

# TOWN OF BERLIN

Office of the Town Clerk  
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Berlin MA 01503-1066

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22

WORCESTER REGISTRY OF DEEDS  
90 FRONT STREET - C201  
WORCESTER MA 01608



2014 00076825

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August 20, 2014

## CERTIFICATE OF NO APPEAL - HIGHLAND COMMONS DEVELOPMENT AGREEMENT

I, Eloise E. Salls, Town Clerk of Berlin, hereby certify that no legal proceedings have been filed concerning the HIGHLAND COMMONS DEVELOPMENT AGREEMENT voted by the TOWN OF BERLIN, Article 1 of the May 14, 2008 Special Town Meeting.. The decision was filed with the Town Clerk on June 26, 2013..

OWNER: Highland Commons Association, LLC

APPLICANT: Highland Commons Association, LLC

Location: vacant land with frontage on (Route 62) Coolidge Rd, Berlin MA 01503 on the Town of Hudson border.

Berlin Assessors records: Map 17, Block 22, Lot 0, Map 17, Block 9, Lot 0, Map 17, Block 21, Lot 0, Map 22, Block 1, Lot 0, Map 22, Block 2, Lot 0, Map 17, Block 106, Lot 0, Map 17, Block 23, Lot 0, and Map 17, Block 30, Lot 0.

Hudson Assessors records: Map 16, Lot 12, 20, 24, 25, 26, 27 and 28, Map 17, Lot 30, and 44

Property Recorded: Worcester County Registry of Deeds, Book 39313, Pages 243, 250, 353 and the Town of Hudson

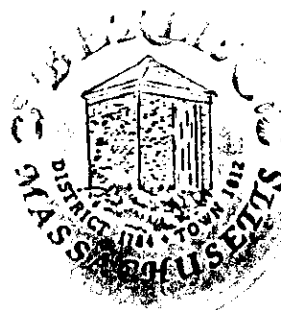
The Development Agreement was granted with the following conditions:

1. That pre and post blasting Plan to be delivered to the Planning Board.
2. Traffic Mitigation, Public Safety, Stormwater Management Plan, Lighting fixtures, Noise, Municipal Impact Mitigation, Community Preservation Mitigation, Project Maintenance, Landscaping and Screening of the Buffer Zone, Utilities and Services, Schedule of Liquidated Damages and other Operating Requirements be in place before an occupancy permit is issued and all plans to be delivered to the Planning Board

**The twenty day (20) appeal period ended on July 16, 2013. There were no appeals.**

A true copy.

Attest: Eloise E. Salls  
Town Clerk of Berlin



TOWN CLERK  
23 LINDEN STREET, #8  
BERLIN MA 01503

Phone 978-838-2931 - Fax 978-838-0014 - email: [townclerk@townofberlin.com](mailto:townclerk@townofberlin.com)

I, Eloise E. Salls, Town Clerk of Berlin, hereby certify that the following is a true and complete extract from the records of the Special Town Meeting of May 14, 2008:

Article 2. Voted to amend the Zoning By-Law by establishing a new Section 440 entitled "Highway Shopping Center Overlay District" as printed in the handout dated April 25, 2008, mailed to all voters with the warrant for this May 14, 2008 Special Town Meeting and made available at this special Town Meeting, with the following change to correct a typographical error: that the reference to "this Section 444.5" in section 444.7(d) be changed to "this Section 444.7";

by adding three (3) related definitions to Article 14 of the Zoning By-Law as printed in said handout;

And as referenced in said Section 440, by adding a new overlay district to the Town's zoning map as shown on a plan entitled "Highway Shopping Center Overlay District Plan," dated March 31, 2008, prepared by DeLuca-Hoffman Associates, Inc. and on file with the Town Clerk;

And to adopt a plan consisting of one (1) sheet entitled "Development Plan for Highway Shopping Center" dated March 31, 2008, prepared by DeLuca-Hoffman Associates, Inc. and on file with the Town Clerk.

Assisting in the paper ballot were Gary Harvey, Christine Flynn, Jim Sandini, Judy Christensen, Robert McTague, June Poland and Judy Booman. Voters were checked by their voter cards. A 2/3's vote was required. Total paper ballots cast were 340. 304 YES 36 NO.

At a Planning Board meeting on May 5, the Planning Board voted unanimously 5-0 to support the zoning amendment and recommend approval.

The conclusions of the Planning Board are contained in a report mailed to all voters and reviewed with you by Tim Wheeler earlier this evening.

A true copy.

Attest: Eloise E. Salls  
Town Clerk of Berlin



5/8/08 version

## DEVELOPMENT AGREEMENT

This Development Agreement (the "Agreement") is entered into as of this 14<sup>th</sup> day of May 2008, by and between Highland Commons Assoc., LLC, a New York limited liability company, ("the Developer") and the Town of Berlin ("the Town"), acting by and through its Board of Selectmen, for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged. This Agreement represents the understanding between the parties with respect to the contributions and commitments of the Developer with respect to mitigating traffic, environmental, public safety, growth management and other impacts arising from the construction and operation of buildings and other improvements in the Town (the "Project"), as an expansion of a shopping center under construction in Hudson on a parcel of land located on Route 62 as more particularly described in the plan entitled "Development Plan for Highway Shopping Center" attached hereto and incorporated herein as Exhibit A (the "Site").

### 1. GENERAL

- 1.1 The Developer shall comply with applicable rules, regulations and by-laws of the Town, Commonwealth of Massachusetts and Federal Agencies as they apply to the construction, maintenance and operation of the Project, including, without limitation, compliance with Wetlands Protection Act final orders, the Massachusetts Environmental Policy Act (MEPA), General Laws Chapter 30, Section 61, and the State Building Code.
- 1.2 The Developer shall comply with applicable regulations issued by the Commonwealth of Massachusetts relative to the existence of hazardous waste that may be located on the Site, including compliance with the provisions of M.G.L. Chapter 21E and other applicable government codes.
- 1.3 The Developer shall file a Notice of Project Change or similar filing as necessary under MEPA covering the Project before beginning any construction of buildings on the Site.
- 1.4 The applicable terms of this Agreement shall be incorporated into the conditions of any site plan approval issued by the Planning Board for any portion of the Project ("Site Plan Approval"), and shall be binding upon the Developer and any successor in interest to the Project, as provided in Sections 16.5 and 16.11 of this Agreement.

### 2. CONSTRUCTION PHASE RESPONSIBILITIES

- 2.1 Construction of all structures on the Site is to be in accordance with all applicable zoning regulations in effect in the applicable local or state jurisdiction and with the State Building Code.
- 2.2 The Developer will work with the Town and with the Town of Hudson to coordinate an integrated approach to permitting and inspections relative to the Project.

*A TRUE COPY.*  
*Attest:*  
*Elaine F. Salo*  
*Town Clerk of Berlin*



*Development Agreement – Highland Commons*

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- 2.3 In addition to the normal fees payable to the Town for building permits and other permits, the Developer shall assume reasonable expenses of ongoing inspection and review of the construction process and compliance with all applicable conditions and requirements of the Zoning By-Law, the Development Plan and Site Plan Approval. Upon the issuance of a building permit, the Town shall provide to the Developer an initial estimate of the cost of inspection and review services and the Developer shall deposit said amount in an interest-bearing escrow account, an initial amount not to exceed \$50,000.00. The Town shall draw from the escrow account as necessary to pay for inspection and review services, and shall provide additional estimates to the Developer when the balance of the escrow account is reduced to a point below the anticipated requirements for the next month. The Developer shall then deposit further amounts equal to such estimates subject to the terms of this Section. At the issuance of a final Occupancy Permit for the Project, any funds remaining in the escrow account shall be returned to the Developer. The Town and the Developer shall work together to coordinate inspections of the Project with the Town of Hudson, to the extent applicable. The Town agrees to use monies deposited under this Section for the purpose of retaining qualified inspectors to review the Project.
- 2.4 During the duration of construction activities in connection with the Project, the Developer has agreed to limit hours of construction to the period from 7 AM until 6 PM, Monday through Saturday. The Developer shall also impose on each of its contractors a requirement that all construction trucks and heavy equipment accessing the Site shall use the interstate highway system (Route 495 to Route 62). Trucks and equipment accessing the Site via Gates Pond Road shall be restricted to those necessary for Site restoration, landscaping, utility work and maintenance activities in this general area. This limitation shall not apply to any trip originating or ending at a place of business within the Town or the Town of Hudson. An appropriate dust control/tire washing program during construction shall be implemented as part of the Site Plan Approval process.
- 2.5 Prior to the issuance of a building permit from the Town, the Developer shall submit a report to the Planning Board for review and approval by the Planning Board and its consultants during the Site Plan Approval process, that details the measures to be undertaken in order to provide protection from any blasting conducted to remove rock located on the Site (the "Controlled Blasting Plan") to all Berlin properties shown on the plan titled "Pre-Blast Survey Limits" attached as Exhibit B, and to any other Berlin properties containing buildings, wells or septic systems located within a five hundred (500) foot radius of any blasting proposed on the Site and containing occupied residential dwellings (collectively, the "Interested Parties"). Any blasting activities on the Site shall be carried out in compliance with any and all applicable law and with the additional specifications set forth in the Controlled Blasting Plan which, at a minimum, shall include the following terms and conditions:
- (a) A copy of the Controlled Blasting Plan shall be delivered to all Interested Parties.

*Development Agreement – Highland Commons*

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- (b) The Developer shall carry or, cause its blasting contractor to carry, sufficient liability insurance.
- (c) All Interested Parties shall be advised in advance of scheduled blasting activities.
- (d) Pre-blast surveys and post-blast surveys shall be performed on all principal structures located on property of the Interested Parties.
- (e) Pre-blast and post-blast testing shall be conducted prior to and following the cessation of major construction activities with test results provided to each respective Interested Party. The testing shall establish the then-existing quantity and quality (in a manner consistent with the Berlin Board of Health requirements for private wells) of well water servicing the Interested Parties. The initial testing shall be conducted at least thirty (30) days prior to the commencement of blasting activities and the post-blast testing of all property of Interested Parties shall be completed within sixty (60) days of the cessation of blasting and major construction activities.
- (f) The Developer shall cause the prompt repair or replacement of any and all damage to the buildings and other improvements located on Interested Parties' properties which is shown by the surveys or testing to be resulting from the blasting or major construction activities; all repairs and replacements are to be made in a prompt, professional and workmanlike manner.
- (g) Any material construction activity proposed within the Pre-Blast Survey Limits shall be generally described in the Controlled Blasting Plan so that the Planning Board and its consultants can make a determination that protections are in place to protect the properties of the Interested Parties.

### **3. TRAFFIC MITIGATION**

#### **3.1 Mitigation projects to be completed by the Developer**

Prior to the issuance of Occupancy Permits for the first 150,000 square feet of building floor area of the Project, subject to receipt of all necessary permits, authorizations and approvals, including, without limitation, approval of MassHighway, the Developer shall complete the following traffic improvements:

- (a) Route 62 (Central Street) at Interstate 495 and Gates Pond Road: Install traffic signals at the northbound and southbound ramps to Interstate 495 and at Gates Pond Road; and install conduit in Route 62 between these sets of signals for future potential interconnection.
- (b) Route 62 (Central Street)/Sawyer Hill Road: Install advance "Intersection" warning signs on Route 62 in both directions.

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- (c) Any other improvements required by MEPA and not listed specifically in this Section 3.1.

3.2 INTENTIONALLY OMITTED

- 3.3 Public Transportation: The Developer shall provide a semi-enclosed shelter at the Project for the drop-off of passengers from the local bus service.

3.4 Traffic calming study/measures for Gates Pond Road

The Developer, prior to Site Plan Approval, shall deposit the sum identified in the Schedule of Payments as 15.1(2) "Traffic calming study/measures for Gates Pond Road" in a separate interest-bearing escrow account (the "GPR Traffic Calming Study Account") to fund traffic study, design and implementation of traffic calming measures and related improvements along Gates Pond Road, in the event the Planning Board decides such measures to be necessary. Any such measures may be "phased" or, in some circumstances, implemented on a trial basis as necessary to evaluate their effectiveness. Any funds in the GPR Traffic Calming Study Account (with accumulated interest) not used for their intended purposes within three (3) years of the issuance of the final Occupancy Permit for the Project shall be retained by the Town and added to the Developer's obligation to pay the sum of money identified in the Schedule of Payments as 15.3(2).

3.5 Ongoing responsibilities

- (a) The Developer shall impose on itself and on each of its tenants (that have not, as of the date of this Agreement, already signed a lease for premises on the Site), tenants' employees, and successors and assigns, a requirement that delivery vehicles serving the Developer and such tenants, successors and assigns will utilize the highway system (Route I-495 to Route 62) to access the Project. Developer's lease with Lowes Home Improvement ("Lowes") predates this Agreement and therefore Lowes shall not be bound by this obligation, however, the Developer shall notify Lowes that delivery vehicles are strongly encouraged to utilize the highway system (Route I-495 and Route 62) to access the Project. This restriction shall not apply to trips originating or ending at a business located in Berlin or Hudson, nor to deliveries of small cargoes made by common carriers such as UPS or Federal Express as part of a route delivery that in its ordinary course includes residences and businesses located within the Towns of Berlin or Hudson.
- (b) The Developer shall cooperate with appropriate officials of the Towns of Berlin and Hudson in developing traffic contingency plans for peak traffic periods or special events associated with the Project.

3.6 Restrictions on Access from Gates Pond Road; Use Restrictions on Commercially-Zoned Corner

*Development Agreement – Highland Commons*

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- (a) The existing so-called “sand pit” access way from Gates Pond Road to the Site shall be landscaped and gated at its point of intersection with Gates Pond Road so as to limit use of the access way to emergency vehicles and uses related to maintenance/landscaping activities on the Site, in a manner determined by the Planning Board during the Site Plan Approval process to be consistent with public safety interests. The Developer shall periodically maintain the landscaping in this area and maintain this access way for such public safety purposes as may be determined upon Site Plan Approval.
- (b) Upon the issuance of the first certificate of occupancy for a building located on that portion of the Site that is located at the intersection of Gates Pond Road and Route 62 and as of the date hereof is situated within the Commercial zoning district (the “Commercial Corner”), the Developer shall, through a recorded deed restriction or other instrument, in a form acceptable to Town Counsel, restrict the use of the land, pursuant to the next sentence, shown and described as the “Land Use Restriction Area” on the attached Exhibit C, a copy of which is attached hereto and incorporated as if fully set forth herein (the “Buffer Strip”). The restriction shall provide, subject to the provisions of this paragraph, that (i) the Buffer Strip is to be maintained as a landscaped area and (ii) no access driveway (other than for gated or restricted emergency access) shall connect the Commercial Corner to the remainder of the Site or to the shopping center currently under development on adjacent land in the Town of Hudson. Notwithstanding the foregoing, permitted uses on the Buffer Strip may include: one (1) access drive in the approximate location shown on the attached Exhibit C; signage for the Project along Route 62 or at Gates Pond Road identifying the existing residential neighborhood; subsurface improvements such as utility lines, above-grade utility lines, transformers, poles and related appurtenances; facilities used in connection with stormwater management; and related infrastructure improvements. This restriction shall be enforceable by the Town in perpetuity.
- (c) Upon the issuance of the first certificate of occupancy for a building located on the Commercial Corner, the Developer shall, through a recorded deed restriction or other instrument, in a form acceptable to Town Counsel, restrict the use of the Commercial Corner, to the extent such land is under Developer’s control, principally for office uses (general, medical, professional, banking or otherwise) only and maintain the Buffer Strip as set forth in Section 3.6(b) above. This restriction shall be enforceable by the Town in perpetuity.

#### **4. PUBLIC SAFETY**

- 4.1 The Developer, prior to the issuance of the final Occupancy Permit, shall delineate the Town line of Berlin and Hudson within the Highway Shopping Center structures and in the parking areas. Such delineation is to be designed so as not to impact the aesthetic quality of the project.

*Development Agreement -- Highland Commons*

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- 4.2 The Developer shall, beginning in the year in which an Occupancy Permit is issued for not less than 150,000 square feet in the Project, make the first annual payment of the sum of money identified in the Schedule of Payments as Section 15.2 (the "Public Safety Services Payment") The Public Safety Services Payment shall be adjusted annually according to the percentage change in the Eastern Massachusetts Consumer Price Index published monthly by the Bureau of Labor Statistics, U.S. Department of Labor. In no event at any time shall the adjustment of the Public Safety Services Payment result in payments that are less than the payments made the immediately prior year. Such payments shall be invoiced annually along with the tax payments for the Project in a manner consistent with Section 16.1 below.
- 4.3 The Developer shall cooperate with the Towns of Berlin and Hudson to develop legally enforceable rules and regulations for the operation of motor vehicles at the Project. Appropriate signage and markings shall be installed and maintained by the Developer after such rules and regulations have been developed.
- 4.4 To the extent necessary, the Developer shall cooperate with the Town and its Police and Fire Departments to develop an appropriate mutual aid agreement and/or revise any intermunicipal agreement(s) with the Town of Hudson to confirm that the Town shall have full responsibility for police and fire coverage within the Site with access to the Site provided through the Town of Hudson, who shall have full responsibility for that portion of the shopping center located in the Town of Hudson.

**5. STORMWATER MANAGEMENT**

- 5.1 During Site Plan Approval for the Project, a Stormwater Management Plan shall be submitted to the Planning Board indicating how the stormwater management system for the Project has been designed to control the rate of release (quantity) as well as the quality of stormwater discharged from the Site. The Stormwater Management Plan shall materially comply with applicable State standards and meet applicable State water quality standards. Under the Stormwater Management Plan, the Developer shall be required to operate, maintain and repair the stormwater system in accordance with a detailed Operations & Maintenance program to be developed for the Project.

At the Town's reasonable request as part of the Site Plan Approval process, the Developer shall engage a competent engineering firm to review the Stormwater Management Plan to determine compliance with applicable requirements and to confirm that such Stormwater Management Plan shall not have a detrimental impact, pursuant to applicable State standards, on abutting residential properties in the Town.

The on-site detention basins within the Project, whether located in the Town or in the Town of Hudson, shall be inspected not less than annually with respect to sedimentation accumulation with copies of annual reports given to the Planning Board of the Town. To the extent such reports indicate the need for sediment removal, the same shall be removed.



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- 5.2 All catch basins of the Highway Shopping Center, whether located in the Town or in the Town of Hudson, shall be installed with sumps and inverted outlets. The catch basins shall be monitored on an annual basis with reports given to the Planning Board of the Town. The catch basins are to be cleaned annually, and as necessary, at more frequent intervals.
- 5.3 Snow storage is to be provided on-site, primarily on impervious surfaces, except (i) during peak periods (November 1 – January 1) or (ii) exceptional storms, in which event the Developer may or may not elect to utilize off-site storage. Snow-melt runoff is to be directed towards catch basins. Snow storage areas will be designed to direct the flow to the stormwater management facilities and shall not be directed towards abutting residential properties in the Town abutting the site. The Developer agrees to use calcium chloride or such other substitute for sodium chloride as may be acceptable to the Town and the Developer for purposes of snow removal treatment. The snow storage area shall be identified on the site plans for the Project to be submitted to the Planning Board. Review by the Planning Board shall confirm that proposed snow storage areas are to be located so that snowmelt from these areas shall not be directed to abutting residential properties in the Town abutting the Site.

**6. LIGHTING**

- 6.1 The Developer shall comply with the lighting requirements set forth in Sections 1031 and 447.3 of the Zoning By-Law.
- 6.2 All lighting fixtures, with the exception of pedestrian lighting with a height of less than eight (8) feet shall be designed and maintained so that the bare light bulb lamp or light source is substantially shielded from direct view at any point five (5) feet above the ground on abutting properties in the Town. The Developer shall primarily utilize shoe-box fixtures, so-called, to satisfy this provision and the locations and specifications of Project lighting shall be reviewed and approved during the Site Plan Approval process.

**7. NOISE**

- 7.1 The Developer shall comply with the noise generation standards set forth in Sections 1021 and 447.2. of the Zoning By-Law.
- 7.2 In order to verify compliance with the performance standards regarding noise impacts from the Project, at the Town's reasonable request, the Developer shall engage a competent engineering firm to make measurements and analyze noise levels in reference to such performance standards.
- 7.3 Prior to the issuance of a building permit in the Town, the Developer shall have submitted to the Planning Board, for review and approval during the Site Plan Approval process, a schedule of hours of operation and operational protocol (including designated delivery waiting area(s), snow removal/storage plan and parking lot sweeping schedule) for the Project.

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**8. MUNICIPAL IMPACT MITIGATION**

8.1 The Developer shall pay the Town, upon the issuance of an occupancy permit for not less than 150,000 square feet for the Project, the sum identified in the Schedule of Payments as 15.4(1) "Capital Plan Contribution" towards the purchase of capital equipment for municipal use.

**9. COMMUNITY PRESERVATION MITIGATION**

9.1 In recognition of the Town's desire to maintain open space and promote affordable housing, senior housing and historic preservation, as well as other community interests such as recreation, community planning, local cable and cultural activities, the Developer shall pay the Town, upon the issuance of an occupancy permit for not less than 150,000 square feet for the Project, the sum identified in the Schedule of Payments as Section 15.3 "Community Preservation Mitigation."

**10. PROJECT MAINTENANCE**

10.1 Vacuum sweeping of parking areas shall comply with the provisions of Section 1021 of the Zoning By-Law.

10.2 As part of its common area maintenance, the Developer, subject to the consent of the Town, or MassHighway, as applicable, shall provide regular, on-foot cleanup of the area along roadways in the Town located within 200 feet of the Site, as well as within the layout of the public ways in the adjoining residential areas identified on the plan attached as Exhibit D, approximately once per week, adjusted, as may be practicable, during the winter months.

10.3 The Developer shall provide mosquito control measures within the Site, as may be necessary and in accordance with applicable law. Such measures may be required by the Planning Board as conditions of Site Plan Approval.

**11. LANDSCAPING AND SCREENING**

11.1 Implementation and Ongoing Maintenance and Enhancement of Buffer Zone:

- (a) The Developer shall prepare a plan and program for the design, implementation and management of the buffer area on the perimeter of the Site, to be designated on the site plan approved by the Planning Board ("Buffer Enhancement Plan"). The goal of the Buffer Enhancement Plan will be to develop, maintain and enhance the existing natural buffer's effectiveness primarily as a visual screen. The Buffer Enhancement Plan shall include provision of the following measures as necessary to visually screen and maintain this buffer to neighboring properties: the implementation of supplemental landscaping, berming, the removal of dead or diseased trees, or intrusive species that would be detrimental to the screening

*Development Agreement – Highland Commons*

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function of the buffer area; replacement of significant stands as a result of loss to fire, storms or disease; planting and maintenance of herbaceous cover and understory species where appropriate to provide lower-level screening; construction and maintenance of security fencing along the outside perimeter of the development area; and construction and maintenance of a gate and landscaping in the area of the existing Site access road at Gates Pond Road (such a gate is intended to prohibit permanent parking, access or egress in this area after the completion of the construction mobilization associated with the Project). The Town and the Developer acknowledge that the purpose of this provision is to maintain the integrity of the visual buffer by reasonable means and undertake to cooperate to assure its application with due concern for balancing the accomplishment of this purpose with reasonable expenditures.

- (b) In the event of loss of significant stands as a result of fire, storm or disease, the Developer shall cause a qualified forester, registered landscape architect or horticulturist to prepare a restoration plan acceptable to the Planning Board and the Developer, which plan may extend over a period of years. The total cost of restoration or any temporary screening shall not entail a cost to the Developer of more than \$5,000 per year. During such restoration period, the Developer and the Planning Board may agree on temporary screening measures, such as additional fencing.
- (c) The Developer shall contract for the services of a qualified forester, registered landscape architect, or horticulturist acceptable to the Planning Board to review the condition of the buffer zone on an annual basis, who will file a report and comment and review. Any work as outlined in the report to restore the Buffer Enhancement Plan and acceptable to the Town and the Developer will be performed at the expense of the Developer.

11.2 Enhancement of Neighborhood Entrance: The Developer shall prepare a plan and program to be submitted to the Planning Board during the Site Plan Approval process for the design and construction of a landscape treatment at the entrance of Gates Pond Road at Route 62 on the Site to improve the aesthetic appearance of this area and specifically identify Gates Pond Road as a residential neighborhood as conceptually depicted on the plan attached as Exhibit E ("Neighborhood Enhancement Plan").

## **12. UTILITIES AND SERVICES**

12.1 The Developer shall contract for solid waste removal at the Developer's expense. In the event that the Town is required to provide solid waste removal for any reason, including but not limited to any applicable law or regulation or failure of the Developer (or tenants of the Project) to properly deal with such waste, the Developer agrees to pay the Town for any expenses arising directly from and reasonably attributable to the Project. In such event the Town and the Developer shall work together to establish a plan to coordinate such services.

*Development Agreement – Highland Commons*

12.2 The Developer shall contract for the provision of public water service by the Town of Hudson, at the Developer's expense. In the event that the Town is required to provide or pay for water or sewer service to the Project for any reason, including but not limited to changes in State laws or regulations or policies of the Town of Hudson, the Developer agrees to hold the Town harmless from any expense, loss, claim or liability arising from the provision of such services to the Project.

**13. SCHEDULE OF LIQUIDATED DAMAGES**

For violations of the terms of this Agreement, the parties agree to the following amounts as liquidated damages to cover the Town's costs in enforcement action. These damages are not to preclude any remedy in law (including, if applicable, specific performance) and do not include regular litigation expenses to the Town in the event that these are necessary for enforcement.

**13.1 Construction Phase:**

For each failure of its contractor: (i) to confine construction activities to the time period set forth herein, (ii) to attempt to provide notice to all Interested Parties in advance of scheduled blasting activities, or (iii) for each failure to have heavy equipment access the site via the interstate highway network, except as otherwise permitted.....\$100

**13.2 Traffic:**

For each failure of a delivery vehicle to access the site via the interstate highway network.....\$100

13.3 Public Safety: .....None

**13.4 Stormwater Management:**

For failure to provide reports, maintain catch basins or comply with snow storage area limitations as required by Section 5.3 of this Agreement:.....\$50 per day beginning 10 business days after developer has received written notice of violation.

**13.5 Lighting:**

For failure to correct lighting violation:.....\$50 per day beginning 10 business days after developer has received written notice of violation; provided that such damage shall not accrue for period during which offending lighting is extinguished.

**13.6 Project Maintenance Noise:**

For any incident of mechanical sweeping not conducted in accordance with Sections 7.1 and 10.1 of this Agreement .....\$100

**13.7 Maintenance:**

For each failure to perform cleanup outside the Project boundaries

*Development Agreement – Highland Commons*

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as required by Section 10.2 of this Agreement .....\$100 per day beginning fourteen (14) days after developer has received written notice of the violation.

13.8 Landscaping and Screening:

For each failure to perform maintenance of the buffer area pursuant to Section 11.1.....\$100 per day beginning sixty (14) days after written notice of failure to perform has been made to the Developer without Developer having commenced good faith efforts to perform such maintenance.

For each failure to file a report with the Planning Board pursuant to Section 11.1.....\$100 per day beginning sixty (60) days after written notice of failure to file has been made to the Developer.

**14. OTHER OPERATING REQUIREMENTS**

14.1 Except in connection with a retail establishment involving the sale of tires, batteries, and other automotive accessories, the lubrication of automobiles, including the changing of oil, will be prohibited. The Developer will comply with applicable requirements under law with respect to the disposal of batteries, tires and used oil returned by customers for safe disposal.

14.2 The Developer agrees prior to the Grand Opening of the Project to conduct a "Job Fair" so-called. The Developer will coordinate such Job Fair, to the extent feasible, with local or regional governmental employment agencies so that local residents are provided with adequate notice of employment opportunities. In addition to the implementation of the specific arrangements that the Developer has made, the Developer will also coordinate a like Job Fair for contractors for tenant improvements in the Project and the Developer will encourage its contractors to hire local construction workers for the Project.

14.3 The Developer shall provide all parking for employees and patrons of the Project in off-street parking areas, either in designated areas of the Project as approved by the Planning Board or at an approved off-site location. No parking will be permitted on public streets.

14.4 In the event that the Developer, which for purposes of this Section 14.4 shall include any owner of a parcel on the Site for which a fee interest may be transferred, appeals its real estate tax assessment and such appeal is finally denied, the Developer shall reimburse the Town for its costs of reasonable appraisal, legal and other professional expenses incurred by the Town with respect to such appeals for abatement of real estate taxes up to a maximum of \$20,000 per event.

*Development Agreement – Highland Commons***15. SCHEDULE OF PAYMENTS**

## 15.1 Neighborhood Traffic Calming Mitigation (one time payments)

(1) Traffic calming study/measures for Gates Pond Road .....\$25,000

15.2 Public Safety Services (ongoing annual payments).....\$565,000

## 15.3 Community Preservation Mitigation

(1) Senior/Affordable housing.....\$375,000

(2) Cultural, historical, educational, recreational  
and planning activities/studies, cultural activities and facilities .....\$750,000

(3) Open space .....\$700,000

## 15.4 Municipal Impact Mitigation (one time payments)

(1) Capital Plan Contribution .....\$200,000

## 15.5 Mitigation Payments

(1) Payments made pursuant to 15.3(3) shall be paid to the Town of Berlin Open Space Account.

(2) All other payments shall be received and expended pursuant to MGL Chapter 44 Section 53A.

**16. MISCELLANEOUS**

## 16.1 Municipal Charges

The payments under this Agreement shall be treated as municipal charges.

## 16.2 Performance Bond

The Town acknowledges that certain improvements and conditions as may have been required in this Agreement, may not be fully completed or satisfied at the time of the issuance of the final Occupancy Permit (due to weather conditions, local, state or federal approvals or other matters beyond the Developer's control). In addition, certain conditions may be ongoing requirements which are unable to be satisfied prior to the issuance of a final Occupancy Permit. In those instances when conditions requiring construction of an improvement are not so satisfied prior to the issuance of the final Occupancy Permit, due to delay or other matters beyond Developer's control, the Developer shall agree, pursuant to the Site Plan Approval process, on the amount and nature of a bond or deliver other adequate security to ensure completion of those conditions not

## *Development Agreement – Highland Commons*

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yet satisfied and the Building Inspector, upon notification that such bond or security is satisfactory, shall issue the Occupancy Permit.

### 16.3 Documentary Production

Concurrent with the presentation of this Agreement, the Developer shall provide documentation in the form of a representation from the Manager(s) of Highland Commons Assoc., LLC that it intends to maintain said limited liability company as a going concern able to discharge its responsibilities hereunder and that it is duly authorized to execute this Agreement.

### 16.4 Forbearance from Suit

Developer shall forego any actions at law or equity attempting to contest the validity or prevent the enforceability of any provisions of this Agreement and shall procure written acknowledgment that such forbearance shall bind any successor or assign. Such forbearance shall not preclude the Developer from bringing any action for breach of contract on the part of the Town or acts of intentional misconduct on the part of the Town with respect to matters contemplated herein.

### 16.5 Successors and Assigns

- (a) The Developer (or the Developer's successor or assign who has assumed the obligations of the Developer under this Agreement) shall maintain common ownership of at least sixty percent (60%) of both the total land area within the Site and the total building floor area within the Project, unless otherwise consented to in writing by the Board of Selectmen acting on behalf of the Town, such consent not to be unreasonably withheld.
- (b) Except as provided in Section 16.5(c) below, all terms of this Agreement shall bind any successor or assign of this Agreement or any successor or assign of land within the Site.
- (c) The obligation to make the payments set forth in the Schedule of Payments shall not be assigned to nor treated as assumed by any entity that acquires a fee interest in any of the land area within the Site (a "New Entity"), but rather such obligations shall remain the responsibility of the Developer and its successors and assigns which expressly assume the same, unless otherwise consented to in writing by the Town, the Developer and any New Entity.

### 16.6 Acquisition of Land

The Developer covenants that at such time as it, or a successor or assign that has specifically and in writing acknowledged the terms of this Agreement, shall acquire title to all land within the Highway Shopping Center Overlay District, the Developer or such successor or assign shall record a notice of this document at the time of such acquisition. In the event that the Developer, or its successor or assign, is unable or unwilling to acquire title to all land within the Highway

*Development Agreement – Highland Commons*

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Shopping Center Overlay District, the Developer shall immediately notify the Town of its inability or unwillingness to acquire title.

16.7 Notices

Notices, when required hereunder shall be deemed sufficient if sent registered mail to the parties at the following addresses:

Town: Town of Berlin  
23 Linden Street  
Town Hall  
Berlin, MA 01503  
Attn: Town Clerk

Developer: Highland Commons Assoc., LLC  
c/o SullivanHayes Companies  
10 Waterside Drive, Suite 200  
Farmington, CT 06032

with a copy to:

Benderson Development Company  
520 Delaware Avenue  
Buffalo, NY 14202  
Attn: Daniel J. Duggan

and

Goulston & Storrs, P.C.  
400 Atlantic Avenue  
Boston, MA 02110-3333  
Attn: John E. Twohig, Esq.

16.8 Governing Law

This Agreement shall be governed by the laws of the Commonwealth of Massachusetts. The parties hereby consent to non-exclusive jurisdiction of the courts of the Commonwealth of Massachusetts sitting in the Counties of Worcester or Middlesex.

16.9 Amendments to this Agreement

Amendments to the terms of this Agreement may be agreed to on behalf of the Town by its Board of Selectmen provided that no such amendment shall relieve the Developer of any material obligation without prior approval of Town Meeting.



*Development Agreement – Highland Commons*

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## 16.10 Interpretation

For purposes of the operation of this Agreement under Section 448.10 of the Zoning By-Laws, the term "Developer" shall include any proponent of the Highway Shopping Center use, whether or not a successor or assign of any signatory of this Agreement. Capitalized terms not defined herein shall have the meaning assigned under the Zoning By-Laws.

## 16.11 Miscellaneous

The Developer acknowledges and agrees that this Agreement shall be binding upon the Developer and each of its successors or assigns as to the obligations which arise under this Agreement during their respective periods of ownership of the Project, provided that each predecessor in interest shall be released under this section only if each has procured a written acknowledgment from their immediate successor addressed to the Town that such successor is bound by the terms of this Agreement, and that this Agreement shall be enforceable by the Board of Selectmen. As and when requested by the Developer, the Town, through its Board of Selectmen, will promptly advise, in writing, the status of the Developer's obligations under this Agreement for the benefit of existing and prospective mortgagees of all or a portion of the Project and such other persons as the Developer may designate.

Developer also acknowledges and agrees that the Town, operating through its officers and employees and upon notice to the Developer, shall have the right to enter the property as reasonably necessary to inspect to confirm compliance with the terms of this Agreement.

The Developer shall not be considered to be in breach of this Agreement for so long as the Developer is unable to complete any work required hereunder due to a force majeure event or other events beyond the reasonable control of Developer. In the event that the Town believes that a breach by Developer under this Agreement exists, it shall give written notice of the same to the Developer and give the Developer a reasonable period of time to cure such breach before taking any action on the same.

This Agreement shall become effective at such time that Article 2 (the "Rezoning Article") to be considered at the May 14, 2008 Town of Berlin Town Meeting is approved or deemed approved by the Attorney General's Office of the Commonwealth of Massachusetts. In the event that the Attorney General's Office approves the Rezoning Article, or the same is deemed approved, but a third party commences legal proceedings claiming invalidity of the Rezoning Article and as a result of such proceeding the Rezoning Article is finally adjudicated to be invalid, either in whole or in part, by decision of a court of competent jurisdiction (and all appeal periods with respect to such decision have lapsed), then this Agreement, at the option of the Developer may be terminated by notice to the Town and shall thereupon be of no further force or effect. It is expressly agreed that the Agreement may only be so terminated if the Developer abandons all efforts to construct the Project pursuant to the Rezoning Article by like written notice to the Town. In the event that only a part of the Rezoning Article is finally adjudicated to be invalid, and the Developer wishes to proceed with or authorize others to proceed with construction of the Project or other substantially similar improvements on the Site pursuant to the Rezoning Article,

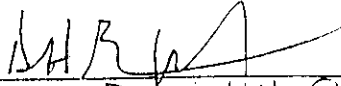
*Development Agreement - Highland Commons*

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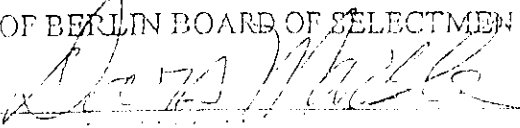
it shall give written notice of such intent to the Town and such written notice shall ratify and confirm this Agreement. The parties agree to cooperate and to act in good faith for the purpose of carrying out the provisions of this paragraph.

EXECUTED under seal as of the date and year first above written, pursuant to the vote under Article 1 of the May 14, 2008 Special Town Meeting of the Town of Berlin, Massachusetts.

HIGHLAND COMMONS ASSOC., LLC

By:   
Name: David H. Baldouff  
Its: Manager  
Hereunto Duly Authorized

TOWN OF BERLIN BOARD OF SELECTMEN

By:   
Name: David J. Miller  
Its: Chairman  
Hereunto Duly Authorized



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

WESTERN MASSACHUSETTS DIVISION  
1350 MAIN STREET  
SPRINGFIELD, MASSACHUSETTS 01103-1629

MARTHA COAKLEY  
ATTORNEY GENERAL

(413) 784-1240  
www.ago.state.ma.us

August 5, 2008

Eloise E. Salls, Town Clerk  
23 Linden Street, #8  
Berlin, MA 01503

**RE: Berlin Special Town Meeting of May 14, 2008 — Case # 4696  
Warrant Article # 2 (Zoning)**

Dear Ms. Salls:

Article 2 - I return with the approval of this Office the amendments to the town by-laws adopted under this Article on the warrant for the Berlin Special Town Meeting that convened on May 14, 2008, and the map pertaining to it.

The amendments adopted under Article 2 add to the Town's zoning by-laws a new Section 440, "Highway Shopping Center Overlay District" (HSCO District). The purpose of the proposed by-law is to permit a large-scale, integrated shopping center and office use on a certain site within the town in accordance with a HSCO Development Plan. Section 44.8 pertains to site plan approval and provides in pertinent part as follows:

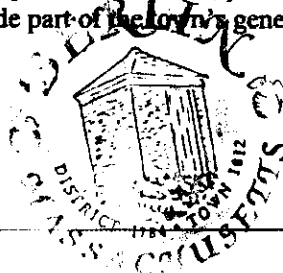
448.3 Application:

\* \* \*

(b) The Planning Board shall obtain with each submission a Site Plan Approval fee, to be determined by the Planning Board. Such fee will be used to cover any expenses connected with public hearing costs and the review of plans, including the costs of any legal, engineering, planning or other consultant services necessary for review procedures, including for periodic site inspections. Any unused portion of the review fee will be returned to the applicant. Any such expenses that the Planning Board comes to anticipate during the Site Plan Approval process shall be paid into such fund by the applicant upon request by the Planning Board. Furthermore, any such expenses incurred by the Town in excess of such fee as so supplemented shall be reimbursed by the applicant.

In approving Section 448.3 (b), we call the Town's attention to G.L. c. 44, §§ 53 and 53G. General Laws Chapter 44, Section 53, provides that "[a]ll money received by a city, town or district officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury." Under Section 53 all moneys received by the town become a part of the general fund, unless the Legislature has expressly made other provisions that are applicable to such receipt. In the absence of any general or special law to the contrary, consultant fees of the sort contemplated here would, pursuant to G.L. c. 44, § 53, have to be deposited with the Town Treasurer and made part of the town's general fund, thus not

A TRUE COPY.  
Attest: *Eloise E. Salls*  
Town Clerk of Berlin



available to the board of selectmen for the purpose for which they were assessed unless in accordance with an appropriation made by Town Meeting. Illustrative of such legislative authority is G.L. c. 44, § 53G.

General Laws Chapter 44, Section 53G, authorizes zoning boards, planning boards, boards of health, and conservation commissions acting under authority conferred by G.L. c. 40A, § 9 and 12, c. 41, § 81Q, c. 40B, § 21, c. 111; and c. 40, § 8C, to impose such a fee, to disburse the funds collected, and to return unused portions to the applicant. It must be noted that the Legislature did not include planning boards acting under the authority conferred solely by a local law within the small class of local boards that enjoy the benefits of Section 53G. For example, when the planning board is acting under its authority conferred by a zoning by-law to review site plans for as of right use, it cannot avail itself of the provisions of G.L. c. 44, § 53G. Such inclusion would require special legislation or an amendment to the statute to accomplish this. Absent a general or special law, the fees contemplated in Section 448.3 must be handled in a manner consistent with G.L. c. 44, § 53. We suggest that the Town discuss this issue in more detail with Town Counsel.

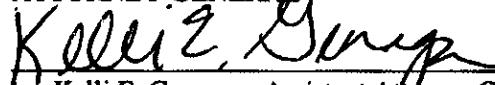
**Note:** Under G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of this section. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.

If the Attorney General has disapproved and deleted one or more portions of any by-law or by-law amendment submitted for approval, only those portions approved are to be posted and published pursuant to G.L. c. 40, § 32. We ask that you forward to us a copy of the final text of the by-law or by-law amendments reflecting any such deletion. It will be sufficient to send us a copy of the text posted and published by the Town Clerk pursuant to this statute.

Nothing in the Attorney General's approval authorizes an exemption from any applicable state law or regulation governing the subject of the by-law submitted for approval.

Very truly yours,

MARTHA COAKLEY  
ATTORNEY GENERAL



by: Kelli E. Gunagan, Assistant Attorney General  
By-law Coordinator, Municipal Law Unit  
1350 Main Street, 4<sup>th</sup> Floor  
Springfield, MA 01103-1629  
(413) 784-1240, x 117

enc.

pc:

Town Counsel

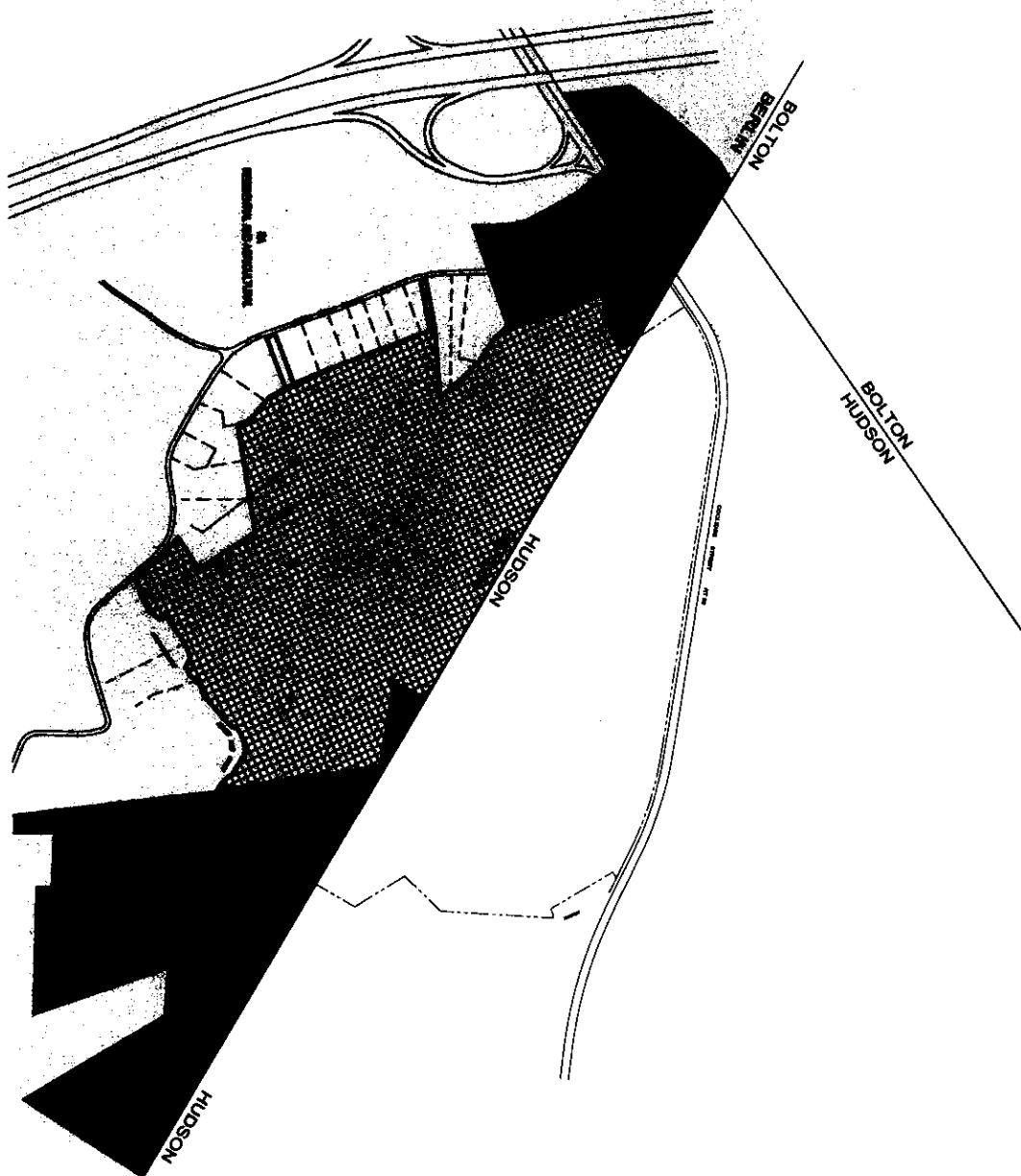
APPROVED

Attorney General's Office

By: *Kelli G. Duran*

Date: *08.05.08*

Art. *2* Town Meeting Date *5.14.08*



A TRUE COPY  
 Attest: *Elaine E. Sallis*  
 Town Clerk of Berlin

- ZONING LEGEND**
- TOWN OF BERLIN
  - ARC-AGRICULTURAL / RECREATIONAL / CONSERVATION
  - C - COMMERCIAL
  - RA - RESIDENTIAL AND AGRICULTURAL
  - AREA OF HIGHWAY SHOPPING CENTER OVERLAY DISTRICT

COMPLIANT  
 STATE OF NEW JERSEY  
 DEPARTMENT OF TREASURY AND BUREAU OF REVENUE  
 DH

Highway Shopping Center Overlay District Plan

LAND AND COMMONS

REF LETTER R

0 125 250 500

GRAPHIC SCALE  
 1" = 250'

APPROVED

Attorney General's Office  
By: *Kelli G. Grogan*  
Date: *08.05.08*  
Art. *2* Town Meeting Date *5.14.08*

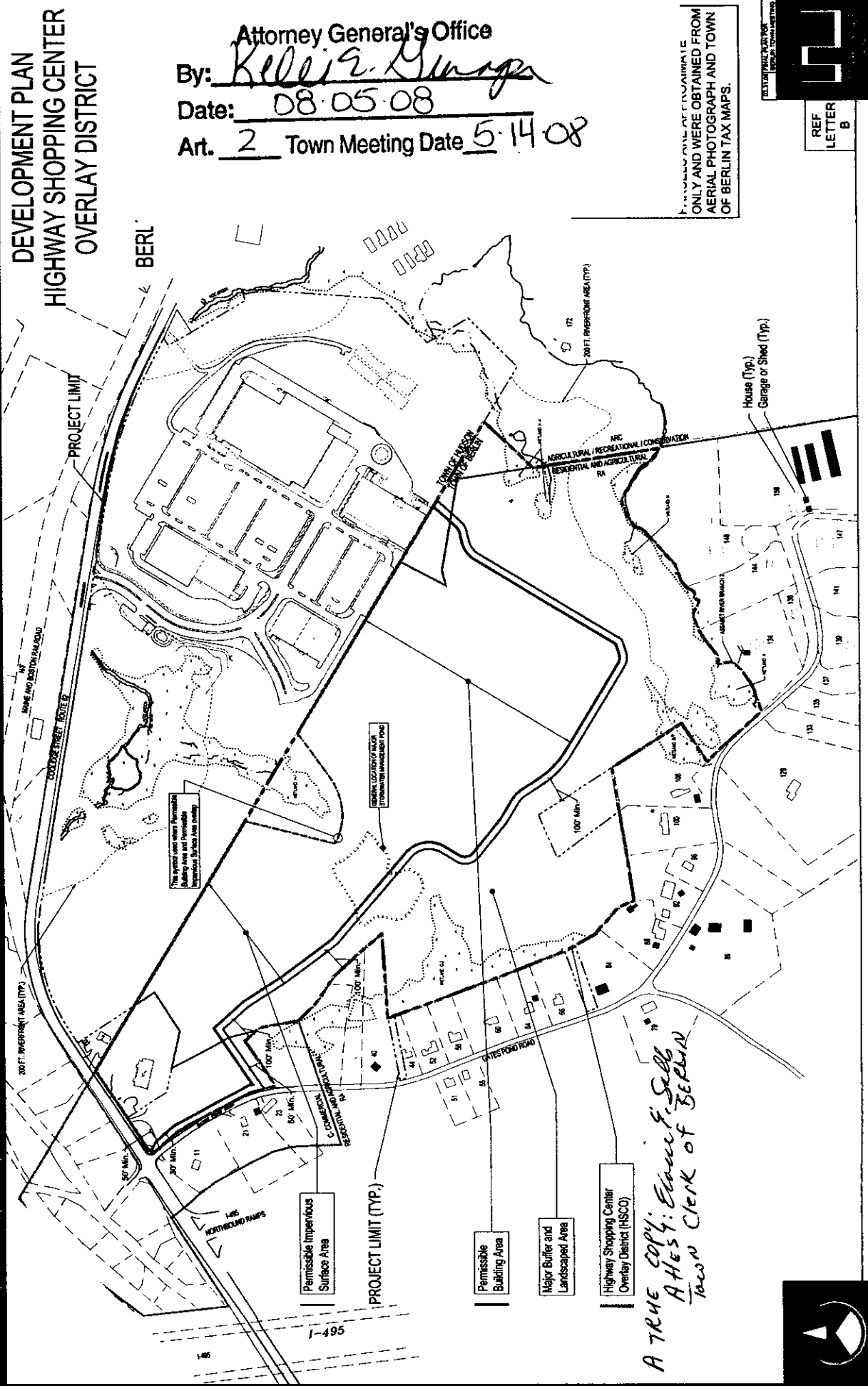
THIS MAP IS AVAILABLE ONLY AND WERE OBTAINED FROM AERIAL PHOTOGRAPH AND TOWN OF BERLIN TAX MAPS.

BERLIN TOWN ENGINEER

REF LETTER B

# HIGHLAND COMMONS

## Development Plan for Highway Shopping Center



A TRUE COPY: *Elaine F. Sebb*  
Attest: *Elaine F. Sebb*  
TOWN CLERK OF BERLIN

ATTEST: WORC. Anthony J. Vignotti, Registrar