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June 26, 2023

Ms. Ellen O'Brien Cushman
Town Clerk
Town of Belmont
455 Concord Avenue
Belmont, MA 02487

Mr. Glen R. Clancy, P.E.,
Director of the Office of Community
Development
Town of Belmont
19 Moore Street
Belmont, MA 02487

Re: *Notice of Appeal (Zoning Bylaw § 7.3.3(f); G.L. c. 40A, §§ 8, 15);
Request for Enforcement (G.L. c. 40A, §7);
April 19, 2023 Design and Site Plan Review Opinion (Planning Board 23-04);
Belmont Hill School, Inc.*

Dear Ms. Cushman and Mr. Clancy:

This firm and I represent the residents of the Town of Belmont named on the attached list.

Pursuant to Section 7.3.3(f) of the Zoning Bylaw of the Town of Belmont, and Gen. L. c. 40A, §§ 8 and 15, these residents are hereby appealing the April 19, 2023 Design and Site Plan Review Opinion and Decision ("BHS Site Plan Review Decision"), in Planning Board application 23-04, for a multi-phased project proposed by Belmont Hill School, Inc. ("BHS"). This appeal is made in connection with appealing the decision by the Office of Community Development, on or about June 8, 2023, to issue permits in connection with the BHS project that was the subject of the BHS Site Plan Review Decision. For the same reasons discussed below, these residents also request that the Office of Community Development enforce the Town's Zoning Bylaw, pursuant to G.L. c. 40A, § 7, by revoking and annulling any permits issued to BHS following the BHS Site Plan Review Decision and withholding any further permits pending further action by the Zoning Board of Appeals and Planning Board.

The Planning Board's approval as reflected in the BHS Site Plan Review Decision was a prerequisite to the right of the BHS project to receive the June 8, 2023 permits from the Office of

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Community Development (or any other permits from OCD), and thus that decision may be appealed in connection with the issuance of such permits. Section 7.3.3(f) of the Zoning Bylaw provides that "any appeal" of a decision on a Design and Site Plan Review application "may be filed with [sic] Zoning Board of Appeals in conjunction with an appeal from the denial or grant of a Building Permit for the subject site." Decisions by the Massachusetts Supreme Judicial Court and Appeals Court confirm that a right of appeal of site plan review decisions to the Zoning Board of Appeals, for projects not requiring a special permit, may be exercised in connection under with an appeal under G.L. c. 40A, §§ 8 and 15 of a permit that has been issued in connection with the project that is the subject of the site plan review decision. *See St. Botolph Citizens Comm., Inc. v. Boston Redev. Authy.*, 429 Mass. 1, 9 (1999); *Dufault v. Millennium Power Partners, L.P.*, 49 Mass.App.Ct. 137, 142 (2000); *Cumberland Farms, Inc. v. Planning Bd. of Bourne*, 56 Mass.App.Ct. 605, 608–610 (2002).¹

The grounds of the appeal are as follows: The BHS Site Plan Review Decision was premised on a misapplication of ¶ 2 of G.L. c. 40A, § 3, the so-called "Dover Amendment," to the proposed project, and a misinterpretation of the Planning Board's authority under the Dover Amendment to reasonably regulate and condition its approval of the proposed project. Under the Planning Board's misinterpretation of the Dover Amendment, the Planning Board understood that the Dover Amendment precluded the board in approving the project from nevertheless applying conditions to the project where such conditions did not reflect regulations expressly set forth in the Zoning Bylaw. Under the Planning Board's interpretation of the Dover Amendment as it applied to the proposed BHS project, the Planning Board erroneously believed it was permitted only to apply regulations that were expressly set forth in the Zoning Bylaw. As the misunderstanding was succinctly illustrated on Page 9 in the BHS Site Plan Review Decision, the Planning Board believed it could only enforce "'reasonable restrictions' *of the ZBL*" (emphasis in the original), meaning the Planning Board understood that it could not condition the Planning Board's approval of the BHS project on conditions if such requirements were not expressly set forth in the Zoning Bylaw. (This misunderstanding also manifested itself in numerous statements made by Planning Board members at the public hearing stating to the public, in effect, that the board's hands were "tied" by the Dover Amendment such that the board

¹ We recognize that the permits issued on June 8, 2023 by OCD were not building permits *per se*. However, G.L. c. 40A, §§ 8 and 15 provide a right of appeal to the Zoning Board of Appeals for any person aggrieved by *any* action of a zoning enforcement officer, not only the issuance of a building permit. Moreover, this appeal also is a request for enforcement of the Town's Zoning Bylaw under c. 40A, § 7 on the grounds that the BHS project lacks the required valid Design and Site Plan Review opinion and approval from the Planning Board.

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was not permitted to place conditions on its approvals if such requirements were not express requirements of the Zoning Bylaw.)

This interpretation of the Dover Amendment, respectfully, was error on the part of the Planning Board. The Dover Amendment permits municipalities to apply reasonable regulations and conditions to a project that is nonetheless protected by the Dover Amendment through site plan review, so long as such reasonable regulations and conditions do not discriminate against a protected use or nullify the protected use. Indeed, every project that undergoes site plan review under Belmont's Zoning Bylaw is, by definition, a project allowed as of right. Nevertheless, such projects can be subjected to reasonable conditions. And nothing in the Dover Amendment itself, or the caselaw interpreting the statute, precluded the Planning Board from conditioning its approval on conditions not expressly set forth in the Zoning Bylaw, so long as such conditions were reasonable and did not nullify the protected educational use. The Dover Amendment protects the proposed educational use, and under both the Zoning Bylaw and the Dover Amendment the Planning Board was not free to deny an application for a protected use; but the Planning Board was always permitted to require the project to meet reasonable, non-discriminatory conditions protective of legitimate municipal interests that did not nullify the protected use. The Planning Board's misunderstanding that it could not so condition its approval fatally infected its consideration throughout its review, and its ultimate decision.

Under the Zoning Bylaw, the purpose of the Design and Site Plan review includes the following:

7.3.1(b): to insure that the development which is subject to this review is planned and designed to minimize impacts on its abutters, the neighborhood, and the environment; [and]

7.3.1(c): to provide an orderly review procedure where site plans of proposed projects can be approved with reasonable conditions which will further the purposes of these By-laws.

However, under the Planning Board's misapplication of the Dover Amendment to the application, the board believed that it could *not* condition the project so as to minimize adverse impacts "on its abutters, the neighborhood, and the environment," and to otherwise further the purposes of the Zoning Bylaw. Accordingly, the Planning Board failed to consider whether to condition its approval – and if so, how – to protect the abutters, the neighborhood, and the environment, as the Zoning Bylaw requires to board to do.

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For these reasons, the residents named below appeal to the Zoning Board of Appeals and respectfully ask that the Zoning Board of Appeals:

- (1) schedule a public hearing on this appeal in accordance with G.L. c. 40A, § 15;
- (2) revoke the permits issued the Office of Community Development on June 8, 2023 for the BHS project,
- (3) revoke any other permits issued by the Office of Community Development for the BHS project;
- (4) void or otherwise overturn the April 19, 2023 Decision of the Planning Board on Design and Site Plan Review Opinion; and
- (5) remand the application of the Belmont Hill School for Site Plan Review to the Planning Board for further review proceedings and consideration under the correct application of the Dover Amendment and the Zoning Bylaw, including whether further *reasonable* conditions to the Planning Board's approval on design and site plan review of the BHS proposed development are necessary to insure "that the development . . . is planned and designed to minimize impacts on its abutters, the neighborhood and the environment," as required by § 7.3.1(b) of the Zoning Bylaw.

For these same reasons, these residents ask that OCD enforce the Zoning Bylaw by revoking the permits issued for the BHS project and withholding all other permits for the BHS project pending further proceedings by the Zoning Board of Appeals and Planning Board.

Thank you for your attention to this matter.

Sincerely yours,

/s/ Dylan Sanders
Dylan Sanders



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cc: Zoning Board of Appeals, Town of Belmont, MA
Planning Board, Town of Belmont, MA

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Appealing Residents

Raif Geha 248 Rutledge Rd, Belmont
Orietta Geha 248 Rutledge Rd, Belmont
Christian Liles 216 Rutledge Rd, Belmont
Dagmar Liles 216 Rutledge Rd, Belmont
Melissa Liska 208 Rutledge Rd, Belmont
Matthew Schwartz 200 Rutledge Rd, Belmont
Carolyn Gillette 200 Rutledge Rd, Belmont
William Bihrl 178 Rutledge Rd, Belmont
Mary Bihrl 178 Rutledge Rd, Belmont
Brian Palmer 210 Clifton St, Belmont
Lisa Palmer 210 Clifton St, Belmont
Ann Roe 269 Prospect St, Belmont
Barry Lubarsky 257 Rutledge Rd, Belmont
Amy Grossman 249 Rutledge Rd, Belmont
Mark Grossman 249 Rutledge Rd, Belmont
Lois Pines 175 Rutledge Rd, Belmont
Barsam Joyce 170 Rutledge Rd, Belmont
Barsam Paul 170 Rutledge Rd, Belmont
Ellen Harris 162 Rutledge Rd, Belmont
Matthias Mokros 162 Rutledge Rd, Belmont
Fred Heller 154 Rutledge Rd, Belmont
Glenn Morgan 144 Rutledge Rd, Belmont
Sandy Fleming 144 Rutledge Rd, Belmont
Hillary Berkman 141 Rutledge Rd, Belmont
Wendelyn Kistler 97 Rutledge Rd, Belmont
Philip Kistler 97 Rutledge Rd, Belmont
Scott Miller 200 Clifton St, Belmont
Nancy Almquist 121 Clifton St, Belmont
Eric Almquist 121 Clifton St, Belmont
James Dow 95 Clifton St, Belmont
Jacquie Dow 95 Clifton St, Belmont
Peter Burke 216 Prospect St, Belmont
Rosemary Burke 216 Prospect St, Belmont
Bob Orfaly 225 Prospect St, Belmont
Sylvia Orfaly 225 Prospect St, Belmont
Michael Moskowitz 257 Prospect St, Belmont
Mary Moskowitz 257 Prospect St, Belmont
Carolyn Schwartz 46 Prospect St, Belmont
Michael Schwartz 46 Prospect St, Belmont
Rebecca Schwartz 46 Prospect St, Belmont

Marcia Sugrue 15 Village Hill Rd, Belmont
David Lesnit 15 Village Hill Rd, Belmont
Margaret Barsam 83 Village Hill Rd, Belmont
Deran Muckjian 108 Village Hill Rd, Belmont
Cynthia Muckjian 108 Village Hill Rd, Belmont
Jane Lappin 37 Amherst Rd, Belmont
Frederique Rigoulot 80 Woodfall Rd, Belmont
Vincent Rigoulot 80 Woodfall Rd, Belmont
Courtney Sturgeon 409 Common St, Belmont
Chloe Sturgeon 409 Common St, Belmont
Jean Devine 52 Raleigh Rd, Belmont
Phil Chisholm 52 Raleigh Rd, Belmont
Elaine Dimopoulos 51 Oakmont Ln, Belmont
Samuel Rubin 168 Claflin St, Belmont
Linda Levin-Scherz 75 Woodbine Rd, Belmont
Jeff Levin-Scherz 75 Woodbine Rd, Belmont
Suhgenie Kim 26 Prentiss Lane, Belmont
Janet Liddell 83 Leicester Rd, Belmont
Bruce Liddell 83 Leicester Rd, Belmont
Carolyn Bishop 7 Orchard St, Belmont
Walter Bishop 7 Orchard St, Belmont
Vanessa DiMauro 92 Richmond Rd, Belmont
Andrew Schiermeier 90 Fletcher Rd, Belmont
Benoit Schiermeier, 90 Fletcher Rd, Belmont
Marie-Cecile Ganne 90 Fletcher Rd, Belmont
Sarah Wang 273 Orchard St, Belmont
Allison Lenk 145 Sherman St, Belmont
William Anderson 76 Stony Brook Rd, Belmont
Katherine A Anderson 76 Stony Brook Rd,
Belmont
Pam Moore 47 Fletcher Rd, Belmont
Lucy Brown 35 Ross Rd, Belmont
Summer Brown 35 Ross Rd, Belmont
Judith McSwain 35 Ross Rd, Belmont
Constantine Chinoporos 25 Crestview Rd,
Belmont
Alix Pollack 15 Dean St, Belmont
Brian Iler 482 School Street, Belmont
Russell Mann 68 Wellesley Rd, Belmont
Diane Toomey 46 Flett Rd, Belmont



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Cabell Eames 26 Lewis Rd, Belmont
Curtis Eames 26 Lewis Rd, Belmont
Chris Doyle 15 Cedar Rd, Belmont
David Brams 15 Cedar Rd, Belmont
Shealagh Brams 15 Cedar Rd, Belmont
Craig White 25 Lewis Rd, Belmont
Laura Duncan 699 Concord Ave, Belmont
Peter Lappin Griffiths 39 Amherst Rd, Belmont
Joseph Baldwin 24 Ross Rd, Belmont
Jennifer Baldwin 24 Rodd Rd, Belmont
Annette Hannon 74 Village Hill Rd, Belmont
Frank Hannon 74 Village Hill Rd, Belmont

Portia Thompson 11 Beatrice Cir, Belmont
Barbara Chinoporos 25 Crestview Rd, Belmont
Anne DiGiovanni 29 Woodbine Rd, Belmont
Jim Sullivan 32 Richmond Rd, Belmont
Lisa Johansen 32 Richmond Rd, Belmont
Emily Sullivan 32 Richmond Rd, Belmont
Grace Sullivan 32 Richmond Rd, Belmont
Allison Martin 1 Hillcrest Terr., Belmont
Juliet Jenkins 76 Lorimer Rd, Belmont
Judith Feinleib 87 Oakley Rd, Belmont
Lisa Oteri 31 Waverley Terrace, Belmont
Ralph Jones 56 Summit Rd, Belmont

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**OFFICE OF COMMUNITY DEVELOPMENT
TOWN OF BELMONT**

**19 Moore Street
Homer Municipal Building
Belmont, Massachusetts 02478-0900
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**Building Division
(617) 993-2664
Engineering Division
(617) 993-2665
Planning Division
(617) 993-2666**

June 30, 2023

Mr. C. Dylan Sanders
Beveridge & Diamond
155 Federal Street
Suite 1600
Boston, MA 02110

Re: Request for Enforcement (G.L. c. 40A, § 7) – Belmont Hill School

Dear Mr. Sanders:

This is in response to the "Request for Enforcement (G.L. c. 40A, § 7)" included within your letter to me and the Belmont Town Clerk dated June 26, 2023. More specifically, you request, on behalf of the persons listed in the Appendix to your letter, "that the Office of Community Development enforce the Town's Zoning Bylaw, pursuant to G.L. c. 40A, § 7, by revoking and annulling any permits issued to [the Belmont Hill School ("BHS")] following the BHS Site Plan Review Decision and withholding any further permits pending further action by the Zoning Board of Appeals and Planning Board." The remainder of your letter, as I understand it, relates to your client group's appeal of the Belmont Planning Board's April 19, 2023 Design and Site Plan Review Opinion and Decision to the Zoning Board of Appeals.

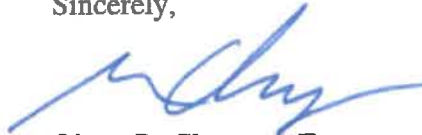
To date, the Office of Community Development has issued two permits for the site that is subject to the BHS Decision: (1) a Storm Drain installation permit, and (2) a Sanitary Sewer installation permit, both dated June 8, 2023.

G.L. c. 40A, § 7 states that "no permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law." The facilities proposed by BHS that the recently-permitted utility connections are designed to serve are uses permitted by right under the Zoning Bylaw and under G.L. c. 40A, § 3. They have received the required Design and Site Plan approval from the Planning Board. To the best of my understanding, the fact that residents have appealed the DSPR decision to the Zoning Board of Appeals does not stay or negate the validity or legal effect of that decision. For that reason, I do not believe that G.L. c. 40A, § 7 furnishes any lawful basis for me to revoke or annul the permits already granted to BHS for this project, or deny those permits that BHS is expected to apply for in the future, and I decline to do so.

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To the extent that G.L c. 40A, § 8 applies to this response, you may appeal to the Zoning Board of Appeals pursuant to that section.

Sincerely,



Glenn R. Clancy, P.E.
Director

Cc: Ellen Cushman, Town Clerk
George A. Hall, Anderson & Kreiger