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VIA HAND DELIVERY

Conservation Commission

Town of Acton

472 Main Street

Acton, MA 01720

RE: Notice of Intent of Hawthorne Homes, LLC (“Applicant”)  
Project Location: 101 Nonset Path

Dear Members of the Commission:

As you know, this office represents the Nagog Woods Community Corporation (“NWCC”) in connection with the above referenced notice of intent (“NOI”) of Hawthorne Homes, LLC (“Applicant”) relative 101 Nonset Path (“Locus”).

Since the filing of the NOI, the Applicant has acknowledged that, although two-family dwellings are a permitted use in the R-A zoning district, they are a prohibited use in the R-2 zoning district in which the proposed access drive is located and, therefore, the proposed access drive may not be used to serve the originally proposed two-family dwellings.

It is NWCC’s understanding that the Applicant is now proposing to build single family dwellings. The Applicant has shown to NWCC a plan to construct twenty single family dwellings.

NWCC respectfully submits that that the Applicant’s proposed change from two-family dwellings to single family dwellings does not cure the zoning defects in the proposed project. Contrary to the letter dated May 27, 2011, submitted by Attorney Greenberg on behalf of the Applicant, the prohibition of more than one building for dwelling purposes on a lot in the R-2 District, is not contained within Section 5 “Dimensional Regulations” of the Acton Zoning Bylaw, but is contained within Section 3 “**Table of Principal Uses, Principal Use Definitions and Accessory Use Regulations,**” of the Acton Zoning Bylaw (the same section which prohibits two family dwellings in the R-2 zoning District). Specifically, Section 3.3 provides:

**Residential Uses** – Not more than one BUILDING for dwelling purposes shall be located on a LOT, except a) in the following Districts: Village Districts (EAV, NAV, SAV, WAV); Residence A District (R-A); Residence AA District (R-AA). A copy of the relevant section of the Bylaw is attached hereto as Exhibit A.



In short, the Bylaw classifies the Applicant's proposed multiple single family buildings for dwelling purposes on a single lot as a different use than a single building for dwelling purposes on a lot. Therefore, for the same reason that the Applicant may not use the proposed Common Driveway for access to two-family homes on the subject property, the Applicant's proposed common driveway for access to multiple single family homes over the R-2 district is prohibited.

Likewise, there is no basis for the Applicant's bald assertion that the requirement of Section 3.8.1.5 (p) for a recorded written agreement making all lots served by a common driveway jointly and severally responsible for maintenance and repair is "an unconstitutional abdication of governmental authority, essentially giving abutting landowners veto power over zoning decisions." While abutting landowners do not have veto power over zoning decisions, they do have the right not to have their land encumbered with additional obligations after they have purchased. There is no provision in the Bylaw which allows common driveway obligations to be imposed *ex post facto*. If Blackstone Middlesex Realty Trust intended to use the easement in question for a common driveway to serve the subject property, it was well within its power to put on record the required common driveway agreement at the time it purportedly conveyed the lots subject to the easement to Richard Sisson. It did not do so. It is undeniable that a Town by zoning may condition the use of land and the requirement for a recorded common driveway agreement is standard in zoning bylaws which permit common driveways. It is especially important where, as here, the proposed common driveway involves significant drainage structures that will require maintenance in order to perform their intended function of protecting wetlands. Absent such an agreement, there is no clear basis for joint responsibility and no basis upon which the Town can impose same. Further, although the bylaw refers to "Lots" it is clear that the intent of Section 3.8.1.5 of the Bylaw is that a common driveway may not be used to serve the traffic expected to be generated by more than twelve dwelling units and that a special permit be obtained where the common driveway is expected to serve six or more dwelling units. A copy of Section 3.8.1.5 of the Zoning Bylaw is attached hereto as Exhibit B.

Under the circumstances, where the Applicant has failed to submit plans clearly setting forth its proposal and where there are substantial issues as to whether the Applicant can comply with zoning, the Commission should enforce the requirement under M.G.L. c. 131, § 40 and 310 CMR 10.05 (3)(e) that the Applicant first apply for and obtain "all obtainable permits, variances and approvals required by local by-law with respect to the proposed activity . . . ." Before the Applicant's NOI is acted upon, there should be a specific plan which the Zoning Enforcement Officer and other relevant authorities acknowledge complies with zoning and all other applicable regulations and requirements.

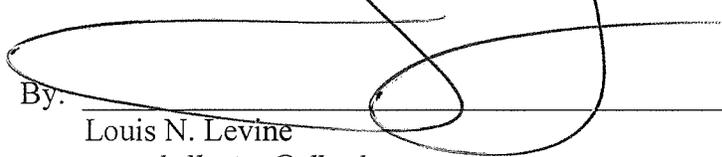


The Applicant asserts that the Commission should not consider Wetlands Policy 88-2 because adopted after the 1983 conveyance. However, Wetlands Policy 88-2 is merely an elaboration on how the Department applies the provisions of 310 CMR 10.53(e), which already existed. ("In this Program Policy, the Department elaborates on the analysis that should be applied when determining whether a new roadway qualifies for consideration as a limited project.") The concept of segmentation was already well established in the Department's regulations when, as the Applicant states, the "Subject Property was separated from most of its frontage on Nonset Path in 1983."

Although the Applicant has recognized that its original proposal to construct 15 two-family dwellings violates zoning, it has not submitted any revised plans to the Conservation Commission. Therefore, in addition to establishing zoning compliance, the Commission is not in a position to judge the wetlands impacts of the proposed project or whether the proposed drainage structures and other mitigation is proper until specific plans are submitted for review by the Commission.

In view of the lack of information and a specific proposal and the substantial outstanding issues, the Commission should ask the Applicant to withdraw its notice of intent until the foregoing issues are resolved, failing which the Commission should deny the Applicant's notice of intent.

Very truly yours,  
NAGOG WOODS COMMUNITY CORPORATION,  
By its attorneys,  
D'AGOSTINE, LEVINE, PARRA & NETBURN, P.C.

By:   
Louis N. Levine  
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LNL/jmd  
Enclosures (2)  
Cc: Client-Via email

# **EXHIBIT A**

**3.2 General USES**

- 3.2.1 Agriculture - On a parcel of more than five acres: Agriculture, including the boarding, keeping or raising of livestock; horticulture (including without limitation the growing and keeping of nursery stock and the sale thereof, whether such nursery stock is grown in the ground or in burlap, containers, or other suitable manner, provided it is nourished, maintained and managed while on the premises); floriculture; or viticulture; the use of buildings and structures for the primary purpose of these activities, including the sale of farm products. All of the aforesaid shall be subject to and in conformance with the definitions and requirements for these activities under MGL Ch. 40A, s. 3. On a parcel of two acres or more: Cultivating, harvesting and storing of field crops, produce or fruit, and storage of farm equipment that is necessary for these activities; the boarding, keeping and raising of not more than one horse, goat or sheep, plus its offspring up to one year of age.
- 3.2.2 Conservation – The USE of land in its natural state or improved with trails or resource management programs that do not significantly alter its natural state.
- 3.2.3 Recreation – A pool or recreation center owned and operated by a neighborhood association, the use of which is limited to members of the association and their guests.

**3.3 Residential USES – Not more than one BUILDING for dwelling purposes shall be located upon a LOT, except**

- a) in the following Districts: Village Districts (EAV, NAV, SAV, WAV); Residence A District (R-A); Residence AA District (R-AA);
  - b) for the following USES: Nursing Home; Full Service Retirement Community; Assisted Living Residence as defined in this Bylaw or in MGL Ch. 19D; and
  - c) where a special permit has been granted for the following: a Planned Conservation Residential Community (PCRC) under Section 9 of this Bylaw; an Independent SENIOR Residence under Section 9B of this Bylaw; an AFFORDABLE Housing Development under Section 4.4 of this Bylaw; a single FAMILY dwelling with one Apartment in a detached BUILDING under Section 3.3.2.10 of this Bylaw; a golf course under Section 3.5.17 of this bylaw.
- 3.3.1 Single FAMILY Dwelling – A detached DWELLING UNIT designed as the residence of one FAMILY.
  - 3.3.2 Single FAMILY Dwelling with One Apartment – A single FAMILY Dwelling, the BUILDING of which was in existence on or before January 1, 1990, to be altered and used for not more than two DWELLING UNITS, the Principal Unit plus one Apartment, provided that:
    - 3.3.2.1 The GROSS FLOOR AREA of the Apartment shall not exceed the lesser of fifty percent of the GROSS FLOOR AREA of the Principal Unit or 800 square feet.
    - 3.3.2.2 There shall be no more than two bedrooms in the Apartment.
    - 3.3.2.3 The Apartment shall be clearly and distinctly separated from the Principal Unit by separate entrances either from the exterior of the BUILDING or from a common hallway located within the BUILDING.
    - 3.3.2.4 Any stairways to an Apartment located above the ground floor of a BUILDING shall be enclosed within the exterior walls of the BUILDING.
    - 3.3.2.5 There shall be not more than one driveway or curb cut providing ACCESS to the DWELLING UNITS, except for half circular or horseshoe driveways located in the front of the BUILDING.
    - 3.3.2.6 A minimum of one additional parking space shall be provided for the Apartment.

# **EXHIBIT B**

Salvage yard and all open air storage of salvage materials and debris	Stadium, coliseum, sports arena, race track
Storage or reprocessing of waste products and salvage materials such as non-operable vehicles or appliances	Storage yard, contractor's yard or other open air establishment for storage, distribution, or sale of materials, merchandise, products or equipment
Tanneries, smelting or rendering plants, gelatin factory	Trailer camp
Truck or trailer cleaning, washing facility or terminal	Water resources development for private commercial sale

- 3.8 ACCESSORY USE Regulations** – ACCESSORY USES shall be permitted in all districts on the same LOT with the PRINCIPAL USE. The ACCESSORY USES listed below are subject to the conditions and requirements stated in the respective Sections.
- 3.8.1 ACCESSORY USES Permitted in the Residential Districts and dwellings in the Non-Residential Districts:
- 3.8.1.1 Private garage or carport for not more than four motor vehicles, solar system, greenhouse, tool shed or barn; swimming pool or tennis court provided that such recreational facilities are used only by the residents and their guests.
- 3.8.1.2 A home occupation, other than retail sales, conducted entirely within the DWELLING UNIT or an accessory BUILDING by a resident and employing no persons other than the residents. In the Village Residential District, the portion of the DWELLING UNIT or accessory BUILDING used for a home occupation shall be limited to 500 square feet of NET FLOOR AREA. The Board of Appeals may authorize by special permit a home occupation which 1) conducts retail sales, or 2) employs non-residents provided that no more than two such non-resident employees shall be present on the premises at any one time.
- 3.8.1.3 The renting of rooms or boarding for not more than four persons; except that by Special Permit from the Board of Appeals the renting of rooms or boarding to more than four persons may be allowed. In either case, the service shall be operated by a resident owner of the premises.
- 3.8.1.4 Breeding for sale of dogs, cats or other pets, provided that not more than four such animals more than one year old shall be permitted.
- 3.8.1.5 Common Drives for vehicular and non-vehicular ACCESS by way of rights-of-way or easements serving more than one LOT. Common Drives are not STREETS and do not provide FRONTAGE for LOTS. Common Drives shall not serve more than 12 LOTS. Common Drives serving 6 or more LOTS shall require a special permit by the Planning Board. Common Drives serving more than two LOTS but less than six LOTS shall also require a special permit by the Planning Board unless they are in compliance with the requirements a) through q) below. All Common Drives shall be completed prior to the occupancy of any DWELLING UNIT served by the Common Drive.
- a) All curb radii and radii of pavement edges shall be designed to accommodate SU-30 design vehicles (fire engine). In determining the adequacy of the radii at the Common Drive intersection with a STREET, it shall be assumed that on local STREETS the entire pavement width is available for turns, whereas on collector and arterial STREETS a turn shall be possible without obstructing oncoming traffic (local, collector and arterial STREETS as defined in the Acton Subdivision Rules and Regulations).
  - b) There shall be a turn around for fire and other emergency vehicles (SU-30 design vehicle) at the end of the Common Drive.
  - c) The maximum grade within 50 feet of the intersection with a STREET shall be 5%.
  - d) The intersection angle between the Common Drive centerline and the STREET centerline shall be not less than 60 degrees.

- e) The maximum grade shall be 10%. The minimum grade shall be 1%.
- f) The Common Drive shall be laid out entirely within an ACCESS and utility easement that is at least 20 feet wide.
- g) The minimum centerline radius shall be 80 feet.
- h) The stopping sight distance along the Common Drive shall be not less than 125 feet.
- i) The design shall be for a maximum design speed of 25 miles per hour.
- j) The minimum sight distance at the intersection of the Common Drive with a STREET shall be 275 feet, and 450 feet where the STREET is an arterial STREET (arterial STREET as defined in the Acton Subdivision Rules and Regulations).
- k) Adequate drainage shall be provided. The drainage design and appurtenances shall prevent washout and excessive erosion and it shall prevent drainage onto a STREET. Subsurface discharge to a public drain system shall be allowed only if there is sufficient capacity in the public drain system based on a 10-year design storm.
- l) The paved wear surface shall be at least 12 feet wide and consist of a minimum of 3 inches of Type I bituminous concrete, applied in two courses over a minimum base of 12 inches of properly prepared and compacted gravel, graded to drain from the crown.
- m) There shall be a minimum 3 foot wide shoulder on each side free of obstructions such as trees or utility poles. The shoulder shall be prepared with 3-4 inches of topsoil over the same gravel base as the wear surface, and seeded.
- n) There shall be a sign posted at the Common Drive intersection with the STREET displaying the name of the Common Drive and indicating "private way".
- o) A sidewalk shall be constructed along the arterial and collector STREET (arterial and collector STREET as defined in the Acton Subdivision Rules and Regulations) FRONTAGE of all LOTS served by the Common Drive, except where a sidewalk already exists. The sidewalk shall be constructed with a paved surface consisting of a minimum of 2.5 inches of Type 1 bituminous concrete over 3 inches processed gravel and 6 inches of bank run gravel (or equivalent). It shall be at least five feet wide and shall follow in general the grade of the STREET. Where the sidewalk crosses driveways it shall have wheelchair ramps. Where the sidewalk does not connect with another sidewalk it shall be connected to the STREET pavement with wheelchair ramps. Easements or additional width in the STREET layout shall be provided as necessary to accommodate the sidewalk.
- p) An agreement providing ACCESS over the Common Drive to all the LOTS and making all the LOTS served by the Common Drive jointly and severally responsible for its maintenance and repair, including snow plowing, shall be recorded. Evidence of recording shall be given to the Zoning Enforcement Officer prior to the issuance of a building permit on any LOT served by the Common Drive.
- q) Compliance with the Common Drive construction and design requirements shall be demonstrated to the Zoning Enforcement Officer by means of proposed plans and as-built plans for the Common Drive and sidewalk, prepared by a registered professional engineer. Zoning Enforcement Officer shall have the power to establish requirements as to the form and contents of such plans.

3.8.2 ACCESSORY USES permitted in the Office, Business, and Industrial Districts.

3.8.2.1 Truck or trailer cleaning and washing provided that the trucks or trailers are necessary for the conduct of the PRINCIPAL USE.

3.8.2.2 Drive-up facilities in a bank.