MEMORANDUM

TO: Town of East Haddam Planning & Zoning Commission (Via Email: landuse@easthaddam.org and Regular Mail)
James Ventres, Land Use Administrator/Zoning Enforcement (Via Email: JVentres@easthaddam.org)

FROM: Michael Feldman, Feldman, Perlstein & Greene, LLC
Mark Altermatt, Law Offices of David G. Hill & Associates

DATE: September 8, 2021

RE: The Lofts At Black Birch: Zoning Application (App. No. 21-10)

On July 27, 2021, the East Haddam Planning & Zoning Commission held a hearing on Application #21-10, "1 Banner Road, The Lofts at Black Birch, LLC Site Plan Review." At that time, various materials were submitted on behalf of the applicant, including: (a) a July 22, 2021 letter by Attorney William W. Ward of Ackerly & Ward and, (b) a July 22, 2021 Hinckley, Allen & Snyder memorandum which, we submit, erroneously states that the "current structure of the condominium documents . . . does not prevent or otherwise impact the development of the former Community Center building." We are writing in response as counsel for Banner Estates Association, Inc. (the association of unit owners for Banner Estates).

Standing.

The Association and unit owners at Banner Estates have a direct and vested interest in this common interest community, which includes the community center. Accordingly, the Association has standing to be heard on matters directly affecting its interest in the property.

The Commission has declined to schedule a public hearing on the Site Plan Review. Nonetheless, because the Commission has accepted materials from the applicant's counsel addressing legal issues relevant to the Commission's ultimate decision, it seems appropriate that it accept this letter addressing those same legal issues.

There is ongoing litigation between the developer of Banner Estates and the Banner Estates Association, Inc. which asserts issues directly related to the permitted use and occupancy of the community center.

Defects in the "25th Amendment".

One of the issues in dispute is the legality, and therefore the effect, of the developer's unilateral 2019 amendment to the Banner Estates Declaration. The Declaration is the governing document of this community; it controls and limits the development rights. The developer apparently recognized that the Declaration did not allow for the community center to be turned into residential apartments. So it unilaterally and, in our view, illegally attempted to amend the Declaration (the 25th Amendment). That amendment purports to permit the developer to convert the community center into apartments (it is noted that the pending application calls for 20 apartments whereas the amendment to the Declaration – even were it valid -- allows for only 16 apartments).

There are many specific legal defects in the so called 25th Amendment which are spelled out in the Association's lawsuit in which (Count III) the Association seeks a declaratory judgment as to the 25th Amendment. One defect is that the 25th Amendment purports to create "unit D as a residential home site unit." But a residential home site unit

is defined as those "portions of the . . . community designated for separate ownership or occupancy . . . and restricted to residential use and occupancy by single families." The so called 25th Amendment violates this definition by creating unit D as a single unit that contains sixteen apartments (now expanded under the application to twenty) instead of single family occupancy per unit as required under the Declaration.

Encroachment on Unit Owner Parking.

The submitted plan also proposes to turn a visitors' parking lot designated for all unit owners into parking spaces for the exclusive use of the future apartment dwellers (further exacerbating a parking shortage caused by the developer's failure to build the requisite number of parking spaces as required under the Declaration). The attached plan (a schedule to the Declaration prepared on behalf of the declarant) shows an area for guest parking for at least 8 spaces that is within the limit line for the Phase I Council Area. We understand the current application brazenly seeks to misappropriate those spaces from the existing Phase I owners for the exclusive use of future tenants.

There is considerable dispute as to the assertions in Attorney Ward's penultimate paragraph that "...the community center area that is the subject of the present zoning application is separate and distinct from the other parts that comprise Banner Estates. Moreover, the development rights for the community center are currently, and have always been, reserved in the Lofts at Black Birch LLC and its predecessors." Attorney Ward cannot dispute that the community center is part of the Banner Estate common interest community and, together with the development rights, are subject to the Declaration and provisions of the Common Interest Ownership Act. Contrary to Attorney Ward's statement, the community center is not "separate and distinct" but has always

been an integral part of the Banner Lodge community and the visitors' parking lot has not "always been reserved in the Lofts at Black Birch LLC and its predecessors" but instead is designated to the Association for use by unit owners and their guests. In short, the Commission is being asked to approve a site plan that ignores pending legal claims that, if successful, would preclude the development of the community center into apartments. It is likewise being asked to approve a parking plan on property the developer had previously allocated to the Phase I Council.

Developer's Express Warranties Relating to the Community Center.

The developer aggressively marketed units in the community with explicit promises to their buyers relating to the community center. Specifically, in promotional materials it warranted that there would be a "spacious community center," a "community center with function rooms and pool tables," and a "membership full fitness center with sauna and locker room." Allowing the development to proceed with apartments would undermine these promises and forever foreclose the use of the community center for its promised, advertised and intended purpose.

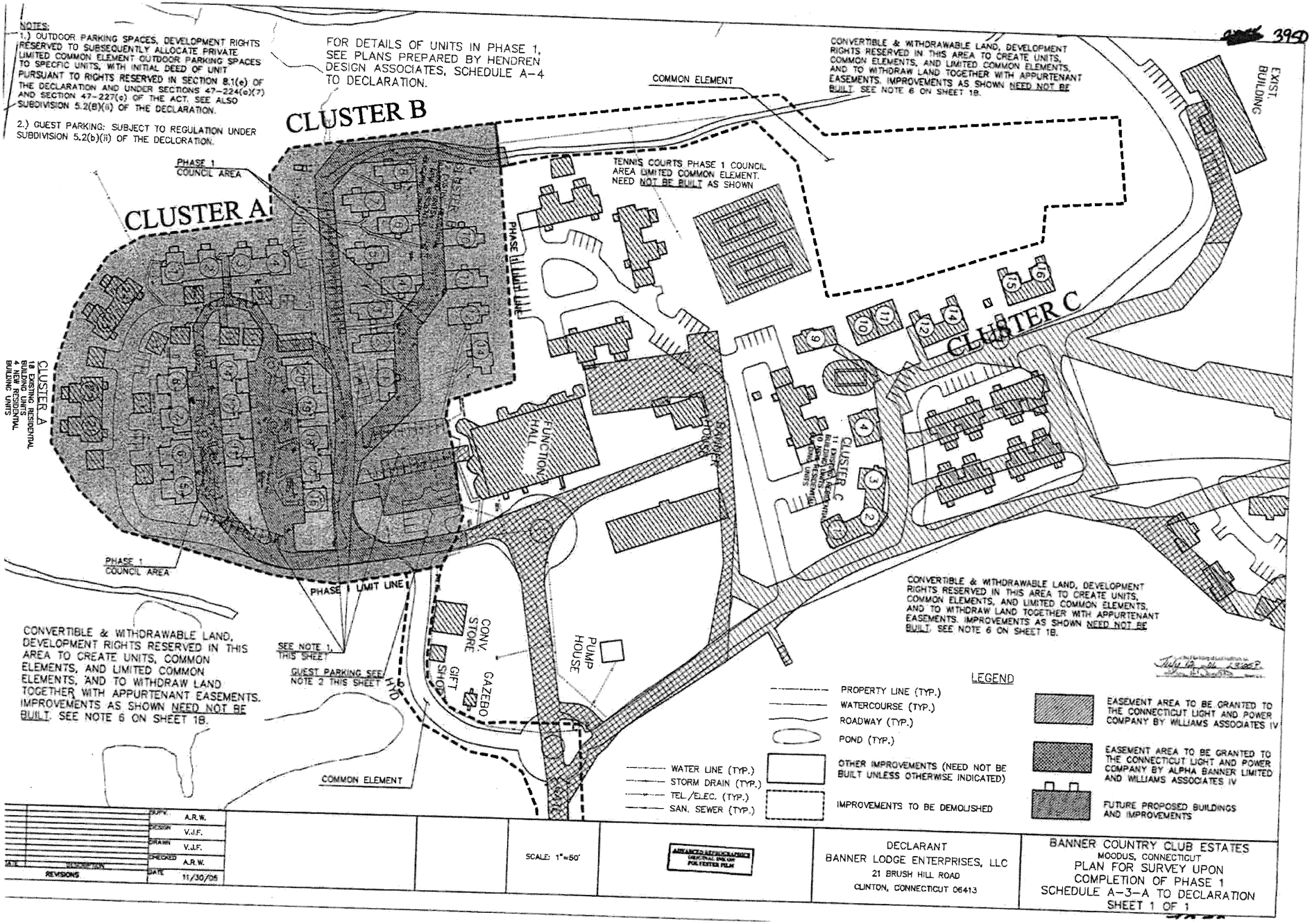
Conclusion.

As discussed above, many of the issues in the lawsuit deal directly with the use and occupancy of the community center. The developer's present application appears to be an end run around issues raised and that need to be determined in the Superior Court. Until such time as the Superior Court has an opportunity to address these important issues, we believe it would be prudent to defer consideration of the present application.

Thank you for your consideration of these concerns and please do not hesitate to contact us should you have questions or require further information.

Enclosure

cc: Banner Board (Via Email)
William Ward, Esq. (Via Email)
Hinckley, Allen & Snyder (Via Regular Mail)
Thomas Lambert, Esq. (Via Email)



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		DESIGN V.J.F.				BANNER COUNTRY CLUB ESTATES MOODUS, CONNECTICUT PLAN FOR SURVEY UPON COMPLETION OF PHASE 1 SCHEDULE A-3-A TO DECLARATION SHEET 1 OF 1
		DRAWN V.J.F.				
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