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Dana Barrette
Chairman, Board of Selectmen
Main Town Hall
130 Main Street
Sandwich, MA 02563

Erik Van Buskirk
Chairman, Board of Appeals
Main Town Hall
130 Main Street
Sandwich, MA 02563

Dear Chairman Barrette and Chairman Van Buskirk:

The purpose of this letter is to provide a summary of this Office's review of both environmental and financial concerns associated with the Woodside Village Chapter 40B, affordable housing development in the town of Sandwich. Our investigation was prompted based on complaints received by this Office.

As is discussed in more detail throughout this letter, the development of the Woodside Village project embodies numerous positive features that warrant commendation and recognition for the developer, the town and the subsidizing agency. Unfortunately, the project also includes some troublesome aspects that need to be addressed. This letter highlights both the positive and the negative elements of the project. We hope that these findings (both good and bad) can be used as an opportunity to improve the overall process for developing affordable housing in the town of Sandwich and throughout the commonwealth.

Prior to finalizing our communication to the town, this Office provided a draft report to the developer for review and comment and we have considered the resulting input in preparing this final account. In order to provide a broader perspective we have included as attachments the letters received from both the attorney and the accountant representing the developer in responding to the draft report.

Overview of Woodside Village:

Woodside Village was developed by Southside Realty Trust (John McShane, Trustee) under provisions of Chapter 40B, the state's affordable housing law. Chapter 40B encourages the development of affordable housing by granting developers waivers from zoning and other local ordinances and bylaws in return for an agreement from the developer to provide a percentage of the housing units to income qualified affordable buyers and a commitment from the developer to earn a limited development profit. Under

Chapter 40B, those developers who benefit from the advantages of the law are limited to a reasonable profit on the affordable housing projects they develop.

The Woodside Village development is situated on approximately a twenty-one (21) acre site at Boardley Road in Sandwich, Massachusetts and includes a total of thirty-one (31) detached single family homes. The affordability profile of the development is both diverse and impressive especially when compared against other Chapter 40B for-profit developments this Office has reviewed. Of the 31 homes in the planned Woodside Village development; twelve (12) or 39% were affordable units (at 80% of area median income), eleven (11) or 35% were moderate priced units targeted for town employees (at 120% of area median income) and the remaining eight (8) or 26% were market rate units. As highlighted above, approximately 74% of the Woodside Village housing units were targeted towards affordable/moderate buyers whereas in general other Chapter 40B for-profit home ownership developments that this Office has reviewed typically make available only 25% of the units to affordable buyers (at 80% of the area median income).

As part of the development review process it was determined that Woodside Village was located in several sensitive water resource areas for several Sandwich public supply wells and the sensitive marine embayment for North Bay in Cotuit Village. Due to the fact that the planned project was within a Water Resource District Zone of Contribution to a Public Supply Well, the developer, in order to better protect drinking water supplies, proposed to use funds from a HOME grant to subsidize the cost of denitrifying septic systems for some of the homes in the development. In total six denitrification systems were targeted for implementation which in turn was memorialized in the subdivision plan for the site. The Barnstable County HOME Consortium provided $60,000 of HOME funds to the developer in order to cover a portion of the construction costs of the project. Also in conformance with Department of Environmental Protection ("DEP") regulations to protect and preserve the quality and quantity of ground water resources within this nitrogen sensitive development site, the developer recorded through the Barnstable County Registry of Deeds a required land use restriction that memorialized the developer's agreement to restrict to eighty-five (85) the total number of bedrooms in the development.

Unlike other Chapter 40B developments that this Office has reviewed, the developer of Woodside Village was required by the Barnstable County HOME Consortium to seek at least three bids from licensed, qualified subcontractors for the various aspects of the project. It was also stipulated that the subcontractors with the lowest bid would be selected, unless it could be demonstrated to the satisfaction of the Barnstable County HOME Consortium that selection of a higher bid proposal was in the best interests of the project. This Office commends the cost containment efforts of the consortium with respect to the development of affordable housing. This Office supports implementation of similar bidding features for all Chapter 40B housing developments as they provide a means for ensuring cost effective construction and also help to counter potential abuse of the system especially in situations where a developer uses related parties in the construction/development of a project. A bidding process can also help raise the overall level of affordability in these Chapter 40B developments

As part of the Chapter 40B approval process for the Woodside Village project, the developer agreed to limit its profits to 12.5% of development cost. In comparison, other Chapter 40B for-profit home ownership developments that this Office has reviewed typically had the profit limitation pegged at 20% of total development cost. The Woodside Village profit commitment at 12.5% was more in line with, but still higher than, the national average of builders profit as reported by the National Association of Home Builders. After the project was completed the developer submitted financial statements for the project that reflected a profit percentage of 12.44% of total development costs.

A project timeline summary by key event for the Woodside Village development is reflected below:

- March 27, 2003 – Barnstable County HOME Consortium issues Project Eligibility/Site Approval Letter to Southside Realty Trust
- April 22, 2003 – Comprehensive Permit Application is received by the Sandwich Zoning Board of Appeals (ZBA)
- May 13, 2003 – ZBA opens public hearing on Comprehensive Permit Application
- June 10, 2003 – ZBA hearing is closed
- July 22, 2003 – The ZBA deliberates and votes to grant Comprehensive Permit with Conditions
- December 31, 2003 – The developer purchased the development site from the Van Buskirk family
- March 10, 2004 – Southside Realty Trust and the Sandwich Board of Health (BOH) execute the "Grant of Title 5 Nitrogen Loading Restriction and Easement on Facility and Credit Land"
- August 26, 2004 - Regulatory and Monitoring Services agreements executed
- April 14, 2006 – Sale closed on final unit in development
- August 15, 2006 – Independent Accountant's Report ("Gosule, Butkus, & Jesson LLP) issued to Southside Realty Trust
- September 1, 2009 – Housing Assistance Corporation (Monitoring Agent) notifies the ZBA that the cost certification has been completed

Environmental – Background on Water Resources Issues/Concerns:

In May 2003 the Cape Cod Commission (a regional land use planning and regulatory agency) reviewed the Woodside Village comprehensive permit application and determined that the proposed project was located in several sensitive water resource areas including a Zone II or primary groundwater recharge area for several Sandwich public supply wells, and the sensitive marine embayment for North Bay in Cotuit Village. The Commission noted that the North Bay area was currently impacted from existing nitrogen loading and was experiencing water quality problems. In addition it was highlighted that the project was located adjacent to a small volume community public supply well that provides water to the Southpoint condominiums.

Excessive nitrogen levels pose a threat to the ecological health of water resources. When faced with the need to remove nitrogen from wastewater, communities with septic systems and developers in nitrogen sensitive areas have two options: construct sewers and centralized treatment facilities or implement reliable decentralized technologies such as an "innovative/alternative" denitrification septic system for removing wastewater nitrogen on an individual or cluster/communal/neighborhood system basis.

Due to the fact that the planned project was within a Water Resource District Zone of Contribution to a Public Supply Well, the developer, in order to better protect drinking water supplies, had proposed to use funds from a HOME grant to subsidize the cost of denitrifying septic systems for some of the homes in the development. In total six denitrification systems were targeted for implementation within the development and were memorialized in the subdivision plan for the site. The Barnstable County HOME Consortium approved and provided $60,000 of HOME funds to the developer in order to cover a portion of the overall project construction costs.

Since the proposed Woodside Village development site was within a designated nitrogen sensitive area, the commonwealth's environmental code (Title V -310 CMR 15.000) promulgated by the DEP required that none of the septic systems serving this new construction could receive more than 440 gallons of design flow per day per acre. In order to meet the flow limitations imposed by 310 CMR 15.214 in this nitrogen sensitive area, the developer elected as provided by 310 CMR 15.216 to aggregate the flow determinations by using credit land in accordance with a DEP approved Facility Aggregation Plan. Through use of this Facility Aggregation Plan, the design flow of 440 gallons per day per acre equivalency across the development site, but not necessarily on every individual acre, would be met through recorded land use restrictions that restrict nitrogen loading on the entire site.

Under a Facility Aggregation Plan, an applicant proposes to meet the 440 gallons per day per acre equivalency standard by establishing nitrogen credit on non-facility land with the consent of the owner of such land. The restriction documents, in addition to placing restrictions on the credit land, must also limit the facility lots in a residential subdivision to a specified number of bedrooms, which should be noted in the subdivision plans. Both facility and non-facility land are factored into the calculation for the overall land area meeting the 440 gallons per day per acre equivalency limitation.

Southside Realty Trust (John McShane) submitted for approval to both the Sandwich Board of Health and the DEP a Facility Aggregation Plan for the Woodside Village development site. The total development site encompassed approximately 20.9 acres. The Facility Aggregation Plan indentified 5.1 acres of this total development site as the credit land that would remain as open space through a perpetual deed restriction. The remainder of the site (15+ acres) encompassed a subdivision plan reflecting the 31 housing units and the associated number of bedrooms for each unit. In conformance with Title V requirements the 31 housing units were limited to 85 total bedrooms. The eight market rate homes were limited to two bedrooms each and each of the remaining 23 units (affordable/moderate rate homes) were planned at three bedrooms. The plan also identified six housing units targeted to be built with denitrification systems as opposed to a standard Title V septic system.

On October 23, 2003 the Sandwich Board of Health notified the developer of their review and approval of the Facility Aggregation Plan. The Board's approval was noted as contingent on DEP's review and approval. The DEP provided formal approval of the plan on March 2, 2004. In their approval letter, DEP noted that the developer must file a certified Registry copy of the Facility and Credit Land Nitrogen Loading Restriction and Easement, as well as the individual lot deed restrictions, with both the Sandwich Board of Health and DEP within thirty (30) days of recording.

In conformance with DEP regulations to protect and preserve the quality and quantity of ground water resources, the developer (Southside Realty Trust) on March 16, 2004 recorded through the Barnstable County Registry of Deeds the required land use restrictions. This was achieved through a "Grant of Title 5 Nitrogen Loading Restriction and Easement on Facility and Credit Land (310 CMR 15.216)". This restriction/easement memorialized the developer's agreement to restrict to 85 the number of bedrooms in the development. In addition the developer agreed to place explicit notice of the bedroom restriction on each individual lot and provide reference to the recorded use restriction document and the bedroom limit for that lot contained in the plan called Subdivision Plan of Land located in Sandwich, MA, by Cape and Islands Engineering, dated September 18, 2003 recorded in plan book 587, page 86 at the Barnstable County Registry of Deeds.

In creating this restriction/easement, the developer granted to the town of Sandwich a perpetual easement to enter upon the development site (both facility and credit land) to ensure protection of the

nitrogen loading limitation of 440 gallons per day per acre and for purposes to ensure compliance with and fulfillment of the terms of the restriction/easement.

Environmental Findings:

1. *The Development does not comply with provisions of the Nitrogen Loading Restriction/ Easement and has resulted in the Planned Bedroom Counts being exceeded.*

On June 2, 2004, less than three months after executing the "Grant of Title 5 Nitrogen Loading Restriction and Easement" Southside Realty Trust (John McShane), submitted to the Sandwich ZBA a formal request to modify the Woodside Village Comprehensive Permit. In summary, Mr. McShane asked the ZBA to allow him to offer three bedroom homes to the market rate customers as opposed to the planned two bedroom models. Mr. McShane did not reference the recently (March 10, 2004) executed restriction/easement that he was a party to nor did he provide alternative plans with a corresponding reduction of bedrooms in the non-market rate homes that would ensure compliance with the overall 85 bedroom restriction for the development as a whole.

Highlighted below is the essence of the formal request made by Southside Realty Trust to the Zoning Board of Appeals on June 2, 2004.

> " . . . .We have been marketing this development for the past 2 months and have had an overwhelming demand for 3-bedroom cape and saltbox style homes as market rate units. We had originally submitted large ranch-style homes as market rate units, but that has significantly narrowed the ability to sell the units in a reasonable amount of time. Copies of the plans and elevations are attached for your review.
>
> We feel that this change will not only ensure the economic feasibility of the project, but may also serve to lessen the distinction between the market rate, town employee and affordable units in the development. The town employee and affordable units will not be changed from the original plan of capes and saltboxes.
>
> In summary, we are asking the board to allow us to offer 3 bedroom capes and saltboxes, and ranches to market rate customers. . . ."

At its meeting on June 8, 2004, the ZBA reviewed this request to modify the Chapter 40B Woodside Village Comprehensive Permit (the original permit had been approved nearly a year earlier). The ZBA viewed this request as a minor modification and approved the requested changes for the market rate units. Although the town was a party to the easement/restriction (through the Board of Health) that limited the overall bedroom count to 85, this Office understands that the ZBA was not attuned to the limitations imposed through the executed restriction/easement at the time they reviewed the developer's change or request for modification.

In moving forward with the development plans that increased the total number of bedrooms in the market rate units beyond the maximum limits previously agreed to, it is the understanding of this Office that Mr. McShane/Southside Realty Trust did not submit any proposed changes of the Nitrogen Loading Restriction/Easement to either the Board of Health or the DEP. In responding to this concern in the draft report, the developer's attorney indicated that it appears that some confusion may have been created when the developer requested the Board of Appeals to approve some alternative building designs to create more style variety within the development. He pointed out further that while these

styles in some cases had a three (3) bedroom floor plan, they were constructed as a two (2) and not as three (3) bedroom units.

This Office's review of the property cards for the market rate units revealed that at least four of the eight market rate units have been assessed by the town as three bedroom homes as opposed to two bedroom dwellings as required in the respective deed restrictions. The site/development is not currently in compliance with the provisions of the Nitrogen Loading Restriction/Easement as the total number of bedrooms on the site has been exceeded due to the increases in the market rate units.

2. Prospective Property Owners were not Properly Notified of the Existing Easements/Restrictions.

Through the executed Nitrogen Loading Restriction and Easement the developer not only agreed to restrict the number of bedrooms in the development to a total of 85, but also to place explicit notice of the bedroom restriction on each individual lot. The notification requirement for each lot included referencing the Grant of Title 5 Nitrogen Loading Restriction and Easement and the agreed to bedroom limit for that lot contained in the recorded subdivision plan called Subdivision Plan of Land located in Sandwich, MA, by Cape and Islands Engineering, dated September 18, 2003.

As was previously noted, the recorded subdivision plan limited the eight market rate homes to two bedrooms each, whereas each one of the affordable and moderate rate homes were limited to three bedrooms. In order to determine the developer's compliance to the proper notification requirements, this Office reviewed the property records for each of the 31 properties through the registry of deeds.

All of the associated market rate deeds indicated that the property was conveyed subject to and with the benefit of the recorded Nitrogen Loading Restriction and Easement. The deeds also referenced the two bedroom limitation reflected in the recorded subdivision plan. In sharp contrast to the market rate property deeds, this Office found no equivalent notification with respect to the affordable/moderate properties. None of the deeds for the twenty-three (23) affordable/moderate rate units identified a bedroom limit. Twenty-two (22) of these units made no reference to the Title V Nitrogen Loading Restriction and Easement.

DEP regulations also require that proper disclosures be made to prospective property owners when denitrification or alternative sewage disposal systems are installed. According to 310 CMR 15.287 (10) a system owner must provide a Notice recorded in the chain of title (through the Registry of Deeds) for the property served by an alternative septic system, disclosing the existence of the alternative on-site system. Based on review of the pertinent deed documents, this Office could not find evidence that any of these required disclosures were made.

In addition to the notification requirements discussed above, the Comprehensive Permit issued to the developer by the ZBA required that each individual lot contain a deed restriction that restricts a fifteen-foot (15') deep undisturbed buffer at the rear of each lot. Compliance with this requirement was done on a haphazard basis. Fewer than half of the deeds incorporated this restrictive language.

3. Affordable/Moderate Homeowners Bear Disproportionate Burden of the Site Wastewater Management Costs.

In order to protect the local drinking water supplies from excessive nitrogen levels brought about from developing housing in this ecologically sensitive area, the developer committed to install six

denitrification systems on the overall development site for wastewater management purposes. Included in the developer's subdivision plan that was recorded along with the Grant of Title 5 Nitrogen Loading Restriction and Easement was the associated plan which highlighted the six individual lots that would contain these denitrification systems. Three of the denitrification systems were integrated into housing units that were designated for affordable buyers and the other three systems were associated with housing units targeted for moderate income buyers. None of these systems were incorporated in any of the market rate housing units.

Offsetting the ecological benefits inherent with denitrification systems are several associated financial drawbacks. In addition to a higher initial acquisition/installation cost when compared against standard Title 5 septic systems, these denitrification systems require incremental operating and energy costs including maintenance expenses. It is the understanding of this Office that the annual incremental costs associated with denitrification systems range between $1,200 and $2,000 per household.

Based on review of contract documents, this Office has determined that each system owner is required to maintain an annual inspection and effluent testing service contract agreement for the life of the system (approximate cost - $420/year). The service contract also calls for periodic effluent testing (initially 4 testing visits per year at a cost of$255/visit or $1,020 per annum). In addition to these maintenance and testing costs there are incremental energy costs associated with running these systems. The specification for the system blower calls for an electrical demand of 0.322 KW/hour. Since these systems run 24 hours per day (365 days per year) we estimated (assuming an electric billing rate of $0.1762 per KW hour – current N-Star billing rate) an incremental energy cost for each household to be in the neighborhood of $497 per year. Assuming effluent testing is done 4 times per year the estimated incremental costs associated with these systems is $1,937 and would drop down to $1,172 if testing only occurred once a year. Emergency services including repairs and maintenance are also billed to the system owners. The standard labor rates in the contract we reviewed were $74.00 per hour.

Although, the entire Woodside Village development benefits from the inclusion of the six denitrification systems, the incremental cost of this community benefit is borne directly by six individual homeowners. As was previously highlighted, the developer did not provide proper notification to either the affordable or the moderate rate homebuyers, through the unit deed documents, of the Nitrogen Loading Restriction and Easement (including the presence of denitrification systems) and the bedroom count restrictions. The implementation of this denitrification plan resulted in a disproportionate financial burden on households with lower financial resources than many of the other indirect beneficiaries of these systems. In the opinion of this Office a more equitable solution such as a community based funding mechanism for wastewater operations and maintenance should have been considered.

At different times between May 2005 and September 2006 each of the six households with denitrification systems had expressed their desire to discontinue their individual maintenance contracts. It is also our understanding that during this timeframe all six homeowners at different points in time had actually turned off their systems. In each instance, the Board of Health was notified of this default situation by the maintenance contractor. In response to this situation the Board of Health advised each homeowner of DEP's requirement that a maintenance contract be in place for the life of these alternative septic systems.

In response to the advice from the Board of Health, it is our understanding that five of the six affected households turned their systems back on. The one remaining household at 40 Clipper Circle (Lot #22) requested that they be allowed to remove their denitrification system and have it replaced with a

standard Title 5 septic system. The Board of Health and DEP allowed this change in septic systems based on the homeowner's agreement to reduce the number of bedrooms in the dwelling from three to two. A restriction on the property deed memorializing this two bedroom limit was required and was implemented through the registry of deeds. In addition the homeowner had to provide the Board of Health with the floor plans for the two bedroom home and also had to contact the Assessor's Office in order to schedule a site visit so the revised/reduced number of bedrooms could be verified.

It is ironic that this moderate rate homebuyer, in order to remove a costly denitrification system, was required to convert her three bedroom unit to a two bedroom home in order to purportedly maintain compliance within the maximum allowable nitrogen loading for the development site while in severe contrast the developer was permitted to convert planned two bedroom market rate units into three bedroom homes with no other concessions that would ensure continued compliance with the applicable environmental regulations. As a public policy matter, it would seem that the developer is better able to preserve the public interest in lowering nitrogen levels rather than at the expense of moderate income or lower income home buyers.

4. The Site Wastewater Denitrification System Installation Plan is not fully implemented.

With the removal of the denitrification system at 40 Clipper Circle (Lot #22), the total number of planned denitrification systems on the development site were reduced from six units down to five. After removal of this system, McShane Construction (a related developer entity) on January 5, 2006 submitted an application to the Board of Health for an upgrade to another existing septic system (34 Clipper Circle – Lot # 24) to a denitrification unit. Highlighted below is the description of the alterations as reflected on the application – "Upgrade existing system 231-03P to 3 bedroom with denitrification unit (Microfast) in accordance with nitrogen aggregation plan, total aggregate bedroom count 85". Although the Board of Health approved this application for the construction permit on January 17, 2006, an inspection of the upgraded system has not been evidenced through an approved Certificate of Compliance. It is the understanding of this Office, that these alterations were never implemented and there are only five denitrification systems that are in operation on the site. The development is not currently in compliance with the subdivision plan filed by the developer with its Nitrogen Loading Restriction and Easement that is registered through the Registry of Deeds and as previously highlighted the development exceeds the maximum bedroom count permitted by the provisions of the Nitrogen Loading Restriction and Easement.

Although it is troubling that the developer failed to fully implement the agreed upon site wastewater denitrification system installation plan, it is equally disconcerting that the town failed to provide adequate oversight over this project that would have ensured compliance with these important requirements affecting the environment.

Financial Issues/Concerns:

Inconsistency in the Developer's Committed Profit Level versus the Regulatory Agreement:

On March 27, 2003 the Barnstable County HOME Consortium issued a Project Eligibility/Site Eligibility Approval Letter to Southside Realty Trust (John McShane, Trustee) for the proposed Chapter 40B Woodside Village housing development. The letter indicated that it was the understanding of the consortium that the developer would limit the overhead and profit of the project to 12.5% of the

development cost. Based on the developer's assertion that the development profits and overhead would be limited to a maximum of 12.5%, the consortium determined that the developer met the general eligibility standards of the HOME Investment Partnerships Program.

Shortly after receiving the Project Eligibility/Site Approval Letter from the Barnstable County HOME Consortium, Mr. McShane applied to the Sandwich ZBA for a Comprehensive Permit. In a letter dated May 7, 2003 and as part of the Comprehensive Permit application Mr. McShane described the proposed project to the ZBA. Mr. McShane indicated to the ZBA that he proposed to develop 31 single family homes on the 21 acre site pursuant to the Barnstable County HOME Program, which set forth specific criteria including that the level of profit to the developer would not exceed 12.5%.

The Cape Cod Commission reviewed the Comprehensive Permit application submitted by Southside Realty Trust/John McShane and in a letter dated May 8, 2003 provided comments on the project to the Sandwich ZBA. Included in the commission's letter was an acknowledgement that the developer would limit the overhead and profit to 12.5% of the development cost and a determination that this was a reasonable profit standard that was consistent with HOME program guidelines[1].

The ZBA opened the public hearing on the Woodside Village Comprehensive Permit on May 13, 2003. The attorney for the developer, Mr. Kevin Kirrane was present along with Mr. McShane. As part of the testimony at this hearing, Attorney Kirrane stated that the profit margin for the project was limited to 12.5%.

As highlighted above, the developer of Woodside Village was committed throughout the review and approval process of the proposed development to a profit level not to exceed 12.5% of the development cost of the project. However, this agreed to profit limitation was not incorporated in the Regulatory Agreement for the project. The Regulatory Agreement executed on August 26, 2004 between Southside Realty Trust and the Barnstable County HOME Consortium ("Funding Administrator"), the Town of Sandwich and the Housing Assistance Corporation ("Monitoring Agent") reflected the following language: *"The Developer further agrees that the aggregate profit from the Project net of related party expenses, including developer's fees, shall not exceed twenty percent (20%) of the total development costs of the Project (the "Allowable Profit").*

This Office attempted to determine the cause/reason for this inconsistency in profit percentage limitations for this project. We contacted the Town of Sandwich and the Barnstable County HOME Consortium in order to obtain a better understanding of this change in the limits of the developer's profit percentage from the 12.5% that was articulated during the project eligibility and comprehensive permit stages of the project versus the 20% limit memorialized through the Regulatory Agreement. Based on these inquiries it is our understanding that the Regulatory Agreement should have included the 12.5% profit limit. It is also the understanding of this Office that the 20% limitation incorporated in the Regulatory Agreement was made in error based on utilizing "boiler plate" language from other agreements. In analyzing the financial results for this development and any associated "excess profits" this Office has utilized the 12.5% profit limitation for developer's profit.

[1] HOME Program Guidelines provided up to a maximum 15% for developer overhead and profit, however in most cases the approved limitations were less than the maximum allowable and 12.5% was viewed as a reasonable limit.

Certified Cost and Income Statement:

At the conclusion of the project the developer was required to deliver to the town and to the Housing Assistance Corporation, the monitoring agent for the development a final Certified Cost and Income Statement prepared and certified by a certified public accountant. The Certified Cost and Income Statement is an itemized statement of total development costs together with a statement of gross income from the project received by the developer. It is through this cost certification process that the developer accounts for its profits. Profits in excess of agreed upon limits are payable by the developer to the Town of Sandwich.

The developer's Certified Public Accountants, Gosule, Butkus & Jesson, LLP ("Gosule"), issued an Independent Accountant's Report (Dated: August 15, 2006). Gosule's report indicated that they had audited the schedule of revenues and expenses of the Woodside Village Project and that in their opinion the schedule presented fairly in all material respects, the financial results of the project in conformity with generally accepted accounting principles in the United States of America. Unlike other Chapter 40B projects reviewed by this Office the audit report for the Woodside Village project did not make any reference to the adherence to any accounting practices prescribed by either the Department of Housing and Community Development or any Monitoring Agent (such as CHAPA) either through regulations or guidelines.

The Gosule audit report for Woodside Village reflected total income for the project of $6,910,759 and total project costs of $6,145,954 resulting in a net profit for the project of $764,805. This Office determined that the reported profit of $764,805 represented a profit percentage of 12.44% of total development costs. The audit report did not reference any limitation to the profits. No mention was made of either the 12.5% or 20% limitations previously discussed.

Monitoring Agent's Cost Certification Review:

The Housing Assistance Corporation, the monitoring agent for the project, contracted with the public accounting firm of Sanders, Walsh & Eaton, LLP ("Sanders") to conduct a cost certification review of the audited financial statements prepared by Gosule. This review by Sanders was conducted using specific "agreed upon procedures" which included but was not limited to the following actions: Review the land appraisal to determine what the indicated value for the land was in an undeveloped state; If no land appraisal is available examine the effect of the calculated maximum allowable profit if the full value of the land is calculated as profit rather than cost; Determine that the developer's total overhead expense is not in excess of amounts typically approved by other state program administrators; and; Examine the portions of related party costs which are retained by a related party to determine if they are commensurate with charges which would be incurred if similar functions were performed by non related third parties (generally accepted by other state program administrators as a total of 14% for general contractor overhead, general conditions and profit. Sanders also used the 20% profit limitation reflected in the Regulatory Agreement as the baseline for determining excess profit levels as opposed to the committed 12.5% level discussed previously.

Unlike the Gosule audit, the Sanders review was focused on determining whether any excess profits were generated by the project based on specific Chapter 40B related guidelines and limitations. The Gosule audit was not centered on unique features associated with Chapter 40B. As such the Gosule audit did not discuss the valuation of the land nor was there any disclosure made as to the extent of related party transactions including any associated related party overhead and profit. With respect to

related party transactions the Gosule audit disclosed in a brief statement that the construction contractor for the project McShane Construction, Inc. and Southside Realty Trust were owned by the same person. Specific amounts paid by Southside Realty Trust to McShane Construction were not divulged.

In their cost certification review, Sanders opined that even though the land had been acquired in an arm's length transaction from an unrelated party, further review of the acquisition value (premium attributed to the ZBA decision and subsequent purchase) may be warranted given the fact that no appraisal existed to determine the fair value of the land under existing zoning without a comprehensive permit. Sanders also identified that related party activity totaled $4,744,704 and the portion of this amount that was retained as profit by McShane Construction was approximately $332,129. Sanders performed alternative analysis to reflect inclusion of the profit retained by McShane Construction as profit rather than a project cost in the calculation of allowable profit. This resulted in a revised profit percentage of 15.87%. Since this revised profit percentage did not exceed the allowable 20% profit utilized by Sanders as the excess profit benchmark, Sanders determined that further review of these related party costs did not appear to be warranted.

Office of the Inspector General - Analysis:

As is discussed in more detail in the findings below, this Office through an examination of the financial records of the Woodside Village development has determined that this project exceeded the 12.5% profit limitation. Based on our financial review we have determined that there are at least $171,013 in excess profits that are owed to the town of Sandwich. Included at the end of this report is a Schedule of OIG Proposed Adjustments that summarizes the adjustments leading to the determination of the excess profits. This schedule begins with a column reflecting by income and expense categories the financial results as reported by the developer (Cost Certification). There is a second column reflecting this Office's proposed adjustments and a final column which tabulates the adjusted balances as determined by this Office.

The adjustments with the largest financial impact include: an $85,000 reduction in land cost in order to bring the land value in line with the appraised value with a comprehensive permit in place; a $60,000 reduction to construction costs (with an offsetting reduction of grant income) in order to recognize the forgiveness of the Barnstable County HOME Loan; and, a $345,834 increase to market units sales income with a complimentary increase of $251,450 to construction costs in order to impute the sales value and construction costs associated with two market rate homes that were initially sold and accounted for as raw land sales by the developer but were subsequently developed with the help of the developer's related party construction company.

It is the opinion of this Office that the excess profit of $171,013 reflected in the Schedule of OIG Proposed Adjustments is conservative. This opinion is based primarily on the fact that this Office has adjusted the land value down to only its appraised value with a comprehensive permit in place for a 31 unit housing development. As a point of reference, assuming that the appraised value of the land under existing zoning without a comprehensive permit (this is the land valuation standard promulgated by the DHCD through the "Guidelines for Housing Programs in Which Funding is Provided Through a Non-Governmental Entity") equals the then current tax assessed value of $350,700 then the excess profit for this development would approximate $890,000.

Financial Findings:

1. Understated Sales Income - Discrepancy in Unit Sales Income Reflected in Developer's Financial Statements versus HUD Settlement Statements.

The Woodside Village development plan called for the construction and sale of 31 detached single family homes. The audited financial statements provided by the developer to the town/monitoring agent reflect total unit/lot sales revenue of $6,834,125 and is comprised of the following subcategories: Affordable Unit Sales ($4,205,000); Market Unit Sales ($2,229,125) and Land Sales ($400,000). The Affordable Unit Sales include the 12 affordable units and the 11 moderate priced units. The Market Unit Sales reflect sales of only six of the targeted market rate units. The other two market rate units are tallied under the Land Sales and are discussed in more detail in the section below.

In order to corroborate that the developer's financial statements properly accounted for all the unit sales in the development, this Office validated each unit sale to the respective HUD settlement statements and to the deed documents. In summary we found that the Affordable Unit Sales were comprised of 12 homes (the affordable units) that sold at $135,000 each and another 11 homes (the moderate or town employee units) that sold at $235,000 each. Through this validation process we were able to confirm the Affordable Unit Sales figure of $4,205,000 ((12 x $135,000) + (11 x $235,000)) that was claimed by the developer in the project financial statements.

This Office was also able to validate that two of the targeted market rate lots were sold to third parties as undeveloped lots. Each one of these lots was sold at $200,000 and therefore we were able to bear out the Land Sales figure of $400,000 found in the developer's financial statements. These raw land sales as opposed to fully developed home sales on these lots are problematic and are discussed in more detail in the section below.

With respect to the Market Unit Sales this Office determined that the total sales value of these six homes as memorialized in the HUD settlement statements and the registry of deed documents is $2,237,500. The developer's financial statements record these Market Unit Sales at $2,229,125 or $8,375 less than what this Office has confirmed through its document review. In order to record the sales revenue for the project consistent with the value determined through comparison to the actual deed documents and settlement statements this Office proposed an adjustment to the development financial statements to increase sales revenue by $8,375. This adjustment is reflected as adjusting entry #1 in the attached Schedule of OIG Proposed Adjustments. The developer's accountant has suggested that this is an appropriate adjustment.

2. Underreported Income Related to Land/Lot Sales.

The development plan for Woodside Village included the construction and sale of 31 single family homes of which eight were targeted to be sold to market rate buyers. As was previously highlighted two of these targeted market rate units were sold by Southside Realty Trust to third party buyers as undeveloped lots at a price of $200,000 per lot. These land sales totaling $400,000 were reflected in the developer's financial statements. However, it was not disclosed in the financial statements that the developer's related party general contractor, McShane Construction had entered into agreements with the buyers to construct individual homes on these two lots. The financial transactions including the associated income, costs and net profit related to this work performed by McShane Construction was not included as part of the revenue and expenses for the Woodside Village development. Exclusion of

these financial transactions from the Woodside Village financial statements understates the excess profits for the development.

This Office has imputed revenue and expense for the two additional homes that were constructed on the Woodside Village development but not previously reflected in the project's financial statements. This imputed revenue and expense has also been incorporated in the attached schedule reflecting OIG proposed adjustments to the cost certification (adjusting entry #2). The imputed revenue adjustment totals $345,834 and the associated construction cost adjustment totals $251,450. The revenue adjustment was arrived at in the following way: this Office calculated the average sales prices for the six market rate homes sold by Southside Realty Trust ($372,917), we extended the average unit sales value against the remaining two lots ($372,917 x 2 = $745,834) and from this extended value we netted off the land sales value of $400,000 that was already recognized in the Woodside Village financial statements which resulted in our proposed revenue adjustment of $345,834 ($745,834 - $400,000 = $345,834). The imputed construction costs of $251,450 were established by totaling the costs as reflected in the McShane Construction Company - Job Profitability Summary report related to these two construction jobs.

In responding to the draft report the developer's accountant proposed a net adjustment that was within $12,002 of that proposed by this Office. The difference was due to the fact that the accountant utilized the sales revenue reflected in the McShane Construction Company – Job Profitability Summary report for these two specific jobs versus the average sales revenue approach employed by this Office and reflective of the six final market unit sales by Southside Realty Trust.

3. Overstated Construction Costs and the Related Accounting for the Barnstable County HOME Loan.

In September 2004, Southside Realty Trust entered into a loan agreement with Barnstable County. Through this agreement, Southside Realty Trust was able to borrow $60,000 under the HOME Investment Partnerships Program to be used for costs associated with the Woodside Village project. The agreement provided for the forgiveness of up to the full amount of the loan if certain affordability conditions were met by the project. Specifically for each affordable housing unit (up to a maximum of four) conveyed by Southside Realty Trust to an eligible purchaser for no more than a maximum sales price and subject to an affordable housing restriction, fifteen thousand ($15,000) of the loan would be forgiven. The entire $60,000 loan was eventually forgiven by Barnstable County as the developer met the affordability terms on the four housing units targeted by the loan program.

At the time the loan was forgiven, there was no specific Chapter 40B guidance regarding the proper accounting methodology to be followed for recording this type of financial transaction. The developer's auditors/accountants (Gosule) in preparing the financial statements for the development took the position that this "debt forgiveness" should be classified as other income as opposed to being reflected as an offset or reduction of construction costs. The cost certification report for the Woodside Village development reflected this $60,000 loan forgiveness as Grant Income in the income section of the project financials.

It is the opinion of this Office that it is more appropriate from a Chapter 40B limited dividend policy perspective to reflect the forgiveness of this loan as a $60,000 reduction to the allowable construction costs for the development as opposed to classifying this as other development income. The original loan was made by Barnstable County specifically to be used by the developer for construction costs associated with the project. In essence by forgiving the loan, Barnstable County paid for certain

construction costs totaling $60,000 and these costs should not be recognized as the developer's costs once the loan was forgiven.

There is no difference in terms of the bottom line profit for the development based on the use of either of these two methodologies. However, the method advocated by the developer through his accountants/auditors would result in the ability of the developer to retain up to an additional $7,500 ($60,000 x 12.5%) of profit since its recorded costs versus its incurred costs would be overstated by $60,000.

As reflected above, this accounting issue does not pose a significant or material difference in calculating excess profits for the Woodside Village development. However, this Office recently was involved in another Chapter 40B review and found that in a somewhat interconnected matter a Braintree developer had obtained over $4,600,000 in casualty insurance proceeds related to fire at the development site. The developer used these insurance proceeds to rebuild those portions of the development site that had been destroyed by the fire. Similar to the Woodside Village development this Braintree developer reflected the insurance proceeds as an income/revenue item as opposed to a reduction in construction costs. This one accounting entry if permitted to stand would have allowed the Braintree developer to shield nearly $600,000 in excess profits from the host community.

Although there currently is no DHCD regulation or guideline addressing this specific type of issue, in July 2007 the Massachusetts Housing Financing Agency ("MassHousing") developed and published a "Developer's Certificate" that is know utilized as part of the cost certification process for Chapter 40B developments. This "Developer's Certificate which is signed under penalties of perjury provides numerous assurances including that the costs reflected in the project financial schedules are net of all kickbacks, adjustments, discounts, promotional or advertising recoupment or similar reimbursement made or to be made to the developer or any related party. This guidance reinforces the position advocated by this Office with respect to the forgiveness of the loan by Barnstable County to the Woodside Village developer.

In order to more appropriately account for the forgiveness of the loan, this Office has through a proposed adjustment reclassified the grant income previously recognized by the developer in its cost certification to a reduction of construction costs. This entry is reflected in the attached Schedule of OIG Proposed Adjustments as adjusting entry number 3.

4. Overstated Land Valuation/Cost.

On November 29, 2002 McShane Construction, Inc entered into a Purchase and Sale Agreement with the owners (Erik J.Van Buskirk, Mark Van Buskirk, Clarence R. Van Buskirk and Mary Beth O'Neill) of the land of the proposed future Woodside Village development site. The agreed upon purchase price for the related parcels was $1,000,000. The Purchase and Sale Agreement included a clause that made the buyer's performance contingent upon the buyer obtaining a Comprehensive Permit pursuant to M.G.L. Chapter 40B to develop the site as a 35 unit detached family residential subdivision. On December 31, 2003 the land was transferred from the previous owners to John McShane, Trustee of the Southside Realty Trust. The HUD Settlement Statement for the land transfer reflected the $1, 00,000 sale price previously referenced in the Purchase and Sale Agreement and included an additional $15,000 in settlement charges that were paid by the buyer. The total of $1,015,000 paid by Southside Realty Trust for the land and the associated settlement charges was the same amount reflected as land cost in the

developer's financial statements that were provided by the developer to the monitoring agent as part of the cost certification process for the project.

The cost certification review conducted by Sanders on behalf of the Monitoring Agent (Housing Assistance Corporation) indicated that the Guidelines of the New England Fund and the Massachusetts Housing Partnership "Local Review and Decision Guidelines" require that land value be limited to the appraised value of the site to the highest and best value as of right under existing zoning without a comprehensive permit. Sanders highlighted that they were not aware of an appraisal report that was performed to determine land value under existing zoning without a comprehensive permit. In order to enhance their evaluation of the land value, Sanders reviewed the history of the recorded deeds. The cost certification report prepared by Sanders noted that two lots which represented $650,000 of the $1,000,000 total selling price were acquired for $185,000 three years earlier (during 2000) representing a $465,000 gain or 350% increase in a three year period. Sanders could not find prior recorded deed costs for the remaining two parcels. Sanders went on to point out that even though the land was acquired in an arm's length transaction from an unrelated party, further review of the acquisition value may be warranted given the fact that no appraisal existed to determine the fair market value of the land under existing zoning without a comprehensive permit.

In reviewing the land valuation issue, this Office consulted the "Guidelines for Housing Programs in Which Funding is Provided Through a Non-Governmental Entity" that were issued by the Department of Housing and Community Development in February 2003 and predated the actual project eligibility approval for the Woodside Village Development. The DHCD guidelines provide that for purposes of calculating total development costs and profit, an independent appraisal is required to determine the allowable acquisition cost and this allowable acquisition cost shall not be unreasonably greater than the current fair market value under existing zoning without a comprehensive permit in place. The guidelines reinforce that the economic benefits of the comprehensive permit shall accrue to the development and shall not be used to substantiate an acquisition cost that is unreasonably greater than the fair market value under existing zoning. This methodology is consistent with the agreed upon procedures that the Housing Assistance Corporation requested Sanders to use in its financial review of the cost certification.

The only appraisal report available to Sanders and this Office was one dated September 22, 2003. This appraisal was prepared for the Cape Cod Bank & Trust by Saben & Associates. This appraisal was prepared based upon a 31 lot subdivision subject to a Chapter 40B comprehensive permit. The Saben appraisal provided an as-is value of $930,000 for the property with the comprehensive permit in place.

As a base level or minimum adjustment for land value this Office incorporated an $85,000 reduction in land value (OIG adjusting entry #4) and represents the difference between the total land acquisition price of $1,015,000 reflected in the developer's financial statements and the appraised value (with a comprehensive permit) of $930,000. This Office is in agreement with the points made by Sanders that further review of the land value under existing zooming without a comprehensive permit is warranted. In addition to the $85,000 proposed adjustment discussed above it appears that there may be a significant land value discrepancy between the appraised value (with comprehensive permit) of $930,000 when compared to the 2003 tax assessment value of the site recorded as $350,700. This difference coupled with the 350% gains indentified by Sanders on two of the parcels over a three year period reinforces the need for an independent land appraisal for purposes of determining the proper profit limitations for the project. It also supports the conservative nature of this Office's proposed land value adjustment.

Conclusion:

There are several particularly positive features of the Woodside Village housing development that merit special commendation. In particular, the developer of the project (Southside Realty Trust), the subsidizing agency (Barnstable County HOME Consortium) and the town of Sandwich all deserve praise for implementation of an aesthetically pleasing affordable housing development that provides a rich mix of affordability. Seventy-four percent (74%) of the units (23 out of 31) were marketed and sold to affordable/moderate rate buyers. This compares favorably to other Chapter 40B for-profit developments this Office has reviewed where the affordable housing percentage is usually implemented at the minimum 25% prescribed level.

The Chapter 40B or Comprehensive Permit process is intended to provide an expedited approval process. The Sandwich ZBA granted a Comprehensive Permit for the Woodside Village project within ten (10) weeks from the opening of the public hearing. This is by far the speediest process this Office has seen through its previous reviews of other Chapter 40B projects.

In addition to delivering a deep and diverse affordable home ownership base, the Woodside Village development was committed to a profit limit of 12.5% of development costs. Although this profit level is higher than the national average of builders profit as reported by the National Association of Home Builders it is significantly lower than the typical profit limit of 20% on the other Chapter 40B for-profit developments that this Office has reviewed. This lower profit limitation of 12.5% enabled an increase to the overall level of affordability. Another positive feature of this project that in our opinion also helped increase the overall level of affordability was the requirement imposed by the Barnstable County HOME Consortium that called for the developer to obtain three bids from qualified subcontractors for the various aspects of the project. This requirement helped to ensure overall project cost competitiveness.

In contrast to the many positive facets of the project that are summarized above there are several troubling issues related to this development which in our opinion pose significant environmental concerns that need to be urgently addressed. In addition to the environmental concerns, there are associated control/oversight weaknesses within the town that require immediate attention. The Woodside Village development, due to its location in sensitive water resource areas, necessitated the implementation of six denitrification systems and the execution of certain land use restrictions including the agreement to limit to eighty-five (85) the total number of bedrooms on the site. Our investigation revealed that the development does not comply with the provisions of the “Grant of Title 5 Nitrogen Loading Restriction and Easement as the total bedroom counts on the site have been exceeded. In addition the developer failed to provide proper notification to the prospective property owners by referencing through the individual lot deeds the pertinent easements/restrictions.

The non-compliance of the development with respect to the required bedroom counts and the lack of proper notifications to prospective property owners were enabled by communication and oversight failures within Sandwich’s own town government. An example of this failure is the approval provided by the ZBA to amend the Comprehensive Permit by allowing the developer to change the planned market rate units from two bedrooms to three bedrooms. This approval that resulted in the planned bedroom counts to exceed 85 in total came less than three months after the developer had executed the Grant of Title 5 Nitrogen Loading Restriction and Easement with the Board of Health. Eventually when the market rate units were sold, the tax assessor’s office recorded some of these market rate units as three bedroom homes even though the registered deed documents identified these units as restricted to 2 bedrooms. These failures demonstrate a breakdown in communications between the different town

bodies and also highlight a failure to review and provide oversight to the actual implementation of the project. The town failed to properly review the executed deeds for each lot to ensure compliance with the terms of the Comprehensive Permit and the Grant of Title 5 Loading Restriction and Easement.

Another shortcoming of this project is the fact that the denitrification systems, which are expensive to operate and maintain, were installed on lots/homes sold to affordable/moderate rate home buyers. In addition to disproportionately financially burdening affordable/moderate rate homeowners with site wastewater management costs, there were related failures to adequately notify these homeowners of the existence and consequences of these systems.

This Office has also determined, based on its review of the Woodside Village financial documents that the project has exceeded the 12.5% profit limitation and therefore there are excess profits that in the opinion of this Office are owed by the developer to the town. We conservatively estimated that there is approximately $171,000 in excess profits. The primary financial statement issues that generate this excess are related to an overstatement of the land value and the recognition of sales income and construction costs for two housing units not previously recorded. The excess profits may be significantly higher based on obtaining an appraisal of the land that would determine the as-is value under existing zoning without a comprehensive permit in place.

Recommendations:

Given both the town of Sandwich's and the commonwealth's critical needs for the development of affordable housing and the equally vital necessity to protect the environment this Office makes the following recommendations based on the results of our investigation into the Woodside Village Chapter 40B housing development:

- The town of Sandwich should work with the DEP to ensure that the Woodside Village development is brought into compliance with respect to the limitations imposed by the nitrogen loading restrictions as promulgated through applicable DEP regulations aimed at protecting and preserving the quality and quantity of ground water resources.

- The town of Sandwich should consider appropriate actions in order to pursue the excess profits associated with the Woodside Village project that are owed to the town. Consideration should be given to obtaining an independent as-is land appraisal to establish the appropriate land valuation to be used in determining the project's total excess profits.

- The town of Sandwich should implement an internal control process/structure to ensure that adequate oversight is exercised over commitments and conditions imposed on future developers. This should include review and approval of all deed restrictions to ensure that all matters affecting the town are adequately addressed. The town should also ensure that individual departments/town bodies are fully integrated and involved as appropriate in the decision making processes affecting the town.

- The DEP in addition to working with the town of Sandwich to bring the Woodside Village development into compliance with DEP regulations should also consider appropriate actions/sanctions against the individual(s) or business entities that created the non-compliant environmental predicament.

- The Department of Housing and Community Development (DHCD) should consider providing guidance to municipalities/developers either through guideline documents or regulations regarding the implementation of site infrastructure costs such as denitrification septic systems for removing wastewater nitrogen on an individual or cluster/communal systems basis. The intent should be to prevent an unfair financial burdening of affordable homebuyers and to ensure that adequate disclosures are made.

- The DHCD should consider providing guidance to municipalities/developers either through guideline documents or regulations regarding the proper accounting treatment for offsetting development costs with such revenue related items as grant proceeds and casualty insurance proceeds.

- In order to provide increased production levels of affordable housing, the DHCD should consider implementing changes in the regulations and guidelines that would provide for higher levels of affordability in Chapter 40B developments similar to the development model followed by Woodside Village. Minimum requirements for affordability could be increased from the current 25% level to at least those realized through the Woodside Village development. To enable this increase in affordability DHCD should also consider reducing the maximum profit levels down from what is typically 20% of development costs to something more in line with a competitive national model (approximately 10%). Consideration should also be given to implementing a required formal bidding process for all subcategories of work performed on Chapter 40B housing developments.

I would be happy to arrange a meeting with you in order to discuss these findings and recommendations in more detail. If you have any questions or concerns, or if I can be of other assistance, please do not hesitate to call.

Sincerely,

Gregory W. Sullivan

Gregory W. Sullivan
Inspector General

Enclosures

CC: John McShane, Trustee, Southside Realty Trust
Kevin M. Kirrane, Attorney, Southside Realty Trust
Tina Brooks, Undersecretary, DHCD
Steve Carvalho, Chief of Staff, DHCD
Deborah Goddard, Chief Counsel, DHCD
Kenneth L. Kimmell, Commissioner, MassDEP
David Ferris, Division Director Wastewater Management, MassDEP
Brian Dudley, Environmental Engineer, MassDEP
David Mason, Health Agent, Town of Sandwich
Rebecca Lovell Scott, Board of Health Commissioner, Town of Sandwich

Sandra Lee Tompkins, Board of Health Commissioner, Town of Sandwich
Sean Grady, Board of Health Commissioner, Town of Sandwich
George H. Dunham, Town Manager, Town of Sandwich
Nicholas E. Fernandes, Jr., Chairman Sandwich Board of Assessors
Edward L. Childs, Director of Assessing, Town of Sandwich
Paul Ruchinskas, Affordable Housing Specialist, Cape Cod Commission
Frederick B. Presbrey, CEO/President Housing Assistance Corporation
Nancy Davison, Vice President Program Operations, Housing Assistance Corporation

WOODSIDE VILLAGE
SCHEDULE OF OIG PROPOSED ADJUSTMENTS

	COST CERTIFICATION	OIG ADJUSTMENTS	ADJUSTED BALANCE
Sales:			
Affordable Unit Sales	$4,205,000		$4,205,000
Market Units Sales	2,229,125	(1) 8,375	2,583,334
		(2) 345,834	
Land Sales	400,000		400,000
Grant Income	60,000	(3) -60,000	0
Net Rental Income	16,634		16,634
Total Income	**$6,910,759**	294,209	**$7,204,968**
Project Costs			
Direct Construction	$4,613,659	(2) 251,450	$4,805,109
		(3) -60,000	
Land	1,015,000	(4) -85,000	930,000
Loan Interest	157,104		157,104
Architecture & Engineer	79,665		79,665
Marketing & Rent up	67,517		67,517
Title & Recording	55,738		55,738
Legal	29,706		29,706
Survey & Permits	26,974		26,974
Real Estate Taxes	22,195		22,195
Archeological Survey	21,034		21,034
Environmental Engineer	16,880		16,880
Inspecting Engineer	14,327		14,327
Accounting	12,192		12,192
Insurance	10,513		10,513
Development Consultant	3,450		3,450
Total Project Costs	**$6,145,954**	106,450	**$6,252,404**
Net Income from Project	**$764,805**	187,759	**$952,564**
Profit %	**12.44%**		**15.24%**
Allowable Profit @ 12.5%	$768,244		$781,551
Excess Profit	**$-(3,439)**		**$171,013**

Adjusting Entries:

(1) To reflect sales of all units to values reflected in HUD closing statements and deed documents

(2) To record imputed sales income and construction costs associated with 2 units sold as land only

(3) To reclassify accounting entry recognizing grant income as reduction of construction costs

(4) To record land value at appraised value with a comprehensive permit in place

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December 22, 2010

SENT VIA FACSIMILE
(617) 723-2334 and FIRST CLASS MAIL

Mr. Gregory W. Sullivan, Inspector General
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State Office Building
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Boston, MA 02108

Re: Woodside Village – Sandwich, MA

Dear Mr. Sullivan:

In behalf of my client, I wish to express our appreciation in affording us the opportunity to respond to the Draft Report issued by your office on November 30, 2010, in connection with the above-captioned matter.

As an integral part of this response, is correspondence with supporting documentation from the accountant, Robert A. Butkus, who was responsible for compiling financial information in connection with the Woodside project and the various audits, and which addresses some of the financial issues raised in the Draft Report.

It is encouraging to note that the Draft Report recognizes many of the positive aspects of this project not the least of which is the fact that, unlike many of the projects developed pursuant to the Comprehensive Permit process, the number of units made available to low and moderate income buyers in the Woodside development represented 74% of the total number of units, 39% affordable (25% required) and 35% moderate.

It has been suggested throughout the report that the developer agreed to a specific profit limitation in connection with this project. It is assumed that the basis for that suggestion is the use of percentage of profit figures set out in the developer's proforma, which was part of the

application process. Reference is also made to testimony during the public hearing process but again such testimony and representations related specifically to information set out in the applicant's pro forma.

As the Draft Report correctly points out, the developer, Southside Realty Trust, was formed as a Limited Dividend Entity, which is a pre-requisite in order to qualify for Comprehensive Permit Relief from the local permitting authority. Under the Statutory Scheme (G.L.c40B) as well as the regulations applicable to a project of this nature, the Limited Dividend Entity is authorized/entitled to generate a profit on an affordable project of up to but not exceeding 20%.

The proforma generated by the Developer as part of the application process was understood and intended to be a projection or estimate of cost and profit and was neither a guaranty of profit to be generated or an agreement to limit the profit to that proposed figure. In a series of letters from the Home Consortium to the Developer, as the project was negotiated and proceeded through the approval process, what had, at one time, been referenced as an agreement to limit profit to what was set forth in the applicant's proforma, was ultimately approved (see Home Consortium correspondence dated October 22, 2003) as a representation (not an agreement) by the applicant of profit and was characterized as "within the profit limitation of a limited dividend organization and the requirements of CMR 760."

Neither the final Home Consortium approval nor the Comprehensive Permit issued by the Municipality imposed a condition that the Developer's profit would be limited beyond what was statutorily permitted for a limited dividend entity.

The Barnstable County Home Consortium was not a party or signatory to the proforma and to characterize the proforma as an agreement is not accurate. In fact, the only instrument, which would qualify as an Agreement and which was executed by the Developer, the Municipality and the Approving Authority (the Barnstable County Home Consortium) is the Regulatory Agreement which clearly provides (Paragraph E(1)) that the aggregate profit. . .shall not exceed twenty percent (20%). That, of course, is consistent with the Statutory and Regulatory scheme relating to the use of Limited Dividend Entities. There is nothing in that Agreement which would require that the profit be limited to figures contained in the applicant's proforma.

The Regulatory Agreement was a document prepared by counsel for the Home Consortium and was scrutinized by both County and Town representatives. To suggest five (5) or more years after the last home has been sold and seven (7) years after the document was executed, the property purchased, construction initiated and audits conducted that an error was

made relating to one of the most important terms of the Agreement and that said term should be disregarded and another figure substituted is unrealistic and not supported by the facts or the statutory and regulatory schemes in effect when this project was approved and developed. If in fact, the use of 20% was an error, it is more likely that the figure which should have appeared in the documentation was 15% since, it was my understanding that that was the limitation prescribed by the Home Consortium, at that time.

Regarding the site wastewater issues, it has been suggested in the Draft Report that the Developer took steps to place a disproportionate burden on the owners of the affordable and moderate home. This is inaccurate and fails to recognize one of the underlying factors considered by the Developer in designing the project.

It is my understanding, given the available acreage, and the location of the acreage that the number of allowable bedrooms on the site was 85. The 85 bedroom count also required the use of at least six (6) denitrifying septic systems. A judgment was made by the Developer, that it would be more beneficial for the low and moderate purchasers to have access to a three (3) bedroom unit. That being the case, the market rate units were proposed and developed as two (2) bedroom units (not three (3) bedroom units as has been suggested in the Draft Report) and the affordable and moderate rate units were proposed and developed as three (3) bedroom units, six (6) of which needed to be developed with denitrifying septic systems otherwise they would have had to be limited to two (2) bedrooms. While there is some additional cost associated with the use of a denitrifying system, it was understood that the cost (for those six (6) homeowners) would be outweighed by the benefit of being able to make a three (3) bedroom unit available to all the prospective low and moderate purchasers. This additional cost was considered by the approving authority and, given its approval of the project and assent to the proposed sale prices of the affordable and moderately priced dwellings concluded that that additional cost associated with the use of such a system did not create a financial burden on the prospective purchaser.

It should be pointed out that based upon information provided by the manufacturer of these denitrifying systems that the initial annual cost of maintaining the system was closer to Five Hundred Dollars, than it was to Twelve Hundred ($1,200.00) or Two Thousand ($2,000.00). The denitrifying systems during the first two (2) years would require quarterly monitoring at a cost of One Hundred ($100.00) Dollars per inspection or Four Hundred ($400.00) Dollars in addition to that, the monthly electrical cost was projected to add perhaps ten ($10.00) Dollars to one's monthly utility bill or One Hundred Twenty ($120.00) annually. Additionally, the Developer contracted to pick up the cost of monitoring those systems for the first two years, a fact not referenced in the Draft Report. After the first two years, it was the developers understanding that the frequency of the monitoring inspections would be reduced to semi-annually, which would, therefore, result in an annual expense closer to Three to Four Hundred ($300.00 to $400.00). However, we have been informed recently that the frequency of inspection may in fact be limited to a single inspection annually which would drive the price of maintaining the system down further to the vicinity of Two Hundred Dollars ($200.00) annually.

It is my understanding with one exception, due to an oversight, that the owners of those six (6) units having a denitrifying septic system were provided information relating to the existence and use of the system and acknowledged receipt of that information at closing. I have attached a letter addressed to the prospective owner, which was typically sent out in advance of closing to inform the property owner of matters relating to the innovative septic system. I have also enclosed a form letter which was typically sent out shortly after closing. One unit owner (Lot 22) decided that it was more advantageous to her to have the denitrifying component removed from her system rather than to have the three (3) bedroom option. She understood and agreed that she would have to restrict her unit to two (2) bedrooms as a result. The Developer removed that system component at her request at no additional cost to her and paid her an additional cash settlement to compensate her. As a result of the restriction which that unit owner placed upon her unit, one additional bedroom became available and a particular market rate owner sought and obtained a permit to add a bedroom with a denitrifying system. To our knowledge that was never installed, no additional bedroom added and to date, it is our understanding that there are only eighty-four (84) bedrooms constructed in the development. To suggest that the market rate unit owner was put in any different position as the moderate or affordable unit owner with regard to this requirement of installing a denitrifying system to accommodate a third bedroom is not supported by the facts.

It appears that some confusion may have been created when the developer requested the Board of Appeals to approve some alternative building designs to create more style variety within the development. While these styles in some cases had a three (3) bedroom floor plan, they were constructed as a two (2) and not a three (3) bedroom units.

I have attached a census of the units and my client has confirmed after a review of both Board of Health and Building Department records that only 85 bedrooms were permitted and constructed on site by the Developer. The market rate units were constructed as two (2) bedroom units and the deeds to those units contained a two bedroom restriction accounting for 16 bedrooms and the affordable and moderate rate units were constructed with three (3) bedrooms accounting for 69 total bedrooms for an overall total of 85. While it may be accurate to indicate that the paperwork could have been more complete, there is no question that documentation of record clearly puts owners on notice of the existence of the Title 5 easements and restrictions. It should also be noted that the use of these innovative systems was a relatively new and as with any new process there were growing pains and room for refinement. Not only were these systems new for the developer, but for the Town, as well.

It was also suggested that there was an inconsistency in the deeds to various units in that some referenced the Fifteen (15') foot undisturbed buffer at the rear of each lot. That is accurate, however, all deeds referenced covenants and restrictions of record and the Declaration of Protective Covenants (which I understand owners were given in advance of the closing) in Paragraph (5) clearly referenced the lot owner obligation to maintain a fifteen (15') undisturbed

buffer at the rear of their lot. I have attached the form letter typically used by the developer in transmitting copies of the Declaration of Restrictive Covenants in advance of closing.

Although it is accurate that an "as of right" appraisal was not performed as part of the permitting and approval process by the Home Consortium, said authority was obviously satisfied that the transaction was truly arms length and not a fabrication or a questionable transaction between related parties.

The Purchase and Sale Agreement was an integral part of the application process. Clearly, the Consortium had the option of rejecting the purchase price as articulated in the Purchase and Sale Agreement and as set out in the applicant's proforma. The Consortium did not reject the proposed Purchase and Sale Agreement or the application. Certainly that was an indication that the Consortium was satisfied that their requirements had been met.

Very truly yours,

Kevin M. Kirrane

KMK/amb
Cc: John McShane

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December 20, 2010

Commonwealth of Massachusetts
Office of the Inspector General
One Ashburton Place, Room 1311
Boston, MA 02108

Re: Woodside Village – Chapter 40B Affordable Housing, Sandwich, MA

To Whom It May Concern:

Our office participated as auditors of the Woodside Village project and as a result, we are responding to the financial concerns raised in the "draft" review report issued by your office, a copy of which was forwarded to our office by the developer Southside Realty Trust, John McShane, Trustee.

The initial concern raised was regarding the appropriate overhead and profit percentages. In 2006 (compared to 2010) there was very little in the way of literature and guidelines with respect to financial statement preparation and reporting. The signed regulatory agreement for the project reflected a 20% maximum profit.

Our report covered the activity through April 30, 2006. The monitoring agent, in their report, revealed certain findings, some of which related to our financial presentation. We responded timely to them (8/13/07) and provided them with additional schedules as they requested to supplement our report. With respect to your proposed adjustments:

1. The adjustment of $8,375 is appropriate

2. Adjustment for houses built on lots which were sold.
   A cost adjustment of $251,450 is appropriate. Sales adjustments should be $333,882 which was the revenue generated (on the same report from which you derived the cost information).

3. The Barnstable County Home Loan - $60,000.
   This adjustment is <u>not appropriate</u>. The journal entry was not posted to construction costs as you see it. We <u>also</u> realized that it would be a duplication of costs and ultimately posted it to the balance sheet. The entry was required to record the grant or as you prefer to call it – a forgiveness of debt. We have attached copies of various workpapers (which are already in your possession) and a schedule showing adjustments to the developer's construction costs which tie to the original project costs per our report. The $60,000 <u>was not</u> recorded twice.

4. This adjustment suggests a reduction of costs associated with the construction of the project; we believe this misrepresents the actual cost of construction by reducing it by $60,000. This "debt forgiveness" is more appropriately classified as other income similar to "net rental income".

5. We believe this adjustment to the purchase price of the land is inappropriate. Developer paid an independent party $1,015,000 for the land. Attached is a copy of a report by the Citizens' Housing and Planning Association which was included in your original package. These proposed guidelines issued on 3/8/04 suggest a 10% per year adjustment be allowed with respect to land acquisition costs with unrelated parties. In addition, your inference on page 15 of your report to the discrepancy between the appraisal and tax assessment in the amount of almost $600,000 - to suggest an add back of that amount would prohibit any 40B projects.

   Pursuant to the aforementioned adjustments, we are enclosing a revised schedule of proposed adjustments.

   Our revised schedule does not include any excess profit for a variety of reasons. Your proposed 12.5% allowable profit was based on an estimated proposal submitted early on in the life of this project. After numerous meetings eventually twenty plus organizations and their representatives signed off on the final agreement which allowed for up to 20% profit. If the norm or standard was 15-20%, why would anyone limit themselves to 12.5? It doesn't make any sense.

In 2010 there is much more guidance available to all parties involved with 40B programs than there was from 2003-2006, the time frame involved with the Woodside Village Project.

As previously provided from documents and literature available in 2006:

A. Financial statement presentation suggested maximum allowable profit from sales (not costs) was 20%
B. Signed regulatory agreement was 20%.
C. Sanders cost certification review acknowledges allowable profit of 20% of development costs.
D. Mass Housing issued a draft on 10/6/06 on cost certifications of 40B projects. This draft was dated after the date of our report and after completion of the Woodside Project.

Thank you for the opportunity to respond to your draft review report.

Very truly yours,

Robert A. Butkus, CPA
Gosule, Butkus & Jesson, LLP