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August 26, 2022

VIA Email ONLY: landuse@warner.nh.us

Ben Frost, Chairman
Warner Planning Board
c/o Janice Loz, Land Use Clerk
5 East Main Street
PO Box 265
Warner NH 03278

Re: Comet LLC/ Workforce Housing Site Plan Application

Dear Warner Planning Board:

Please be advised that this office represents Comet LLC regarding a pending site plan to build workforce housing in a commercial district C-1 near I-89 exit 9 in Warner. An application for a special exception, was submitted to build a 24-unit apartment building for affordable workforce housing. The hearing on said application was held before the Zoning Board of Adjustment (the “ZBA”) at its meeting on August 10, 2022. On August 15, 2022, the ZBA voted 4-1 to grant a special exception for the project.

Chair Ben Frost sent a notice of concerns dated August 21, relating to Comet LLC’s compliance with Warner Zoning Ordinance XIV-A(“WZO”). We address below some of Chair Frost’s concerns related to the legal requirements for workforce housing.

Proportion of Workforce Housing Units to Market-Rate Housing Units

Workforce housing fulfills the important need of providing affordable housing for members of the community. See RSA 674:58; RSA 674:59; RSA 672:1, III-e. Importantly, “[a]ll citizens of the state benefit from a balanced supply of housing which is affordable to persons and families of low and moderate income.” RSA 672:1, III-e New Hampshire law likewise recognizes that the “[e]stablishment of housing, which is decent, safe, sanitary and affordable to low- and moderate-income persons and families is in the best interests of each community and the state of New Hampshire and serves a vital public need.” *Id.* Accordingly, the “[o]ppportunity for development of such housing shall not be prohibited or unreasonably discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.” *Id.*

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Nashua, NH 03063
T (603) 889-9952
F (603) 595-7489

120 Water Street
2nd Floor
Boston, MA 02109
T (617) 523-8080
F (603) 226-2700

26 State Street
Suite 9
Montpelier, VT 05602
T (802) 552-4037
F (603) 226-2700

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Manchester NH 03104
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To encourage the development of affordable housing, RSA 674:59 requires that all municipalities that adopt land use ordinances and regulations “**shall provide reasonable and realistic opportunities for the development of workforce housing.**” (emphasis added). Additionally, RSA 674:58, III specifies that such “reasonable and realistic opportunities” must include opportunities for developments to be economically viable. Accordingly, the “[o]pportunity for development of such housing shall not be prohibited or unreasonably discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.” RSA 672:1, III(e) (cited by RSA 674:58, III).

Accordingly, the Planning Board may impose a certain proportion of workforce housing in the development, but it may not impose a ratio that would not be economically viable for the developer. *See* RSA 674:58-59; *Ten Harris Road, LLC v. Town of Windham*, PBA-2021-04, at 4-7 (Sept. 15, 2021); *see also* RSA 679:5, III (giving the Housing Appeals Board power to determine appeals where “the local land use board has imposed conditions of approval that render the proposal economically unviable . . .”). Requiring that all units in a workforce housing development be workforce housing would make the construction and operation of workforce housing developments economically unviable and thus unlawful. *See Ten Harris Road, LLC*, PBA-2021-04, at 5, 7 (noting that requiring 50% of units in a workforce housing development to be workforce housing may be economically unviable in some communities).

Warner’s zoning ordinance also contemplates these workforce housing developments. WZO XIV-A (C), (D), and (E) discuss the requirements of developments that include workforce housing and market-rate housing. Under WZO XIV-A.C.3, “[t]he combined total of all workforce housing types must equal a 15 percent designation of workforce dwelling units, at a minimum.” The developer of this workforce housing project, Comet LLC, is committed to providing 12 affordable workforce housing units out of 24 total units, for a term of 30 years. In addition, for the first 10 years of the development, there will be three (3) additional units that meet the workforce housing requirements. Since at least 50% of the proposed units are workforce housing, the minimum of 15% workforce housing requirement under the WZO is more than satisfied.

To be economically viable, the project needs to include a mix of workforce and market-rate housing of varying periods of duration, so Comet LLC has proposed that the development include up to 15 workforce housing units. This meets the Town of Warner Zoning requirements and also meets the State requirement to qualify for the Invest NH grant for workforce housing. Comet LLC submits that it satisfies required ratio of workforce and market-rate units under the provisions for workforce housing under state and local law. Requiring a greater proportion of workforce housing would be economically unviable for Comet LLC, and thus unlawful under New Hampshire law.

In order to meet the mandatory standard of providing “reasonable and realistic opportunities” for the development of workforce housing, the planning board must consider the collective impact of all such regulations on the workforce development being proposed. Conditions imposed by the planning board that make construction unprofitable, or that result in considerable delay to the project’s development or completion may result in adding costs that make the development economically unviable. Such action by the planning board would be contrary to the express mandatory workforce housing statutory requirements. Likewise, so as not to be unduly burdensome, the workforce housing statute allows the zoning or planning board to waive certain requirements. Pursuant to Article XIV-A, it is recognized by the Town that there are situations in which



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normal Site Plan review “may be waived without sacrificing public health, safety and welfare so long as proper safeguards are maintained.” Article XIV-A pp 26-27.

Certification of Tenant Income Eligibility

Comet LLC’s goal is to provide affordable workforce housing that primarily serves the labor force. The Workforce housing statute defines affordability as housing with combined rental and utility costs that do not exceed 30 % of a household’s gross annual income. The statute requires that the housing be affordable to a workforce that have earnings that range up to what might be characterized as middle income. For rental housing the workforce housing statute defines it as rental housing affordable at 60% of Area Median Income (AMI). In accordance with WZO XIV-A.D.2.b, Comet LLC will annually certify and report tenant eligibility. Comet LLC will certify tenant eligibility by requiring all tenants and prospective tenants to submit a copy of their IRS tax return upon renewing or signing a lease. The rental agreement will also require all tenants to notify Comet LLC of all changes to household income.

Term of Affordability of Restricted Units

Consistent with WZO XIV-A.E.3, the developer will commit to 12 workforce housing units for a term of 30 years and 3 additional workforce housing units for a term of 10 years, or such other term as required by state or local law from time to time.

Deed Restriction

Comet LLC’s proposed Deed Restriction, in draft form, in accordance with WZO XIV-A.E.4 is attached hereto as Exhibit 1.

Thank you for your prompt attention to this matter and do not hesitate to reach out to me with any questions. We look forward to the planning Board meeting on Monday August 29, 2022, at 7:00 pm, so the developer and his representatives can hopefully address all of the Board’s concerns.

Very truly yours,

RATH, YOUNG AND PIGNATELLI, P.C.
ATTORNEYS-AT-LAW

By: Jamie N. Hage

Cc. Client
Enclosure

Jamie N. Hage, Esq.

Exhibit 1

Draft Deed Description

Upon recording return to:

Comet LLC
84 Range Road
Windham, NH, 03087

DEED RESTRICTION
(Rental)

This DEED RESTRICTION (this “Deed Restriction”) is granted as of _____, 20__ by COMET LLC having a mailing address of 84 Range Road in Windham, NH (“Grantor”), for the benefit of Warner, NH having a mailing address of 5 East Main Street, PO Box 265, Warner NH 03278 (the “Municipality”), as such Deed Restriction may be amended from time to time.

WITNESSETH:

A. Grantor holds legal title to that certain real property located at 9 Rt 103 West, further identified as Map 35 and Lot 4-3 in the Tax Assessor’s Records of Warner, NH (the “Property”), and intends to construct a 24-unit rental housing development, consisting of 1 residential building, at the Property. No fewer than 12 units at the Property will qualify as Workforce Housing (as defined in RSA 674:58, IV, as amended from time to time) for period of 30 years from the date hereof and for the first 10 years from this date, an additional 3 units will qualify as Workforce Housing.

B. The Property was developed as Workforce Housing used to ensure the development of affordable, accessible, safe and sanitary housing, and subject to terms and conditions imposed by the Town of Warner.

C. The Property was developed in accordance with the InvestNH Capital Grant Program (the “Program”).

D. As a condition to the municipal government ordinance and the Program, the Grantor has agreed that this Deed Restriction be imposed upon the Property as a covenant running with the land and binding upon any successors to the Grantor, as owner thereof.

E. The rights and restrictions granted herein to the Grantor and the Municipality serve the public’s interest in the creation and retention of affordable housing for persons and households of low and moderate income and in the restricting of the resale price of property in order to assure its affordability by future low- and moderate-income purchasers.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Grantor hereby agrees that the Property shall be subject to the following rights and restrictions:

1. **Recitals Incorporated by Reference.** The foregoing recitals are incorporated by reference herein and made a part hereof.

2. **Affordability and Occupancy Requirement.**

(a) This Deed Restriction shall remain in effect from the date this Deed Restriction is recorded in the Merrimack County Registry of Deeds (“MCRD”) and continuing for (30) thirty years, or such other period as required by local or state law (“Affordability Period”). Any modification of the Affordability Period must be approved by the appropriate governmental authority, in writing, and recorded at the MCRD.

(b) This Deed Restriction’s compliance with the affordability requirements shall be monitored and enforced by Comet LLC and subject to review by the Warner planning board or other authorized municipal officials

3. **Rights of Mortgagees.**

In the event of foreclosure, all successors in interest remain bound by the terms of this program and the Deed Restriction required by the Program. If compliance with the deed restrictions becomes impossible or impracticable, the person(s) or organization holding title to the property must seek disposition instructions from the New Hampshire Department of Business and Economic Affairs and the authorized Town of Warner officials and comply with those instructions.

4. **Covenants to Run With the Property.**

(a) A copy of this Deed Restriction, as recorded, shall be provided to the appropriate officials of the Municipality.

(b) This Deed Restriction shall be deemed to be a workforce housing deed restriction.

(c) Grantor acknowledges, declares and covenants on behalf of Grantor and Grantor’s successors and assigns (i) that this Deed Restriction shall be and are covenants running with the land, encumbering the Property for the Affordability Period, and are binding upon Grantor’s successors in title and assigns, (ii) are not merely personal covenants of Grantor, and (iii) shall bind Grantor, and Grantor’s successors and assigns, and inure to the benefit of and be enforceable by the Municipality and its successors and assigns, for the Affordability Period.

5. **Miscellaneous Provisions.**

(a) **Amendments.** This Deed Restriction may not be rescinded, modified or amended, in whole or in part, without the written consent of the current owner of the Property and the Municipality.

(b) Notice. Any notices, demands or requests that may be given under this Deed Restriction shall be sufficiently served if given in writing and delivered by hand or mailed by certified or registered mail, return receipt requested, or via reputable overnight courier, in each case postage prepaid and addressed to the parties at their respective addresses set forth below, or such other addresses as may be specified by any party (or its successor) by such notice. All such notices, demands or requests shall be deemed to have been given on the day it is hand delivered or mailed:

Grantor:
Comet LLC
84 Range Road
Windham, NH, 03087
Attn: Adam Quinn, Manager

Municipality:
Town of Warner
5 East Main Street
PO Box 265
Warner NH 03278
Attn: Planning Board

(c) Severability. If any provisions hereof or the application thereof to any person or circumstance shall come, to any extent, to be invalid or unenforceable, the remainder hereof, or the application of such provision to the persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each provision hereof shall be valid and enforced to the fullest extent permitted by law.

(d) Third Party Beneficiary. The Municipality shall be entitled to enforce this Deed Restriction and may rely upon the benefits hereof.

(e) Gender; Captions. The use of the plural in this Deed Restriction shall include the singular, the singular, the plural and the use of any gender shall be deemed to include all genders. The captions used in this Deed Restriction are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of the intent of this Deed Restriction.

(f) Binding Successors. This Deed Restriction shall bind, and the benefits shall inure to, the respective parties hereto, their legal representatives, executors, administrators, successors, and assigns; provided, that Grantor may not assign this Deed Restriction or any of its obligations hereunder without the prior written approval of the Municipality pursuant to the terms of this Deed Restriction.

(j) Governing Law. This Deed Restriction is being executed and delivered in the State of New Hampshire and shall in all respects be governed by, construed and enforced in accordance with the laws of said State without giving effect to any conflict of law provision or rule.

(k) Counterparts. This Deed Restriction may be executed in several counterparts, each of which shall be deemed to be an original copy of all of which together shall constitute one agreement binding on all parties hereto, notwithstanding that all parties shall not have signed the same counterpart.

[signatures appear on next page]

IN WITNESS WHEREOF, the parties hereto each caused this Deed Restriction to be duly executed and delivered by themselves or their respective duly authorized representatives as of the day and year set forth above.

GRANTOR(S):

Comet LLC

By: _____

Name: _____

Title: _____

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK

In _____ on this ____ day of _____, 20__, before me personally appeared _____, the _____ of _____, to me known, and known by me to be the party executing the foregoing instrument and he/she acknowledged said instrument, by him/her executed to be his/her free act and deed, in said capacity, and the free act and deed of _____.

Notary Public

Printed Name: _____

My Commission Expires: _____

The terms of this Deed Restriction are acknowledged by:

MUNICIPALITY:

TOWN OF WARNER, NEW HAMPSHIRE

By: _____

Name: _____

Title: _____

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK

In _____ on this _____ day of _____, 20____,
before me personally appeared _____, the _____ of the
[NAME OF MUNICIPALITY], to me known, and known by me to be the party executing
the foregoing instrument, and he/she acknowledged said instrument, by him/her executed
to be his/her free act and deed, in said capacity, and the free act and deed of the [NAME
OF MUNICIPALITY].

Notary Public

Printed Name: _____

My Commission Expires: _____

Exhibit A

Copy of Deed