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BY ELECTRONIC AND US MAIL

December 21, 2015

Matthew A. Beaton, Secretary
Executive Office of Energy and Environmental Affairs
Attn: MEPA Office
100 Cambridge Street, Suite 900
Boston, MA 02114

Re: **EEA 15444**, Environmental Notification Form
"The Commons at Weiss Farm," Stoneham, Massachusetts

Dear Secretary Beaton:

Acting as special counsel on behalf of our clients, the Board of Selectmen, Conservation Commission and Zoning Board of Appeals of the Town of Stoneham, we provide the following comments on the Environmental Notification Form (ENF) filed by Weiss Farm Apartments, LLC regarding the above project, as supplemented by a November 12, 2015 letter (entitled "Alternatives Discussion"). For the reasons discussed below, we respectfully suggest that the Secretary require preparation of an Environmental Impact Report (EIR) for the project. Not least of these reasons is the project parcel's historic and ongoing violation of the Wetlands Protection Act, and two Administrative Consent Orders issued by the Department of Environmental Protection (2006, ACO with Penalty and Notice of Noncompliance, File No. ACOP-NE-06-6W018; 2010, ACO and Notice of Noncompliance, File No. ACO-NE-10-6W002), necessitating an Enforcement Order from the Conservation Commission and claim in Superior Court even as the applicant seeks to persuade the Secretary that the project complies with the Wetlands Protection Act and other matters within the scope of MEPA review. We respectfully draw the Secretary's attention to the following:

I. Broad Scope Jurisdiction

State Agency Permits for this project include a Superseding Order of Conditions (SOC) from the Department of Environmental Protection (DEP), sought in an appeal by the applicant from a Stoneham Conservation Commission decision finding the proposed work noncompliant with the Act; and a decision by the Housing Appeals Committee (HAC) of the Department of Housing and Community Development in any appeal by the applicant

from a decision by the Stoneham Zoning Board of Appeals on the pending comprehensive permit application. See ENF at p.2.

MEPA review of this project is determined by the subject matter of the required permits. The regulations specifically provide that subject matter jurisdiction may be functionally equivalent to broad scope jurisdiction in the case of certain permits or decisions such as those issued by the HAC. The HAC, in reviewing a comprehensive permit decision, will address issues including the number of dwelling units, impacts to open space and wetland resources, traffic patterns and safety, and building and site design. See G.L. c. 40B, ss. 20-23. (Further, it is axiomatic that the ongoing ACO violations on the project site must be remedied prior to any development going forward. Thus the scope of review by DEP will go beyond the requested SOC to the full scope of the WPA violations enumerated in DEP's 2006 and 2010 ACOs and the Conservation Commission's denial pursuant to the Stoneham Wetlands Bylaw).

Where the scope of the HAC's review will extend to the full range of these topics, we suggest that MEPA requires an EIR pursuant to 301 CMR 11.00 for "The Commons at Weiss Farm." The scope of the EIR should be inclusive of all aspects of the project that are likely, directly or indirectly, to cause Damage to the Environment, as that phrase is used in 301 CMR 11.00, including but not limited to destruction of wetlands, open space, and natural areas; and increases in flooding and storm water flow.

II. The Project entails Financial Assistance from an Agency of the Commonwealth

The ENF states that "[n]o financial assistance or land transfer from an Agency of the Commonwealth is planned". See ENF at p. 2. This is wrong. MassHousing, a state agency, issued the Project Eligibility letter for the project on June 23, 2014. According to the Project Eligibility letter, the project will be financed through the Federal Home Loan Bank of Boston's New England Fund Program. Technical assistance offered by MassHousing, including issuance of the Project Eligibility letter, constitutes financial assistance from an agency of the Commonwealth. See Town of Middleborough v. Housing Appeals Committee, et al., 449 Mass. 514, 525-526 (2007)(citing 760 CMR 30.02 definition of subsidy to include "indirect financial assistance" and "technical assistance or other supportive services," and finding that "subsidy" includes "direct financial support and a wide range of indirect financial and nonfinancial support").

III. The Project Violates Executive Order 193: Conversion of Agricultural Land

Executive Order 193 states in relevant part, "State funds and federal grants administered by the state shall not be used to encourage the conversion of agricultural land to other uses when feasible alternatives are available." EO 193 is further clarified by the Commonwealth's Department of Food and Agriculture's "Agricultural Land Mitigation Policy."

The project locus qualifies as "Agricultural Land" pursuant to both EO 193 and the above Department Land Mitigation Policy. As acknowledged by the applicant, part of the project site has been in active agricultural use in the last five years. See ENF at p. 13. As further acknowledged by the applicant, the site contains areas mapped as farmland of unique importance, where "[t]he Natural Resources Conservation Service mapped two soils on the project site as farmland of unique importance: soil 51A, Swansea muck, 0 to 1 percent slope, and soil 52A, Freetown muck, 0 to 1 percent slopes." See *id.* Although the applicant represents that the areas "mapped as farmland of unique importance will not be developed under the proposed project," this is disingenuous: such areas will be rendered wholly unusable as farmland as a result of project construction. Thus, the project entails "the conversion of agricultural land to other uses" as that term is used in EO 193 - in this case, to a residential development.

We respectfully suggest that an EIR should investigate alternative development scenarios that comply with the purpose of EO 193, including but not limited to the avoidance of destroying the agricultural values of the locus as required by EO 193 and the mitigation options under the above-noted Agricultural Land Mitigation Policy.

IV. The Project is subject to the requirement of an EIR pursuant to 301 CMR 11.03(3)

The applicant has asserted that this project meets no regulatory thresholds requiring the preparation of an EIR pursuant to 301 CMR 11.03. This is incorrect. Not discussed by the applicant is the existence of a dam on the project site, part of the stormwater management system for the Weiss Farm property and surrounding area. This dam is currently in disrepair and functioning inadequately to serve its intended purposes. The proposed project cannot be constructed absent significant modifications to the site's stormwater management system, including the construction of an entirely new dam.

301 CMR 11.03, "Review Thresholds, "identif[ies] categories of Projects or aspects thereof of a nature, size or location that are likely, directly or indirectly, to cause Damage to the Environment." An ENF and mandatory EIR are required for the enumerated projects, including, with respect to Wetlands, Waterways, and Tidelands, "construction of a new dam." See 301 CMR 11.03(3)(a)3. Inexplicably, the applicant denies in the ENF that a part of the project is "the construction or alteration of a dam," notwithstanding the extensive discussion of this dam and the need for construction of a new dam in the Order of Conditions. See ENF at p. 18 and discussion below.

As the Conservation Commission found in its Order of Conditions, the existing weir dam structure is of overall poor design and its construction has clearly failed. The applicant's proposed improvements – although disguised as simply the resetting of concrete blocks – is, in fact, the construction of a new dam; one made necessary for the site's stormwater

management system to function. The regulatory threshold of 301 CMR 11.03(3)(a) 3 - "construction of a new dam" - is met by this project and accordingly an EIR is required.¹

V. Fail-Safe Review of this project under 301 CMR 11.04 is warranted

Even if the Secretary were to find that none of the regulatory thresholds of 301 CMR 11.03 requiring an EIR are met by this project, which, respectfully, we do not believe legally possible, Fail-Safe review under 301 CMR 11.04 is merited based on 1) the history of wetlands violations on the project site, giving rise to two ACOs from DEP and a current Conservation Commission Enforcement Order and Superior Court claim; and 2) this project applicant's refusal thus far to provide information sufficient to allow a full determination of the project's environmental impacts. The applicant's refusal to provide such information during the hearing on its Notice of Intent - and its insistence that the hearing be closed - in fact prevented the Conservation Commission from concluding that WPA standards would be met or that the project may be conditioned consistent with WPA.

The above constitutes the "circumstance or combination of circumstances," with respect to a project having "the potential to cause Damage to the Environment and the potential Damage to the Environment," where requiring an EIR "is essential to avoid or minimize Damage to the Environment." See 301 CMR 11.04(1). The requirement of an EIR will entail more investigation and analysis by the applicant, but such efforts "will not result in an undue hardship for the Proponent." See id.

A. History of Noncompliance: 2006 ACOP and 2010 ACOs²

While noting the applicant seeks a Superseding Order of Conditions from DEP (ENF at p. 2), the ENF fails to note DEP's ongoing involvement with the project locus dating back a

¹301 CMR 11.02 does not define the term "dam"; the regulation provides that a term not therein defined "shall have the meaning given to the term by any statutes, regulations, executive orders or policy directives governing the subject matter of the term . . . [A] term pertaining to . . . wetlands . . . is defined by the Wetlands Protection Act, M.G.L. c. 131 section 40, and its implementing regulations, 310 CMR 10.00." 310 CMR 10.04 provides the following definition for the term "dam": "any artificial barrier placed across a watercourse that raises or has the potential to raise the level of water or which impounds and/or diverts water."

² The Conservation Commission is aware that the applicant and project are distinct from the property owner and its past and present activities. Yet the applicant has elected to build on a site where environmental resources on the project locus have been damaged; state and local enforcement orders have been disregarded; and affirmative steps are needed to remediate and restore such resources, including, as proposed by the applicant, the construction of a new dam. If the applicant seeks to go forward with this project, it has no choice but to address the full scope of remediation and restoration needed.

decade. At the same time that the applicant seeks to persuade the Secretary that this project complies with the WPA and other matters within the scope of MEPA review, the project locus is noncompliant with the WPA and Administrative Consent Orders issued by DEP in 2006 and 2010.³

Among the findings made by DEP in the 2006 Administrative Consent Order with Penalty and Notice of Noncompliance (File No. ACOP-NE-06-6W018) were the following:

- At an inspection in September of 2005, DEP staff observed that Bordering Vegetated Wetlands (BVW) and Land Under Waterway (LUW) had been altered as a result of Weiss Farm's composting activities.⁴ These activities were causing untreated runoff containing pollutants to enter streams and BVW. In addition, concrete slabs had been placed in BVW. No requests for a Determination of Applicability or Notice of Intent had been filed regarding these activities.
- These unpermitted activities had altered, impaired and had an adverse effect on BVW and LUW, causing damages to the interests of the WPA, specifically flood control, storm damage prevention, private water supply, groundwater supply, fisheries, prevention of pollution, and protection of wildlife habitat.
- Weiss Farm's alteration of BVW and LUW at the site had resulted in a violation of the WPA and of 310 CMR 10.05(3)(a) (work in Buffer Zone without NOI or RDA); 310 CMR 10.56 (adverse effect on specified habitat sites) and 310 CMR 10.55 (work destroying or impairing BVW).
- By failing to restore the altered wetlands to their original state, Weiss Farm had violated and continued to violate the WPA and regulations.
- Weiss Farm had failed to incorporate good management practices to prevent "unpermitted discharge of pollutants to air, water or other natural resources of the Commonwealth" in violation of 310 CMR 16.05(4).

³ As discussed further below, the site is also the subject of an Enforcement Order and ensuing claim in Superior Court, necessitated by the owner's ongoing failure to comply with the WPA and regulations, Stoneham Wetlands Protection Bylaw; and the ACOs. The Conservation Commission's claim for enforcement of its July 9, 2015 Enforcement Order was brought as a counterclaim in Weiss Farm Inc.'s appeal of the Enforcement Order. This case is pending in Middlesex Superior Court as Civil Action No. 1581CV05342.

⁴ At the time, Weiss Farm held an agricultural composting license from the Massachusetts Department of Agricultural Resources.

The ACOP issued by DEP on August 24, 2006 required Weiss Farm to comply with an Environmental Management Plan and Sedimentation Plan, entailing a variety of corrective and preventive measures to restore and protect wetland resources on the site. It also required Weiss Farm to conduct its composting operations using good management practices, making all reasonable efforts to prevent air and water quality impacts.

In a compliance inspection on March 18, 2009, DEP staff again observed that BVW and LUW had been altered as the result of Weiss Farm's composting activities and management practices. Following subsequent site inspections in response to reports of nuisance odors, DEP concluded that the facility was "not being managed in accordance with best management practices (BMPs) for a composting operation to prevent nuisance odors" and therefore had violated 310 CMR 16.05(4).⁵ A second ACO, issued on July 22, 2010 (File No. ACO-NE-10-6W002), contained the following findings:

- Weiss Farm's operations continued to cause; and Weiss Farm continued to allow untreated runoff to enter wetland resources, without a permit.
- This unpermitted activity had altered, impaired, and had an adverse impact on BVW and LUW, causing damage to interests protected under the WPA, specifically flood control, storm damage prevention, private water supply, groundwater supply, fisheries, prevention of pollution, and protection of wildlife habitat.
- Weiss Farm's alteration of wetland resources violated the WPA, 310 CMR 10.55 (impairment of BVW functions) and 310 CMR 10.56 (impairment of LUW functions).
- By failing to adhere to the Environmental Management Plan of the 2006 ACOP, and by failing to restore illegally altered wetlands to their original condition, Weiss Farm continued to violate the WPA, regulations, and the terms of the 2006 ACOP.

The 2010 ACO again required Weiss Farm to undertake certain corrective and preventive measures to restore and protect wetland resources on the site, including compliance with the Environmental Management Plan, a Compost Management Plan, a revised Sedimentation Control Plan, and an Operation and Management plan to maintain erosion controls; and to conduct a drainage study for submission to DEP. Weiss Farm was also required to install a "check dam" in a drainage ditch on the east side of the property, to address accumulated stormwater, and to prevent flooding of the pump access road and

⁵ This regulation conditionally exempts agricultural waste composting operations from site assignment regulations for solid waste facilities, provided that such operations incorporate good management practices and are carried out in a manner that prevents unpermitted discharge of pollutants to air, water or other natural resources. 310 CMR 16.05(4).

further degradation of wetland resource areas. A Final Decision incorporating the ACO was entered by DEP on April 11, 2011, imposing a \$5,000 fine.

The site's history of statutory and regulatory noncompliance - which, as described in the next section, is ongoing - strongly suggests that more oversight, not less, is required to "avoid Damage to the Environment or, to the extent Damage to the Environment cannot be avoided, to minimize and mitigate damage to the Environment to the maximum extent practicable." 301 CMR 11.01(a). An EIR will serve such purpose.

B. History of Noncompliance: 2015 Enforcement Order

Notwithstanding issuance of the 2010 ACO, violations continued on the Weiss Farm property. A July 9, 2015 Enforcement Order issued by the Conservation Commission found the following violations of the WPA, regulations, the Stoneham Wetlands Protection Act, and the 2006 and 2010 ACOs:

- Work within the WPA Buffer Zone and the Wetland Bylaw's 25-foot No-Disturb Zone conducted without a permit; failure to restore the illegally-altered land to original condition. Stockpiles located within 25 feet of wetlands flags indicated the placement of fill over areas of BVW and Bordering Land Subject to Flooding (BLSF), adversely impacting the ability of these Resource Areas to contribute to the interests of the WPA and the Wetlands Bylaw. See in particular 310 CMR 10.55 and 10.57.

The Enforcement Order required that the stockpiles be removed; and that soils in the location where the stockpiles existed be evaluated to determine whether the stockpiles resulted in filling of BVW and BLSF.

- Work within BVW and LUW conducted without a permit; failure to restore the illegally altered land to original condition. Concrete debris had been placed within BVW, LUW, and BLSF, violating Wetlands Bylaw Section 11.2, which states in part that "[n]o person . . . shall leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its condition." The 2010 ACO required compliance with the Wetlands Bylaw. The concrete debris was causing displacement and compaction of hydric soils, and alteration the vegetative community, resulting in the inability of the resource area to function to support wildlife habitat, or to prevent pollution. See in particular 310 CMR 10.56(1) and 10.55(1).

The Enforcement Order required that the concrete debris be removed, minimizing disturbance to vegetation, pursuant to a work plan documenting the extent of debris, mitigation methods, and the extent of any vegetation growing on fill.

- Work within BVW conducted without a permit; failure to restore the illegally altered land to original condition. Weiss Farm had excavated in BVW and BLSF adjacent to wetlands flags, removing hydric organic soils; resulting in changes in

hydrology and inability of the soils to function to address the interests of the WPA and the Wetlands Bylaw; further changing the condition of the wet meadow; altering resource areas without a permit and causing a change in resource area's ability to function or contribute to the interests of the WPA and Bylaw. See 310 CMR 10.56 and 10.57.

The Enforcement Order required that a current drainage study be prepared to determine the location of the drainage divide on the property.

- Constructed and maintenance of a pump station access road and weir without a permit from the Conservation Commission, as required by the 2010 ACOP; failure to maintain the roadway as specified in the 2006 ACOP. Weiss Farm's construction of the pump access road resulted in the displacement of wetland and flood storage capacity; no mitigation was provided, in violation of the WPA and the Wetlands Bylaw.

The Enforcement Order required that the access roadway be brought to grade meeting the conditions specified in the 2006 ACOP; and that the impact to floodplain altered by construction of the access road be calculated, and "mitigation provided" as specified in 310 CMR 10.57 and the Wetlands Bylaw.

- Installation of structures including a "backwater control dam" (also referred to as the "weir") without a required permit from the Conservation Commission, such permit being required by the 2010 ACO. Further, Weiss Farm had failed to maintain the backwater control dam (weir) and it is in a state of disrepair.

The Enforcement Order required that the dam meet the conditions specified in the 2006 ACOP ; and that the impact to floodplain altered by dam construction be calculated, and mitigation provided as specified in 310 CMR 10.57 and the Wetlands Bylaw.

Weiss Farm complied with none of the Enforcement Order's requirements noted above, and accordingly the Conservation Commission was compelled to bring a claim in Superior Court to enforce the Order.

As it stands now, the project locus is currently noncompliant with the WPA and regulations; the Stoneham Wetlands Protection Bylaw; certain terms of the 2006 and 2010 ACO; and the Enforcement Order issued by the Conservation Commission.

C. Order of Conditions: Project impacts, to the extent they have been disclosed, are inconsistent with the interests of the WPA

The applicant states in the ENF the project "will comply with all requirements of the Massachusetts Wetlands Protection Act, including the Massachusetts Stormwater

Management Standards. " ENF at p. 5. The evidence received by the Conservation Commission pursuant to the project Notice of Intent is to the contrary.

The Commission found that the applicant's documents were not compliant with DEP Stormwater Management Guidelines; and that the applicant's plans were incomplete, preventing the Commission from fully assessing the project's impacts. Further, the applicant's insistence on closing the public hearing without providing certain information sought by the Conservation Commission resulted in project plans that could not, in their submitted form, comply with WPA performance standards.⁶ Faced with incomplete information and noncompliant project plans, the Commission was unable to condition the project in a manner that would meet WPA requirements. The Order of Conditions made the following findings, based on on-site observations; the applicant's materials; public hearing testimony; and the reports of its peer reviewers⁷:

- The project locus was not in compliance with the 2010 ACO, causing "essentially continuous violations" of the ACO and WPA, and significant damage to adjacent properties and downgradient drainage systems. The applicant failed to demonstrate that its proposed work would remediate these violations and noncompliance, or that its proposed work would reliably prevent such conditions.⁸
- The stormwater management system provided by the applicant's engineer does not meet the minimum recharge standards of DEP's Stormwater Management Guidelines. Calculations provided by the applicant regarding the project's onsite drainage system were in error and were not consistent with the applicant's design drawings.
- The applicant had failed to provide additional information, promised in the July 9, 2015 letter, in response to the Commission's concerns regarding the project-landscaping plan.⁹

⁶ The information sought by the Commission had been promised by the applicant in a letter dated July 9, 2015 and given to the Commission that night - the same night the applicant insisted on closing the hearing.

⁷ Ingeborg E. Hegeman, PWS, BSC Group; Robert H. Griffin, P.E., Griffin Engineering Group.

⁸ The Commission concluded that the landowner's failure to comply with the 2006 and 2010 ACO requirements has made pump station operation and maintenance impossible; increased downstream siltation; and significantly worsened downstream drainage.

⁹ The ENF states that "[l]andscaping of the project area will be substantial," including the planting of "more than 75 trees. . . around the perimeter of the project area within the buffer zone of on site wetlands resource areas," such area "currently devoid of such

- Large stockpiles of soils or other materials associated with ongoing Weiss Farm operations remained directly adjacent to wetland resources. The applicant's proposed grading plan is incomplete in this area and it was impossible for the Commission to understand the proposed drainage conditions that will exist in the area, or how the proposed work will look upon completion. The Commission's request that the applicant agree to continue the hearing so that this issue, among others, could be addressed, was refused.
- The applicant proposed certain improvements to the pump station and weir dam with the goal of diverting stream flows away from the failed pump station along Franklin Street to Meetinghouse Brook west of the site. The Commission expressed concerns that this diversion of flow could alter hydraulic conditions affecting wetland resources on the site and at off-site properties, including causing flooding of properties to the west of the site. The applicant's topographical plans confirmed that off-site properties would be affected by this diversion of flow. The Commission's request that this concern be further addressed was rejected; the applicant insisted on closing the hearing.
- The existing weir dam structure is of overall poor design and its construction has clearly failed. The applicant's proposed improvements - resetting concrete blocks - are insufficient to reliably prevent such failure from recurring in the future.
- The applicant's proposed work to repair existing on-site drainage deficiencies at the pump station was incomplete and insufficient to demonstrate reliable future operation. The Commission requested plans and specifications for pump station repairs for evaluation; the applicant failed to provide such plans.
- The applicant's watershed study recommends several onsite and offsite improvements as necessary to address current deficiencies in drainage, but the applicant has not provided any specific plans to accomplish any of the offsite improvements. Without the offsite improvements, the onsite drainage will not be effective.¹⁰

growth." ENF at p. 5. The applicant fails to note that the project entails the leveling of an approximately 30-foot tall drumlin with mature woodlands and exposed ledge outcrops.

¹⁰ The applicant recommended in its watershed study that several off-site drainage improvements be made (e.g., cleaning drainage pipes and channels), so as to restore normal drainage conditions on the site. The applicant stated that it would contribute \$20,000.00 towards such improvements if carried out by the Town. The Commission was concerned that this amount did not reflect the complexity and cost of these improvements, and requested additional information from the applicant and time (until July 22, 2015) to consult with the Town's DPW director. The applicant declined to provide either

- Existing on-site drainage deficiencies cause flooding of lands at, and adjacent to the site and the applicant's proposed work will worsen the extent and duration of flooding at and adjacent to the site.
- The project will create approximately 5.5 acres of new impervious surface at the site. The infiltration structures to be constructed within parking lots and roadways will be constructed a few feet above the seasonal high groundwater table, at the perimeter of the work area, very close to the BVW and stream channels on the north, east and west sides of the development. Soil borings in this area fairly consistently describe glacial outwash (highly permeable), and groundwater tables at the infiltration structures that are essentially at the same elevation as the nearby streams and the impounded water at the failed pump station. The proposed project will quickly convert rainfall into impounded water at the southeast corner of the site.
- Because the applicant has not provided satisfactory plans to address the existing drainage deficiencies, the additional stormwater runoff caused by the project and its rapid conveyance to the southeast corner of the site will exacerbate the continuously flooded conditions that affect the site and the adjacent properties. The Commission requested that the applicant provide additional information to address the increased runoff volumes; rapid stormwater conveyance; and off-site flooding concerns. The applicant refused to provide such additional information.
- An unusual hydraulic condition exists at this site: pumping is necessary to empty the site. The applicant failed to provide basic information describing the existing stormwater pump station, such as pump operating levels and pump performance. Failure to provide this information made it impossible for the Commission to understand how the applicant's proposed limited repairs to the pump station would operate if undertaken.
- The Commission must consider the potential impacts of the project and its drainage system on the site and adjacent properties. The applicant's proposal will clearly increase the extent of storm damage, one of the basic interests protected under the Wetlands Protection Act.

The Commission concluded that it could not approve the project as presented - at the close of hearing insisted upon by the applicant - "because the applicant separated itself from the need to carry out the downstream drainage remediation." Without pump station improvements and downstream drainage remediation, wetland resources and properties

information or time and insisted that the hearing be closed. Consequently, there is no viable plan before the Commission to undertake the recommended drainage improvements.

near the site will continue to be harmed. The Commission accordingly denied the proposed project, concluding that it was unable to set conditions to adequately protect the nearby wetland resources and interests of the WPA. The Commission observed that the applicant's refusal to provide the additional information requested rendered it impossible for the Commission to conclude that all WPA performance standards would be met.

The applicant's "not my problem" approach to the increased runoff volumes and offsite flooding is entirely at odds with MEPA, the purpose of which is to provide agencies with the information needed to employ "all feasible means to avoid Damage to the Environment or, to the extent Damage to the Environment cannot be avoided, to minimize and mitigate damage to the Environment to the maximum extent practicable." 301 CMR 11.01(a). The applicant's unwillingness to provide the Commission with further information on these impacts - and how they might be avoided should give the Secretary pause - as well as reason to require an EIR.

VI. Stormwater management on the project site requires MassDOT participation

The Board of Appeals' engineering consultant Thomas Houston, P.E, AICP, has concluded that existing stormwater and drainage conditions on the site have been insufficiently analyzed, and that stormwater impacts have been insufficiently described by the applicant. Further, Mr. Houston concludes that the participation of MassDOT is necessary to resolve stormwater management issues on the site and in the surrounding area. Such conclusion underscores the need for an EIR for this project.

The project locus borders an extensive wetland system north of Franklin Street that has a tributary area of approximately 250 acres. There are two outlets to this system that convey runoff to the south across Franklin Street. One of the Franklin Street culverts is an 18 inch RCP culvert located on the east side of the Weiss Farm at 175-177 Franklin Street (Weiss Farm Culvert) and the other Franklin Street culvert is located approximately 800 feet west of Weiss Farm at 136-140 Franklin Street (West Culvert). The inverts of these two culverts are at a roughly comparable elevations and the discharge through these culverts depends on hydrology in the wetland area as well as stormwater management practices to be implemented by the Proponent related to operation of a stormwater pump station at the Weiss Farm Culvert.

The Weiss Farm Culvert was installed by MassDOT in the 1950s or 1960s. The entrance invert of the Weiss Farm Culvert is situated well above the elevation of the land and drainage channels on Weiss Farm immediately upgradient of the culvert which necessitates pumping of stormwater. This culvert also receives substantial runoff directly from the MassDOT stormdrain system in Franklin Street. The culvert is located at a low point in the highway and the MassDOT stormdrain system is directly connected to the culvert. There is no attenuation of the peak rate of discharge and no water quality treatment provided for the runoff discharged by the MassDOT stormdrain system into the Weiss Farm Culvert.

Of greater concern, the drainage way extending south of Franklin Street for a distance of approximately 900 feet is prone to flooding even under minor storms which results in damage to residences and a rise in groundwater elevation which contributes to basement water intrusion. The Stoneham Director of Public Works has stated that this is a major concern for his Department.

The flow path for drainage discharged from the Weiss Farm Culvert is extensively obstructed causing stagnant ponded water conditions and localized flooding. There is a large area of ponded water just downgradient end of the Weiss Farm Culvert that is eutrophic and presents a health and mosquito breeding threat. Further downgradient and to the south there is an undersized 18-inch diameter vitrified clay (record) culvert 450 feet long that was installed too high and with too flat a slope. The 18-inch diameter culvert connects to a 36-inch diameter culvert. The invert of the 36-inch diameter culvert is approximately 7 feet below the invert of the 18-inch diameter culvert. If flow constraints between the Weiss Farm Culvert and this downgradient 36-inch diameter culvert can be removed, there is the potential to solve the ponded stagnant water and localized flooding problems.

Solving the severe problems in this drainage way requires a public-private partnership. Where the proposed project will further exacerbate an identified public health and safety issue, the project proponent will require the Commonwealth's assistance to correct the same.

We respectfully suggest that only MassDOT's participation can resolve the flooding and stormwater issues the proposed project will create. Improvements could include reinstallation of the Weiss Farm culvert to flow by gravity, excavation of a defined drainage channel south of Franklin Street, and replacement of 450 feet of drainline further to the south of Franklin Street.

Further, the analysis of the project in terms of peak rate attenuation has not been properly modeled pursuant to DEP Stormwater Management Standard 2 requiring that stormwater management systems shall be designed so that post-development peak discharge rates do not exceed pre-development peak discharge rates. The stormwater analysis submitted to date considers the active development area within the Project Site in isolation. The adjacent wetland system is part of a 4/10ths square mile drainage area that has not been modeled. Within the extensive wetland system that includes much of the Project Site, there are existing stormwater controls that must be operated by the Proponent following development of the Proposed Project. These controls include a dam with variable discharge control and a stormwater pump station. To date no management plan has been provided for operation of these stormwater controls that directly control the peak rate and volume of runoff discharges to two separate wetland systems.

An EIR should be required, and should include comments from MassDOT with respect to the agency's commitment to participate in evaluation and construction of measures to control flooding and health hazards in the drainage way south of the Weiss Farm Culvert in

Franklin Street. Further, the EIR should require a proper evaluation of stormwater runoff, which evaluates runoff from the project site as a component in the large watershed and wetland system of which the Project Site is a part.

VII. The ENF is Deficient

The ENF as submitted is deficient in numerous significant respects. These deficiencies point beyond a lack of compliance with ENF requirements, to a clear need for the more in-depth, multi-agency review entailed in an EIR.

A. Lack of any meaningful alternatives analysis

The need for more scrutiny of this project is nicely illustrated by the short shrift the applicant has given to an alternative analysis - and the applicant's evident lack of understanding of the purpose of an alternatives analysis. As the Secretary is aware, the ENF form asks the applicant to "[d]escribe the on-site project alternatives (and alternative off-site locations, if applicable), considered by the proponent, including at least one feasible alternative under current zoning, and the reason(s) that they were not selected as the preferred alternative."

This was the applicant's original "Project Alternatives" section, in its entirety:

"Current zoning would allow for single family residences. However, the developer's experience mainly consists of multifamily developments with no recent work in single-family residential development. Further, the developer recognizes the need for affordable housing in suburban towns in the Commonwealth, and the Town of Stoneham has not met the state's minimum threshold for affordable housing."¹¹

As the Secretary is aware, the purpose of MEPA is not to promote the construction of housing, affordable or otherwise. Rather,

¹¹ Whether or not Stoneham has met any state threshold for affordable housing is irrelevant to Secretary's statutory duty, which is to evaluate environmental impacts and, where necessary, to impose project conditions that mitigate such impacts. The standard to be applied by the Secretary is no different from that which would be applied to project that consists of 100% market rate units, as opposed to the proposed project's 75% market rate units. In addition, there is no "minimum threshold for affordable housing" as asserted by the applicant. Further, the Town of Stoneham disputes any claim that it has not achieved G.L. c.40B, s.20's metric for determination of "consistency with local needs". This dispute, in which Weiss Farm Apartments, LLC is a named party, is pending in the Middlesex Superior Court (See Stoneham Board of Appeals v. Housing Appeals Committee, et al., 1581CV05104).

"[t]he purpose of the alternatives analysis is to consider what effect changing the parameters and/or siting of a project, or components thereof, will have on the environment, keeping in mind that the objective of the MEPA review process is to minimize damage to the environment to the greatest extent feasible. Examples of alternative projects include alternative site locations, alternative site uses, and alternative site configurations."

The applicant later submitted an "Alternatives Discussion" (see letter dated November 12, 2015), but this offering is woefully inadequate. First, there is no discussion of a "no build" alternative. Instead, the applicant states that if this project does not go forward, the property will be sold and the use thereafter "cannot be known." Thus, "[n]o estimates of environmental effect can be made for the No-Build Alternative." At the same time, the applicant suggests that "the No-Build alternative could have substantial negative environmental effects." Self-contradiction aside, these assertions do not discuss what environmental impacts would occur based on existing conditions. The applicant cannot avoid this requirement by simply stating that a no-build alternative does not exist.

Second, the applicant's selection of other alternatives is cynical and deeply flawed. Although the offered on-site alternative (25 single family homes) is appropriate, the other offered alternative - 259 single-family homes, off site - is nonsensical, and clearly included only as a foil, providing grossly inflated impacts so as to dwarf the environmental impacts of the preferred alternative. Following a discussion of the impacts of this illusory 259-lot¹² "single-family, sprawl development," and citing the "need for affordable housing," the applicant concludes that "the proposed Project is the only viable alternative for Weiss Farm Apartments LLC and the John M. Corcoran & Co. LLC."

Contrary to the applicant's belief, the focus of an alternatives analysis is not on the developer, but rather with regard to the land; it is not to examine what is most "viable" or profitable for the developer, but rather to examine the comparative environmental impacts of the project and alternative uses. The Board of Selectmen, Board of Appeals and Conservation Commission trust that the Secretary will not view the applicant's facetious "alternatives discussion" as satisfying MEPA requirements, but rather as evidence that the additional scrutiny of an EIR is warranted for an applicant who confuses profitability with evaluation of environmental impacts as the purpose of alternatives analysis.

B. Inconsistency of project with Town Planning

Although Stoneham does not have a comprehensive plan, it does have a highly relevant "Stoneham Town Center Strategic Action Plan," prepared by the Metropolitan Area

¹² As noted elsewhere in the ENF, Stoneham is a "mature" suburb. With little build-out remaining, the opportunity to construct a 259-lot subdivision "on one or more sites" as suggested by the applicant, is nonexistent.

Planning Council (MAPC) and issued in December of 2014. The applicant has ignored this Plan in its entirety - perhaps because the proposed project is inconsistent with it, including with respect to specified ENF criteria such as economic development.

The Town Center Strategic Action Plan identifies Stoneham's Town Center - where, the Plan directs, residential and economic development should be targeted - as centered along Route 28 (Main Street), and including Stoneham Square, the Town Common, primary entry corridors, and surrounding blocks.¹³ While noting that the Town Center remains the "civic center of the town," the Plan further notes that development just outside the Town Center area has "drawn much of the area's vibrancy away," specifically, "drawing businesses and consumers away from the Town Center." The Town Center Plan calls for increased residential uses and densities in the Town Center to support an active retail environment, while also providing housing in "a walkable, amenity-rich Town Center." The Plan also calls for improved transportation options serving the Town Center.

The project locus is outside the Town Center. As such, it is directly at odds with the Town Center Plan. The proposed project places dense residential development in area where it will serve neither goal of supporting retail or providing a "walkable, amenity-rich" housing option in the Town Center. In fact, in its location outside the Town Center, the project will draw vibrancy away from the Town Center, as indicated by the Plan. The proposed project is thus wholly inconsistent with the Plan with respect to economic development. Further, by locating dense development outside the Town Center - where, presumably, the benefits of concentrated development, such as open space, should manifest - the proposed project in fact eliminates open space and is incompatible with the adjacent single-family land use. The project is thus wholly inconsistent with the Plan with respect to "open space impacts" and "compatibility with adjacent land uses."

The applicant relies on a few lazily-selected generalities from the 2008 MAPC "MetroFuture" Plan, which - not surprisingly - is consistent with MAPC's recommendations in the Town Center Plan. The applicant's problem is that the proposed project does not conform even to those principles the applicant has extracted from the MetroFuture Plan. Like the Town Center Plan, the MetroFuture Plan calls for targeted, transit-oriented residential development in existing town centers. By contrast, the project site is outside the Town Center; is more than half a mile from a bus stop, and almost one mile from a rail station. As such, it is automobile-dependant¹⁴; at odds with the goal cited

¹³ A primary Town Center along Main Street and surrounding blocks was identified as the core of the district; a larger, secondary area included this core and extended to the "gateway corridors into the Town Center." The project locus lies outside both areas.

¹⁴ The project calls for 438 parking spaces; 1,774 automobile trips per day will be generated, according to the applicant. See November 12, 2015 letter at p. 2.

by the applicant;¹⁵ and inconsistent with the MetroFuture Plan with respect to "adequacy of infrastructure." Further, where the project is outside the Town Center, it does not constitute or support "economic development with a Smart Growth perspective," suggested by the applicant (see ENF at p. 14), nor is it consistent with the MetroFuture Plan's recommendations for economic development - unless every addition of housing units, anywhere, is said to promote economic development.

Further, the proposed project eliminates all functional open space from the parcel, cramming buildings, roadways, parking areas and other infrastructure into an historically agricultural and undeveloped parcel. This is entirely inconsistent with the MetroFuture principal cited by the applicant that "new growth will occur through reuse of previously developed land and buildings." See ENF at p. 15. The applicant's statement that "the existing open space on the site will remain as open space" is inaccurate and misleading. The "open space" referenced by the applicant consists of remnants of land, like carpet scraps, left over following the placement of buildings surrounded by acres of parking lots, drainage structures, and roadways. These remnants of open space are accessible only by traversing active parking lots and roadways, and as such, are unrelated to the preservation of open space as that term is used in the MetroFuture Plan.

Finally, the applicant provides no discussion as to how the proposed project is consistent with the MetroFuture Plan with respect fourth criterion identified in the ENF, "compatibility with adjacent land uses."

An EIR should be required, and it should include a compete alternatives analysis.

C. Inconsistency with Neighborhood and with Principals of Site Planning

The scale, mass, and height of the proposed buildings are not compatible with the adjacent residential neighborhoods. For the portion of the site near Franklin Street, townhouses are used to create a transition presenting residential scale when viewed from Franklin Street. However, the residences at the end of Beacon Street that are elevated up to 40± feet above the typical finished grades of the project site, and the houses on Ellen Road that are elevated up to 60± feet above the typical finished grades of the project site, will be significantly impacted by Building B and the easterly wing of Building C - which are five (5) stories in height along the easterly edge of the development - given that the intervening land between the residences and these buildings generally slopes continuously downward. This change in grade substantially negates the buffering effect that would otherwise arise from the intervening treed buffer. Greater building height can be considered for Building A and the westerly wing of Building C that are located along the westerly edge of the

¹⁵ The applicant cites to a goal relating to "low income households" and a related objective that affordable housing units "be located within 1/2 mile of fixed-route transit service." See ENF at p. 15. The proposed project consists of 75% market rate units and 25% moderate-income units, none of which will be priced for "low income households".

Development Footprint because they are more remote from neighboring residences. Alternatives should have been developed and evaluated, but were not.

The applicant has refused to evaluate alternatives. Although some modest reduction in unit count may result, a thorough analysis of measures to avoid and minimize adverse effects on visual quality and community character is an important component of the environmental analysis for this project.

An EIR should be required, and it should include an analysis of stepped height buildings with lower buildings placed in proximity to abutting residences.

D. Lack of assessment of traffic impacts, parking, pedestrian and bicycle accommodations

A consultant to the Zoning Board of Appeals, Jeffrey S. Dirk, P.E., PTOE, Vanasse & Associates, Inc., has raised the following specific concerns, all of which are directly associated with the size, density and location of the Project.

Traffic impacts

Access to the project site will be provided by way of a boulevard-type driveway that will intersect the north side of Franklin Street approximately 550 feet southeast of Franklin Place (the access to Stoneham High School).

The project site is not currently served by public transportation and, therefore, the vast majority of the residents of the project will use private automobiles as their primary mode of transportation. As a result, the project is expected to add over 1,700 new vehicle trips daily to Franklin Street, a heavily travelled commuter route between Stoneham and Melrose that also provides access to Stoneham High School and the Colonial Park Elementary School. As noted above, the entrance to Stoneham High School is located approximately 550 feet southeast of the proposed entrance to the project site. During school drop-off and pick-up periods, vehicle queues from the High School driveway extend past the entrance to the project site and will inhibit the ability of residents to enter and exit the project. The added traffic that will be associated with the project will further exacerbate these conditions.

In order to mitigate these impacts, the Applicant has proposed several transportation infrastructure improvements, including the restriping of Franklin Street (a public way over which the Applicant has no legal authority or control) to provide a left-turn lane at the Project site driveway (for motorists entering the project site) and the construction of a pedestrian crosswalk for crossing Franklin Street that will include a pedestrian actuated beacon (High-Intensity Activated Crosswalk, a.k.a. "HAWK"). In order to accommodate these improvements, the Applicant is proposing to reduce the shoulder width along the north side of Franklin Street to an extent that the remaining shoulder will no longer support on-street parking or bicycle travel. Although the ZBA acknowledges the benefit of

providing a controlled pedestrian crossing, the addition of the left-turn lane to serve the project is necessitated by the size and scale of the development and its resulting traffic impacts to Franklin Street.

We note that removal of the possibility of bicycle travel from Franklin Street is in direct conflict with the Commonwealths Sustainable Development principles, and thus with MassHousing's project eligibility letter for this project, which requires compliance with such principles. It is axiomatic that the MEPA process enforces the Commonwealth's Sustainable Development principles. Compliance with such principles, and the project eligibility letter, is rendered impossible if a left-turn lane is imposed on Franklin Street due to the density of this development.¹⁶

A reduction in the project to an appropriate size would negate the need to construct a left-turn lane, minimize the volume of new traffic added to Franklin Street and the associated impacts, and maintain the ability of Franklin Street to accommodate bicycle travel in this area on this public way. Unrebutted testimony from Jeffrey Dirk, P.E. has made clear that the left turn lane would not be required with a project density of no greater than 125 dwelling units.

Parking

The project includes on-site parking for 438 vehicles, or a parking ratio of approximately 1.66 spaces per residential unit (assuming 259 new dwelling units), primarily comprised of surface parking located throughout the project site. This parking ratio is below Stoneham's zoning requirements of 2.0 spaces per residential unit. While the Town of Stoneham is sensitive to the goal of providing a balanced parking supply that encourages the use of alternative modes of transportation to single-occupant vehicles, given the current lack of public transportation services to the project site, it is critical that sufficient parking is provided for the Project. This need should also be balanced with the impacts that surface parking creates on stormwater management.

Reducing the number of residential units and/or placing more parking beneath the proposed buildings could achieve the goals of balancing the parking supply and reducing impervious area.

Pedestrian and Bicycle Accommodations

The Town of Stoneham has been and continues to advocate for pedestrian and bicycle accommodations throughout the Town. These accommodations benefit the Town's residents and the region by reducing automobile usage, improving air quality and providing healthier transportation options. The Town has been working with the

¹⁶ Sustainable Development principles violated by the proposed project include Principle 3 (Make Efficient Decisions); Principle 4 (Protect Land and Ecosystems); Principle 5 (Use Natural Resources Wisely); Principle 9 (Promote Clean Energy); and Principle 10 (Plan Regionally).

Metropolitan Area Planning Council, MassDOT and neighboring communities to advance the completion of the Tri-Community Bikeway.

As described previously, the applicant has proposed specific mitigation measures for the project that are totally at odds with the Town's goal to improve bicycle access. Specifically, the proposed addition of a left-turn lane on Franklin Street to serve the development will require the permanent loss of bicycle accommodations on this public way.

A reduction in the project to an appropriate size would allow for the Town to maintain current bicycle accommodations in this area and afford opportunities for future enhancements.

In sum, an EIR should be required, including an assessment of the proposed project's impacts on traffic, parking, pedestrian and bicycle accommodations, and consideration of a project of reduced size reflecting the above concerns.

E. Lack of Assessment or mitigation of noise and other construction impacts

Impacts to abutters from construction noise, vibration, or required blasting should be identified. To date, the applicant has refused to provide any quantitative analysis of such impacts on abutting residences. Although these residences are separated by approximately 100 feet from the active development area, most of the intervening land is herbaceous wetland that provides no shielding. Further many of the abutting residences are raised 20 to 40 feet above the active development area, enhancing their exposure to noise.

An EIR should be required, and it should include an analysis of construction phase noise and vibration impacts on sensitive receptors.

F. Lack of Assessment of Prime Forest Land

Substantial quantities of ledge are expected to be removed during construction including substantial ledge believed to be located beneath the wooded hill at the northwest corner of the site. This land is identified as Prime Forest Land on MassGIS.

An EIR should be required, and it should include an analysis of the irretrievable loss of prime forestland.

VIII. Should an EIR not be required, the project should be conditioned to minimize environmental impacts

Should the Secretary not require an EIR, we request that the project be conditioned as follows to minimize environmental damage:

Stormwater Management: The project should be conditioned to entail DOT participation in the evaluation and construction of measures to control flooding and health hazards in the drainage way south of the Weiss Farm Culvert in Franklin Street.

The project should be conditioned to require a proper evaluation of stormwater runoff from the project site as a component in the large watershed and wetland system of which the Project Site is a part.

The project should be conditioned to require full reconstruction of a new dam and all other components of a stormwater management system needed to control offsite flooding. We note again that the construction of a new dam, as proposed and required for this project, requires the preparation of an EIR.

Wetlands:- The project proposes extensive alteration of buffer zones to accommodate site improvements, primarily parking. Work in buffer zones has a high probability of impacting bordering wetlands, which is the reason that DEP regulations require regulation of work in buffer zones.

The project should be conditioned so as to avoid alteration of buffer zones. The project should also be conditioned so as to comply with the 2006 and 2010 ACOs and the Conservation Commission's July 9, 2015 Enforcement Order (as well the WPA and regulations, and Stoneham's Wetlands Protection Bylaw).

Prime Forest Land: The project should be conditioned so as to avoid the irretrievable loss of prime forestland.

Site Planning and Site Design: The project should be reduced in size and conditioned so as to minimize adverse effects on visual quality and community character.

Traffic: The project should be reduced in size so as to avoid the need to construct a left turn lane, minimizing the volume of new traffic added to Franklin Street and the associated impacts, and maintain the ability of Franklin Street to accommodate bicycle travel on this public way.

Bicycle and Pedestrian Accommodations: See above; the project should be reduced in size, eliminating the need for a left-turn lane. This will ensure retention of bicycle travel on Franklin Street as required by the Commonwealth's Sustainable Development Principles and by MassHousing in its project eligibility letter.

Parking: The project should be reduced in size and conditioned so as to achieve the goals of balancing parking supply and reducing impervious area.

Noise: The project should be conditioned so as to minimize construction noise, vibration, and other construction impacts on abutting properties.

Matthew A. Beaton, Secretary

December 21, 2015

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Conclusion

The purpose of MEPA is not, as this ENF would suggest, to facilitate residential construction, affordable or otherwise. Rather, the purpose of MEPA is to "provide meaningful opportunities for public review of the potential environmental impacts of projects for which [state] Agency Action is required and to assist each agency is using . . . all feasible means to avoid Damage to the Environment or, to the extent Damage to the Environment cannot be avoided, to minimize and mitigate damage to the Environment to the maximum extent practicable." 301 CMR 11.01(a).

As the discussion above indicates, the impacts of this project - as well as the ongoing WPA violations on the site - are such that an EIR is needed to satisfy these purposes of MEPA. The Stoneham Board of Selectmen, Board of Appeals and Conservation Commission respectfully request that the Secretary require the applicant to prepare an EIR of a scope fully commensurate with the project impacts. In the alternative, the Board of Selectmen, Board of Appeals and Conservation Commission respectfully request that the Secretary condition the project so as to minimize the environmental impacts discussed above.

Respectfully submitted on behalf of the Board of Selectmen, Conservation Commission and Board of Appeals of the Town of Stoneham, acting as special counsel,

HUGGINS AND WITTEN, LLC

/s/ Jonathan D. Witten

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Member

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