via Forest Circle without additional design modifications to the road layout.

The same is true for school bus traffic. The Town Engineer questions the use of Forest Circle as a bus stop location for children living in the Project. Those children living on the eastern side of the Project will have a walk of approximately 2000 feet to catch the bus. As pointed out above, the gated driveway will have steep grades, and will be non-ADA compliant. The bus will have difficulty maneuvering on Forest Circle due to the narrow pavement width and tight turning radii.

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[1] It should be noted that if the PEL is approved and a comprehensive permit is ultimately awarded, Stoneham will get all of the traffic but none of the affordable housing. This is hardly fair to Stoneham.

Widening Forest Circle along the Applicant's frontage is simple enough – Krebs can dedicate some land for that purpose. However, widening Forest Circle in front of the land of other owners is more problematic. A title examination has revealed that there is no recorded layout of Forest Circle by the state, county or local government. Thus, title is unclear. The physical impediments along Forest Circle limit layout to twenty feet, at best, along stretches of the road not owned by the Applicant. Some neighbors have structures and landscaping features quite close to the layout that further hinder widening.

Fire and Police

Both the Fire and Police Departments expressed dismay with the impact Forest Ridge would have on already stressed departments.

The Fire Chief, John Nash, provided statistics for his department's responses to Parkview Condominiums, a comparable facility with 315 dwelling units in Winchester.

Year	Total	Fire	EMS
2016 (YTD)	50	3	47
2015	37	5	32
2014	46	6	40
2013	56	9	47
2012	39	3	36
2011	84	5	79
2010	46	7	39

Chief Nash fears that another large apartment complex will affect his department's ability to conform with NFPA response times for fire emergencies. Chief Nash estimates that Forest Ridge will generate another 65 calls and require 60-70 annual inspections.

Similarly, Chief of Police MacDonnell reports that the Parkview Condominiums have taken a toll on his department's resources. He states that there were 132 incidents in 2015, and 104 in 2016 to date. Each incident represents an average of one half hour of an officer's time, with consequent loss of money and resources. The 2:00 AM to 7:00 AM shift has three (3) officers to cover the entire Town. He, too, fears that Forest Ridge will only make stretch limited resources to the breaking point.

Water and Sewer Infrastructure

The Town Engineer, in Exhibit 12, reports that domestic and fire flow is unlikely to be provided, as proposed, by the system in place on Forest Circle. Instead, the project will need to tie into the MWRA system on Forest Street. MWRA will have to approve this alternative.

As to sewer, the Town has yet to fully investigate inflow and infiltration (I&I) problems on the east side of Town. Weston & Sampson should be retained, if a PEL is issued, as the

ZBA's peer reviewer.

I&I Fee

The Town's current I&I policy requires payment of $2,400 per unit for a new sewer connection. This fee has been historically charged to subsidized and nonsubsidized units alike. If a PEL is issued, MassHousing should require the Applicant to pay this fee for all units.

Drainage, Groundwater, and Ledge Concerns

If a PEL is issued, the Project must be designed in accordance with the "Rules and Regulations Regarding the Use of Public Sewers and Storm Drains in the Town of Winchester, Massachusetts." Water from the site drains to two separate bodies of water. The smaller southeastern parcel contributes stormwater runoff to wetlands which feed Dyke's Brook, which then flows into the North Reservoir, Winchester's public water supply. The water from the northwestern portion flows towards Sunset Road and into the Aberjona River, which flows through downtown Winchester and into the Mystic Lakes in Medford/Arlington. The excessive water that flows in the Aberjona during heavy rain or rapid snow melt has caused flooding in Winchester's downtown area as well as other sections of town. Winchester has invested a great amount of effort and money into flood mitigation efforts relative to the Aberjona. The Project should strive to maintain the existing hydrology of the site to preserve the volume of runoff that ultimately flows in both directions.

Given the extensive ledge outcroppings on the site, the Town Engineer is concerned that the stormwater management system can meet DEP standards. Peak rates of runoff from the site are likely to increase, in violation of the DEP standard. Forest Circle and Polk Road already suffer from surface water and groundwater drainage problems after significant events. Many neighbors responded to the Town's request for information. The Appendix is full of testimony regarding flooded basements and yards after heavy rainfall.

The ledge is likely to be the target of extensive blasting. The Engineering Department is concerned that such blasting will alter the pattern of existing groundwater flow, exacerbating the existing conditions on Forest Circle and Polk Road.

Impacts to Wetlands

The Town's Conservation Agent reports that some parts of the Project will be within the 100 foot buffer, requiring action by the Conservation Commission. However, there is a concern that storm water overflow may impact the North Reservoir, a drinking water source, which is downgradient from the Project. DEP imposes higher standards for discharges in a Zone A which feeds Outstanding Resource Waters. See 310 CMR 10.04 and 10.05; 314 CMR 4.04 and 9.04, attached as Exhibit 13.

The Applicant also needs permission to cross wetlands in Stoneham to construct the proposed access road to Fallon Road. MassHousing should determine whether such crossings comply with Stoneham's locally adopted rules and regulations ***before*** a PEL is issued. The

Applicant has not sought relief from the locally adopted standards, and none is available without recourse to a comprehensive permit application in Stoneham. No such application has been filed.

Prior Use of the Locus as Dumping Grounds

In 2007, during its review of the proposed subdivision plan, the Board of Health advised the Planning Board to engage an LSP to evaluate the prior use of the Locus as a dumping ground. Apparently, construction debris (at a minimum) was improperly disposed of on the Locus prior to 2000. No site cleanup has been supervised by authorities. See Exhibit 14.

Neighborhood Screening and Noise Control

To the extent possible, the proposed buildings should be screen visually from the surrounding neighborhood and rooftop HVAC units should be designed to limit noise impacts to abutters.

Project Design

In 2011, MassHousing joined with other subsidizing agencies to release the *Handbook: Approach to Chapter 40B Design Reviews*, prepared by The Cecil Group, Inc. The Town has a long and progressive history of promoting sustainable and smart development. Winchester is a Green Community and a strong proponent of alternative energy sources. Any PEL should mandate, at a minimum, compliance with the *Handbook*.

Programmatic Considerations

MassHousing is requested to include a condition in the PEL that will keep the housing affordable in perpetuity. In addition, the Applicant should be required to establish a local preference for the affordable rental units, to the extent permitted by state and federal law.

Housing Partnership Comments

The Winchester Housing Partnership, a strong advocate for affordable housing, submitted a letter, attached hereto as Exhibit 15. The Partnership expressed support for the use of the Locus for some affordable housing, but expressed ten concerns that mirror those set forth above about the size and scale of this proposal.

Comments from the General Public

In addition to those comments generated by the Town and its staff, the comments set forth in the Appendix were submitted to the Town by interested organizations or members of the general public. These comments are hereby forwarded as a courtesy to the public and MassHousing.

Conclusion

For the reasons set forth above, the Winchester Board of Selectmen, at its regular meeting on August 29, 2016, voted 4-0 to request that MassHousing deny this application for a PEL. The Project is ill-conceived and downright dangerous.

The Applicant's representatives were requested by email on August 1, 2016, to address many of the issues raised in this memorandum. A reply was received on the next day, promising answers. None were ever provided. Several legal issues remain unresolved. In particular, the Project has no legal access to Fallon Road. Even if it did, the use of the Access Parcel to take multifamily residential traffic through a Commercial -1 District constitutes a zoning violation in Stoneham. No PEL has been requested for any work in Stoneham.

Winchester recently approved a 96 unit 40B project on Wainwright Road in May of 2016. There was no developer appeal to HAC. In short, the Town could tell an acceptable project from a bad one. The Board of Selectmen urges MassHousing to demonstrate similar good judgment in assessing this application for a PEL.

Please do not hesitate to contact me with any questions that you may have. Thank you for your consideration.

Sincerely,

Mark Bobrowski
Special Town Counsel

cc: R. Howard, Town Manager
Atty. Welch, Town Counsel