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December 31, 2014

**VIA E-MAIL**

Mr. Benjamin Avery  
Vice President of Marketing and Development  
BlackRock Construction, LLC  
302 Mountain Drive, Suite 300  
Colchester, Vermont 05446

Re: Zoning of Stormwater Infrastructure: Haystack Crossing, Hinesburg, Vermont

Dear Ben:

You asked me to review whether stormwater infrastructure supporting a proposed development in the Village Growth Area zoning district in Hinesburg, Vermont must be located entirely within that district pursuant to the Town of Hinesburg Zoning Regulations, dated November 5, 2013 (the "Regulations").

Although the proposed Haystack Crossing development ("Haystack Crossing") is located entirely within the Town of Hinesburg's Village Growth Area, a stormwater pond, which will serve Haystack Crossing and adjacent recreational fields that will be owned by the Town, is located outside of the Village Growth Area in the abutting Agricultural zoning district.

As an initial matter, because zoning ordinances contravene common law property rights, the Vermont Supreme Court has created the following special rules for the interpretation of zoning ordinances. First, "zoning ordinances are to be strictly construed in view of the fact that they are in derogation of common law property rights . . . and when exemptions appear in favor of the property owner, the exemptions shall be construed in favor of the owner."<sup>1</sup> In light of this standard, zoning regulations and restrictions "may not be extended by implication."<sup>2</sup> (Emphasis added). Rather, "[a]ny ambiguity or uncertainty must be decided in favor of the property owner."<sup>3</sup> (Emphasis added).

<sup>1</sup> *Glabach v. Sardelli*, 132 Vt. 490, 494 (1974); accord *In re Shearer Variance*, 156 Vt. 641 (1990) (mem.); *Town of Westford v. Kilburn*, 131 Vt. 120, 126 (1973); *City of Rutland v. Keiffer*, 124 Vt. 357, 360 (1964); see also *In re Vitale*, 151 Vt. 580, 584, (1989).

<sup>2</sup> *Murphy Motor Sales v. First Nat'l Bank*, 122 Vt. 121, 123-24 (1960) (citations omitted).

<sup>3</sup> *Id.* at 124 (citations omitted).

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The Regulations do not prohibit or restrict the extension of a project's stormwater infrastructure onto a portion of a development parcel located in a different zoning district. The only limitation on split-lot development in the Regulations is with respect to density (i.e. restricting the transfer of density from one district to another).<sup>4</sup> However, this provision does not prohibit the extension of project stormwater infrastructure across district lines.

While Vermont courts have not directly addressed the issue, courts in other jurisdictions have permitted the extension of a project's infrastructure onto portions of a development parcel located in a different zoning district, when, as is the case here, the municipal ordinance does not specifically prohibit such a practice. *See, e.g. People ex rel. First Nat. Bank & Trust Co. v. Deerfield* 50 Ill. App. 2d 349 (Ill. App.1964) (finding that there was nothing in a municipal ordinance to prevent the use of a single-family-zoned lot as an access way to a multiple-family-zoned lot); *Faulkner v. Keene* 85 N.H. 147, 155 A 195 (1931) (noting that the use of a residentially zoned strip of land for access to the remaining portion of the parcel, which was located in a commercial zoning district, was permitted); *Prospect Park v. McClaskey*, 151 Pa. Super. 467, 472 (Pa. Super. Ct. 1943) (finding that the use of commercially zoned land for a driveway that would lead to industrial property under the same ownership was not forbidden); *see also Duffy v. City of Dover*, 818 A.2d 1251 (N.H. 2003) (stating that a landowner was not prohibited from extending utility lines from a commercially-zoned portion of a lot to a portion of the same lot that was zoned residential).<sup>5</sup> Vermont courts would likely adopt this approach because zoning regulations and restrictions "may not be extended by implication" and because "[a]ny ambiguity or uncertainty must be decided in favor of the property owner."<sup>6</sup>

The only reference to stormwater infrastructure in the Regulations is in Article 5.1<sup>7</sup> and Article 6. Article 6 prohibits stormwater treatment facilities in Fluvial Erosion Hazard Areas and Floodways and also lists stormwater treatment facilities as a conditional use within areas located in the Special Flood Hazard Area that are located outside of Floodways. Importantly, the Haystack Crossing project is located outside any Flood Hazard Area or Fluvial Erosion Hazard Area.

While the Regulations do prohibit or restrict the construction of stormwater infrastructure in areas prone to floods or erosion, the Regulations do not forbid the development of stormwater

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<sup>4</sup> *Regulations, Section 2.4.4* (regulating density within the Village Growth Area including density "within a single parcel divided by a district line") (emphasis added).

<sup>5</sup> By contrast, courts have prohibited access ways to less restricted land when the ordinance specifically forbids such a practice. *58 A.L.R. 3d 1241 § 10b* (collecting cases in which access over more restricted land to the balance of a lot, lying in a less restrictive land, was forbidden). However, no such restriction exists under the Regulations.

<sup>6</sup> *Murphy*, 122 Vt. at 123-24.

<sup>7</sup> Article 5.1 of the Regulations addresses the application of planning standards such as "Transportation," "Municipal Services" and "Soil Erosion and Storm Water Run-off."

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infrastructure elsewhere. Had the Town of Hinesburg wanted to prohibit or regulate stormwater within the Agricultural district, or in the context of split-lot development, it could have done so as it did in flood-prone areas. As the Vermont Supreme Court has noted on many occasions, “[w]here the Legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the Legislature did so advisedly.”<sup>8</sup>

Because the Regulations do not prohibit the extension of a project’s stormwater infrastructure onto a portion of a development parcel located in a different zoning district, and in light of the rules of statutory construction discussed above, the development of Haystack Crossing’s stormwater system within the Agricultural zoning district should be permitted.

I hope this information addresses your questions. Please be in touch with any questions.

Very truly yours,

GRAVEL & SHEA PC



Robert H. Rushford

RHR:kjm

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<sup>8</sup> *Hopkinton Scout Leaders Ass'n v. Town of Guilford*, 2004 VT 2, ¶8 (2004); *In re Munson Earth Moving Corp.*, 169 Vt. 455, 465 (1999); *see also In re Vermont National Bank*, 157 Vt. 306, 312 (1991) (finding that, in construing a zoning ordinance, courts generally use the same rules of construction as statutes”).