Howard Barnet
33 Sabbaday Lane
Washington, CT 06793

May 9, 2021

Zoning Commission
Town of Washington
Bryan Memorial Town Hall
Washington, CT 06794

Re: 101 Wykeham Road

Dear Commissioners:

I write regarding the illegal use of the driveway to 101 Wykeham from Bell Hill Road. And I use the term "illegal" advisedly. The owner of the property was obligated to "permanently abandon" the driveway.

The Zoning Enforcement Officer learned of the illegal activity in early February but failed to take effective action. This history was described by Messrs. Parker and Rogness in their letter to you of March 30 (attached in electronic form).

The Commission has now received the advice of its attorney, Michael Zizka, by letter dated April 7. Attorney Zizka evidently agrees (as he should) that the 2013 Settlement Agreement (also attached in electronic form) is currently "in effect" by its terms. The owner's desire to modify it, and the fact that such subsequent modification is currently on appeal, is irrelevant. The issue is solely the meaning of numbered paragraph 6 of the Settlement Agreement.

Notwithstanding the straightforward language of paragraph 6, Attorney Zizka concludes that the Settlement Agreement should not be "interpreted" to require the abandonment of the driveway until the inn has been constructed and is in operation. His conclusion does not stand up to scrutiny.

The first thing to note is that Zizka's letter erroneously refers to paragraph 6 as a "condition." However, the agreement itself refers to the numbered paragraphs as "covenants and restrictions." Zizka's mis-characterization might suggest to a casual reader, *incorrectly*, that the abandonment of the driveway is merely a "condition" to something, such as the *operation* of an inn. It is in fact a covenant, or promise, to do something; it is not a condition to anything.

Attorney Zizka argues that the "context" negates the plain meaning of paragraph 6. It is true as he says that several of the numbered paragraphs "cannot possibly take effect until the proposed inn becomes operational." Those provisions (e.g., the limitation on the number of seats in the restaurant) might indeed be regarded as "restrictions" or "conditions" on the operation of the inn. But that has no bearing on all the other paragraphs, including paragraph 6. By the explicit terms

of the agreement, the covenants became "binding and legally valid if and when the Property is *approved* for use as an Inn by the Zoning Commission and the Superior Court…"—NOT "if and when the inn is built" or "if and when the inn becomes operational."

And that was the property owner's understanding as well, evidenced by the fact that every site plan submitted to the Zoning Commission has shown Wykeham Road as the exclusive means of access to the property, including for demolition and construction of the inn.

Attorney Zizka nevertheless suggests that a straightforward reading of paragraph 6 might make it an unconstitutional "taking" of private property. He says that "it would be highly unusual… for a court to allow a land use commission to require an applicant to give up a property right as a condition of approval regardless of whether the applicant chooses to go forward with it."[1] Of course, the Superior Court DID in fact already approve this very agreement.

More significantly, Zizka overlooks a critical distinction—the very distinction highlighted by Commissioner Hill in the statement included in the minutes of the April 26 meeting: that we have a settlement agreement, which was not only agreed to but proposed by the property owner and summarily accepted by the Zoning Commission. In the case of Leroy Land Development v. Tahoe Regional Planning Agency (Ninth Circuit 1991), a developer sought to rescind an earlier *settlement agreement* with the local planning agency that required off-site mitigation. The developer claimed that the settlement terms constituted an unconstitutional taking. The court disagreed, holding that **"such *a contractual promise cannot result in a 'taking' because the promise was entered into voluntarily, in good faith and was supported by consideration."***

The covenant made in paragraph 6 was likewise agreed by Ms. Klauer, explicitly for "valuable consideration," including "for the Commission to approve an Inn on the Property." The agreement was subsequently approved by both the Commission and the Superior Court, at her request.

Therefore, contrary to the advice in Attorney Zizka's April 7 opinion, there is nothing in federal caselaw that would justify ignoring the plain meaning of paragraph 6 of the Settlement Agreement. If, on the other hand, Ms. Klauer wishes to surrender the special permit for an inn, and thereby re-claim the right to use the driveway, then I agree that the Commission might entertain that proposition.

The only reasonable conclusion is that the covenant in paragraph 6 is valid as written, and currently effective. There is no ambiguity about it. The Zoning Commission should affirm this understanding of the 2013 Settlement Agreement *now*, before another violation occurs, and is again wrongly excused by the ZEO. In this regard, please note that any use of the driveway is

[1] Zizka cites US Supreme Court caselaw [unspecified, but presumably Nollan (1987) and its progeny], holding that regulatory "exactments" *may* amount to unconstitutional "takings" *in some circumstances*. In other words, he suggests that paragraph 6 could or even would be unconstitutional, IF it were interpreted to apply even before the inn has been built. However, he provides no analysis of the Supreme Court's "nexus" and "rough proportionality" tests as applied to the situation in 101 Wykeham Road.

itself illegal, since the agreement requires its abandonment. Vehicles traversing and/or parking on the driveway (as they did recently) is a clear violation. The additional fact that the access has been cleared and widened to accommodate such usage just exacerbates the violation, regardless of the precise nature and extent of such alterations.

Finally, and more generally, while I appreciate the difficult and largely thankless work that you do, I do hope that the Commission, the ZEO and the Commission's attorney will henceforth diligently and impartially enforce the zoning rules, for the benefit of the entire Town. Did someone request that Attorney Zizka justify the Commission's inaction in this and other cases? My impression, formed over many years, is that the Commission is so eager to avoid litigation that, when confronted with a hyper-aggressive property owner, feeble excuses are too often invoked to rationalize acquiescence. This approach allows the few bad actors to violate the rules with impunity. Such lax enforcement is unfair, pits neighbor against neighbor, and ultimately damages the Town's harmony and overall attractiveness, which the zoning regulations are intended to protect.

Very truly yours,

Howard Barnet

Cc: Mr. Nick Tsacoyannis, Zoning Enforcement Officer
Ms. Shelley White, Land Use Administrator