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January 15, 2021

Town of Belmont  
Zoning Board of Appeals  
Attn: Nicholas Iannuzzi, Chair  
Homer Municipal Building, 2nd Floor  
19 Moore Street  
Belmont, MA 02478

**Re: Chapter 40B Application: 91 Beatrice Circle, Belmont, MA (Case No. 21-01)**  
**Applicant: 91 Beatrice Circle, LLC**

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Dear Board Members:

This office is legal counsel to 91 Beatrice Circle, LLC, the Applicant in the above-referenced proceeding. We are in receipt of correspondence from Messrs. Timothy Fallon and Dan Hill on behalf of a group of neighbors styling themselves as “Build Wise Belmont”. In both letters, this neighborhood group falsely claims that the Town of Belmont is entitled to invoke “Safe Harbor” based on 1.5% General Land Area Minimum (GLAM) in accordance with 760 CMR 56.03(8).<sup>1</sup> Per the Board’s instructions, the Applicant hereby submits this response to the neighborhood group’s correspondence. For the reasons discussed below, the Applicant respectfully submits that all evidence conclusively establishes that Belmont is not eligible to claim this Safe Harbor, and, as such, no claim of Safe Harbor can in good faith be made at this time.

In order to assess the neighborhood group’s filing, the Applicant has retained Nels Nelson, a Senior Planner at Stantec, and a recognized expert in Global Information Systems (GIS) analysis – particularly in the context of claims of Safe Harbor based on GLAM. Mr. Nelson is perhaps the foremost expert in this field in the Commonwealth of Massachusetts, having offered expert testimony to the Housing Appeals Committee (HAC) in numerous proceedings. Indeed, in the

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<sup>1</sup> The neighborhood group states in its letter that it had been working on preparing information for the Board’s consideration in relation to the issue of GLAM for an unspecified number of “weeks”, yet neither its members nor its counsel provided copies of this correspondence to either the Board or the Applicant until the day of the initial public hearing of this matter. Notwithstanding the neighborhood group’s discourteous approach, which was in direct violation of the Board’s policy that such filings be made at least one week before a hearing, the Applicant has endeavored to review and assess the Neighborhood Group’s claims under the extremely limited timeframe available.

leading HAC case on the topic of GLAM calculation, *Braintree Zoning Bd. of Appeals v. 383 Washington Street, LLC*, 14 MHACR 9 (Mass. Hous. App. Comm. June 27, 2019), Mr. Nelson has the distinction of having been the expert witness for the prevailing party.

The Applicant requested that Mr. Nelson review the neighborhood group's filing and assess its compliance with the applicable provisions of 760 CMR 56 and DHCD's *Guidelines for Calculating General Land Area Minimum*. Enclosed herewith is a memorandum dated January 15, 2021 from Mr. Nelson, in which he concludes, among other things, that the neighborhood group's calculation of GLAM vastly overestimates the Affordable Land Area in Belmont based on numerous errors and misapplications of the *Guidelines*. More specifically, he concludes that the correct calculation of GLAM is approximately 1.08%, and thus that Belmont falls well short of meeting the necessary criteria to claim this Safe Harbor. As such, we respectfully submit that a claim of Safe Harbor cannot in good faith be made by the Board at this juncture.

Rather than repeat Mr. Nelson's conclusions at length, I would instead like to address several legal and procedural points implicated by the neighborhood group's filings. In particular, the Applicant objects to the neighborhood group's disingenuous suggestion that the enforceability of the *Guidelines* (particularly as it requires the exclusion of non-Directly Associated land area from the calculation of Affordable Land Area) is legitimately in question. This is deeply misleading for two reasons.

First, it should be noted that the requirement to exclude non-Directly Associated land area from the GLAM numerator is based on Chapter 40B regulations, 760 CMR 56.03(3)(b) – not the *Guidelines*; the *Guidelines* merely provide specific guidance to municipalities on how to properly calculate Directly Associated area in accordance with 760 CMR 56.03(3)(b). Thus, even if the *Guidelines* were deemed unenforceable, the requirement to exclude non-Directly Associated land area would still be applicable.

Second – and more importantly – while it is true that a number of frivolous challenges to the *Guidelines* have been attempted, none to date has been successful, and the HAC has consistently rejected such challenges, as they did in *Arlington Bd. of Appeals v. Arlington Land Realty LLC*, 14 MHACR 23, 30 (Mass. Hous. App. Comm. Oct. 15, 2019) (citing *Zoning Bd. of Appeals of Amesbury v. Hous. App. Comm.*, 457 Mass. 748, 760 n. 17 (2010); *Royce v. Comm'r of Corr.*, 390 Mass. 425, 427 (1983)). As the neighborhood group's counsel is well-aware, the current state of the law as it applies to the Board's consideration of this issue is that the *Guidelines* are fully valid and enforceable.

Next, in reference to the neighborhood group's reference to the "collection and analysis of data" needed to support a GLAM Safe Harbor claim, the Board should be aware of the significant burden and expense that the Town of Belmont would be forced to incur in order to claim this Safe Harbor. As noted in 760 CMR 56.03(8)(a), doing so would require the Board to issue notice by January 26, 2021 stating "the factual basis for that position, including any necessary supportive documentation." Further, "[t]he Board shall have the burden of proving satisfaction of the grounds

for asserting that a denial or approval with conditions would be consistent with local needs . . . .” Additionally, 760 CMR 56.03(3)(d) requires that all evidence filed by the Board “shall comply with any guidelines issued by the Department.”

In this regard, I would direct the Board’s attention to Section VI and Appendix A of the *Guidelines*, which outline the evidence and electronic data that must be filed by the Board (by January 26, 2021) in order to meet the Board’s burden of proof. The data required go far beyond the basic documents submitted by the neighborhood group, and include, among other things, the following information: (1) MassGIS Level 3 digital parcel standard-compliant data, (2) spatial data files and tabular data files relating to all relevant land categories, (3) map images documenting each step of the GLAM calculation process, (4) digital copies of all relevant local regulations, and (5) where necessary, photographs documenting the calculation of Directly Associated Area.

Because the process of invoking the GLAM Safe Harbor is such an intensive process, the *Guidelines* contemplate that the process of compiling the information needed to do so commence shortly after the filing of the application for project eligibility – which here occurred over eight months ago. Further, to the extent the Board intends to seek a Group Home Acreage Calculation, the *Guidelines* require such a request to be made within seven (7) days of the Comprehensive Permit application, which here did not occur. It is simply too late to make this request at this late date, and the Applicant respectfully submits that it would be unreasonable to make such a request to DHCD under the circumstances.

Relatedly, in weighing the decision of whether to invoke Safe Harbor, the Applicant respectfully suggests that the Board should be aware that pursuing an ill-fated claim of Safe Harbor would entail a significant investment by the Town of Belmont, both in terms of personnel hours and also monetarily, in the form of legal and consultancy fees. The high monetary cost to the Town (and its taxpayers) to pursue an appeal of this issue, in our view, would be a considerable waste of municipal funds that could be better spent elsewhere to advance the community’s needs and goals – particularly given the challenging economic climate during the COVID-19 pandemic.

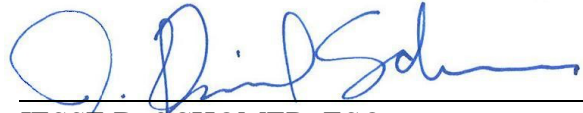
I would note in conclusion that the neighborhood group’s request that the Board invoke the GLAM Safe Harbor is part and parcel of a disturbing trend whereby private parties seeking to thwart the development of affordable housing attempt to coopt the public hearing process in the service of their own private property interests – even under circumstances where, as here, there is no legally supportable Safe Harbor claim to be made. Given the pressing need for affordable housing in the Commonwealth, this proliferation of such a cynical tactic is deeply unfortunate.

In sum, the applicant respectfully urges the Board to decline to petition DHCD for Safe Harbor designation. Given the irrefutable evidence that Belmont does not meet the criteria for this Safe Harbor, to nonetheless pursue such a claim would be a wasteful, frivolous exercise that would not only prejudice the applicant, but also would be contrary to the interests of the Town and its taxpayers.

Both I and Mr. Nelson will be in attendance at the Board's January 21, 2021 hearing and available to answer any questions the Board may have in regards to GLAM. We look forward to discussing this issue further with the Board. Thank you.

Respectfully,

REGNANTE STERIO LLP



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JESSE D. SCHOMER, ESQ.

THÉODORE C. REGNANTE, ESQ.

cc.     Ara Yogurtian  
         Glenn Clancy  
         Patrice Garvin  
         George Hall, Esq. (Belmont Town Counsel)  
         Timothy Fallon  
         Dan Hill