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Zoning Enforcement Officer

**TO: Terry Maitland, Chairman
Conservation Commission**

DATE: August 12, 2011

**FROM: Scott A. Mutch
Zoning Enforcement Officer & Assistant Town Planner**

**SUBJECT: Notice of Intent of Hawthorne Homes, LLC.
101 Nonset Path, Acton, MA**

Dear Mr. Maitland & Members of the Conservation Commission,

I am writing in response to your request for information regarding the zoning implications of the Notice of Intent filed by Hawthorne Homes, LLC (the "applicant") with the Conservation Commission concerning a proposed project at 101 Nonset Path in Acton (the "site"). The Planning Department is happy to provide you with any assistance that we can. However, please bear in mind that there is no permit application currently pending before the Planning Department regarding this site. The comments provided below are, therefore, based only on a general understanding of the proposal and the site. We have attempted to provide the requested assistance and guidance. However, we do not have all of the information regarding the site or the proposal, and we have therefore not undertaken the rigorous level of analysis that we would apply to any permit application, and we do not offer any formal opinion on the compliance of the proposed project with the Acton Zoning Bylaw.

I. Background:

I understand that the applicant proposes to construct 12 new single-family residential dwelling units on the single lot that is located at 101 Nonset Path (the "project"). Currently pending before the Conservation Commission is the applicant's Notice of Intent, which seeks an Order of Conditions permitting a limited project in order to obtain access to the buildable portion of the lot across wetlands.

101 Nonset Path is located entirely within an R-A (Residence A) Zoning District. Under the provisions set forth in the Zoning Bylaw ("Bylaw"), properties located within an R-A District are permitted to be developed for residential uses "by-right" up to a density of five dwelling units per acre. Single-family and two-family dwellings are permitted in this Zoning District.

While the Planning Department offers no opinion, one way or the other, regarding whether or not this specific project, as proposed, would be permitted to go forward under the Zoning Bylaw, it does appear that the uses that are proposed are the types of uses that are permitted in an R-A Zoning District.

II. Access:

The plans reviewed by the Planning Department to date identify two (2) possible alternatives for access to the proposed project. The alternatives are very different in nature. One proposal involves accessing the property over a currently-existing driveway that serves abutting properties and over which this property has an easement. The other proposal involves accessing the property directly from Nonset Path over a proposed new driveway.

A. Existing Driveway Across Abutters' Land:

Option 1 proposes providing access to the site through a 20'-0" wide right-of-way and utility easement over abutting properties. A driveway currently exists at this location to serve the abutting properties. We understand that the applicant proposes to expand and extend this driveway to also serve the proposed project, and that the expansion and extension of this driveway would have wetlands impacts, triggering the applicant's request for an Order of Conditions from the Conservation Commission.

The abutting properties, and the driveway serving the abutting properties, are not located in the R-A Zoning District. The existing driveway currently serves three (3) single family residential dwellings on individual lots. The three (3) existing homes and the subject driveway easement are all located within an R-2 (Residence 2) single family residential zoning district.

The Bylaw limits residential development of lots zoned R-2 as follows: "not more than one BUILDING for dwelling purposes shall be located on a lot." The project that is proposed by the applicant on its parcel in the R-A district would therefore not be permitted in the neighboring R-2 zoning district, because it proposes more than one dwelling unit per lot (i.e. 12 units on a single lot).

The applicant may not provide access to the site over a driveway that runs through a different zoning district unless the project to be constructed on the site would also be permitted in that neighboring zoning district. In this case, the R-2 Zoning District, where the driveway is located, limits development to one dwelling unit per lot. Therefore, if the applicant chooses to provide access to the site over the driveway located in the abutting zoning district, the applicant would only be able to construct one dwelling unit on the lot, as would be permitted in the R-2 Zoning District.

Should the applicant choose to proceed in this manner, as with any project, the applicant would also have to comply with all other applicable zoning requirements, including dimensional requirements, requirements regarding driveway access agreements, and including demonstrating that 101 Nonset Path is a buildable lot with the required amount of frontage. The frontage requirement is discussed further below.

B. New Driveway Directly from Nonset Path:

Option 2 proposes providing access to the site by constructing a driveway directly from Nonset Path, which would also have wetlands impacts, triggering a request for an Order of Conditions. This proposal raises a number of possible zoning issues, as follows:

1. Frontage Requirement:

Under the Bylaw, a lot is not a buildable lot unless it has the requisite frontage. In the R-A Zoning District, between 50 and 200 feet of frontage is required, depending on the type of project being constructed.

"Frontage" is defined under Section 1.3.10 of the Bylaw as follows: "A continuous LOT line along the sideline of a STREET."

"Street" is defined under Section 1.3.16 of the Bylaw, in part, as follows: "A public or private way shall not be deemed to be a STREET as to any LOT of land that does not have rights of ACCESS to and passage over said way."

Thus, unless the applicant can demonstrate that he has "rights of ACCESS to and passage over" 50 - 200 feet of land located along Nonset Path, then the site is not a buildable lot.

2. Use Restrictions and Easements:

It appears, from the documentation that has been provided to us, that there are a number of use restrictions and easements burdening the property at 101 Nonset Path. The applicant maintains that the use restrictions

have expired and that only the easements remain in effect. The Planning Department offers no opinion one way or the other about whether or not that is the case. However, even assuming that only the easements remain on the property, those easements appear to operate to prohibit the applicant from accessing the property directly from 101 Nonset Path.

The easements, like the use restrictions, run in favor of the abutting Nagog Woods Condominium Association. From a review of the maps on-file with the Registry of Deeds, it appears that the easements run across 101 Nonset Path's entire front lot line with the street. Although the use of the easements is held in common by the Nagog Woods Condominium Association and the owners of the site, the easements require that the encumbered land be used for recreational purposes only and do not appear to permit a driveway to be constructed across that land.

The applicant has asserted that it is entitled to cross the easements with a driveway for access. Based on an initial review of the documents recorded at the Registry of Deeds, this does not appear to be the case. The applicant also asserts that, to the extent that it is not permitted to cross the easements with a driveway, it is permitted to move the easements to a different location so that the applicant may construct a driveway across its frontage.

While it is possible, in some circumstances, to move an easement, the requirements for moving an easement are rigorous and we think that it is by no means clear that the applicant would be able to do so unilaterally in this case. Any movement of the easement would be a significant move, requiring the creation of between 50 and 200 feet of frontage with access rights along Nonset Path.

If the easement is not permitted to be moved or changed, it appears that there is no legal access to the property directly from Nonset Path. If that is the case, this property would likely not be deemed a buildable lot at the time of building permit application because it lacks the requisite "frontage" as defined by the Bylaw.

If the applicant is able to obtain permission to access the site over the easement area, or to move the easement area, then the applicant could likely convert this into a buildable lot, and could access the site via its own frontage on Nonset Path or via the abutting driveway easement (subject to the limitations discussed above). Should the applicant choose to proceed in this manner, as with any project, the applicant would also have to comply with all other applicable zoning requirements, including dimensional requirements and requirements regarding driveway access agreements.

Conclusion:

The opinions expressed in this Memorandum are simply initial impressions regarding the project that is pending before the Conservation Commission based on the limited information about the project that has been provided to the Planning Department. There is no official building permit application, special permit application, site plan special permit application, variance application, or any other request currently before the Planning Department for Staff review and comment. All of the information regarding this project that has been obtained to date has been obtained informally. I therefore cannot offer any formal opinion on the status of this project, or the likelihood that this project will be able to proceed. I nonetheless hope that the guidance and analysis provided above is of assistance to the Conservation Commission, and welcome any additional requests for assistance that you may have.