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August 31, 2022

**VIA EMAIL:** landuse@warner.nh.us

Ben Frost, Chairman  
Warner Planning Board  
c/o Janice Loz  
5 East Main Street  
PO Box 265  
Warner NH 03278  
landuse@warner.nh.us

**Re: Comet LLC/ Workforce Housing Site Plan Application**

Dear Warner Planning Board:

In connection with its Site Plan Application, Comet LLC submits the attached documents explaining its position concerning the economic viability of the proposed workforce housing development. The proposed development would include 12 affordable workforce housing units out of 24 total units, for a term of 30 years. In addition, for the first 10 years of the development, there will be three (3) additional units that meet the workforce housing requirements. Comet LLC submits that requiring 24 units of workforce housing would not be legal under New Hampshire law.

Comet LLC's August 30, 2022, letter to Attorney Courtney explains its legal position regarding the Planning Board's discussion about whether the proposed workforce housing development must have 24 workforce housing units. The attached affidavit from Mike Quinn, the manager of Comet LLC, illustrates that requiring 24 workforce housing units would not be economically viable.

Thank you for your prompt attention to this matter and do not hesitate to reach out to me or Jamie Hage with any questions. We look forward to the Planning Board meeting tonight at 7:00 pm to address the Board's concerns.

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INSIGHT MATTERS

Ben Frost, Chairman  
Warner Planning Board  
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Very truly yours,

RATH, YOUNG AND PIGNATELLI, P.C.  
ATTORNEYS-AT-LAW

By: /s/ Cassandra Moran  
Cassandra Moran, Esq.

Cc. Attorney Courtney  
Enclosure

# **Exhibit 1**

**Letter to Attorney Courtney**

**Jamie Hage, Esquire**

Attorney-at-Law  
JNH@rathlaw.com  
603-410- 4324

August 30, 2022

**VIA Email:** [mcourtney@upton-hatfield.com](mailto:mcourtney@upton-hatfield.com)

Michael Courtney, Esq.  
Town Counsel for Town of Warner  
10 Centre Street PO Box 1090  
Concord, New Hampshire, 03301  
mcourtney@uptonhatfield.com

**Re: Comet LLC/ Workforce Housing Site Plan Application**

Dear Warner Planning Board:

Please be advised that this office represents Comet LLC regarding a pending site plan to build workforce housing in a commercial district C-1 near I-89 exit 9 in Warner. An application for a special exception, was submitted to build a 24-unit apartment building for affordable workforce housing. The hearing on said application was held before the Zoning Board of Adjustment (the “ZBA”) at its meeting on August 10, 2022. On August 15, 2022, the ZBA voted 4-1 to grant a special exception for the project. The ZBA made this decision in light of the express intent of the applicant’s statement, which promised to build no less than four and no more than fifteen workforce housing units.

On August 29, 2022, the Warner Planning Board (the “Board”) continued its hearing on Comet LLC’s site plan application to speak with counsel about the requirements of the Warner Zoning Ordinance as it relates to workforce housing. Comet LLC submits that the Warner Town Ordinance does not require 100% workforce housing and that such a requirement would be contrary to state law.

Workforce housing fulfills the important need of providing affordable housing for members of the community. *See* RSA 674:58; RSA 674:59; RSA 672:1, III-e. Importantly, “[a]ll citizens of the state benefit from a balanced supply of housing which is affordable to persons and families of low and moderate income.” RSA 672:1, III-e New Hampshire law likewise recognizes that the “[e]stablishment of housing, which is decent, safe, sanitary and affordable to low- and moderate-income persons and families is in the best interests of each community and the state of New Hampshire and serves a vital public need.” *Id.* Accordingly, the “[o]pportunity for development of such housing shall not be prohibited or unreasonably discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.” *Id.*

To encourage the development of affordable housing, RSA 674:59 requires that all municipalities that adopt land use ordinances and regulations “**shall provide reasonable and realistic opportunities for the development of workforce housing.**” (emphasis added). Additionally, RSA 674:58, III specifies that such “reasonable and realistic opportunities” must include opportunities for developments to be economically viable. Accordingly, the “[o]pportunity for development of such housing shall not be prohibited or unreasonably discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.” RSA 672:1, III(e) (cited by RSA 674:58, III).

Accordingly, the Planning Board may impose a certain proportion of workforce housing in the development, but it may not impose a ratio that would not be economically viable for the developer. *See* RSA 674:58-59; *Ten Harris Road, LLC v. Town of Windham*, PBA-2021-04, at 4-7 (Sept. 15, 2021); *see also* RSA 679:5, III (giving the Housing Appeals Board power to determine appeals where “the local land use board has imposed conditions of approval that render the proposal economically unviable . . .”). Requiring that all units in a workforce housing development be workforce housing would make the construction and operation of workforce housing developments economically unviable and thus unlawful. *See Ten Harris Road, LLC*, PBA-2021-04, at 5, 7 (noting that requiring 50% of units in a workforce housing development to be workforce housing may be economically unviable in some communities).

If the Planning Board is correct that workforce housing must make up 100% of a development in perpetuity, it would be impossible for any developer to construct workforce housing, which by its definition is well below market rates. Unless the construction is fully subsidized, it would not be a profitable or viable project for any developer.

To be economically viable, the project needs to include a mix of workforce and market-rate housing of varying periods of duration. Accordingly, Comet LLC has proposed that the development include up to 15 workforce housing units. This meets the Town of Warner Zoning requirements and also meets the State requirement to qualify for the Invest NH grant for workforce housing. Comet LLC submits that it satisfies the required ratio of workforce and market-rate units under the provisions for workforce housing under state and local law. Requiring a greater proportion of workforce housing would be economically unviable for Comet LLC, and thus unlawful under New Hampshire law.

Other municipalities have acknowledged the importance of workforce housing by allowing workforce housing developments to include market-rate units. For example, Windham Zoning Ordinance § 619.7.3.3 states that “In a Workforce Housing Development where there are both market-rate and workforce housing units, a minimum of 50% of the dwellings must qualify as workforce housing . . . .” Bedford requires that only 25% of units in a workforce housing development qualify as workforce housing. Bedford Zoning **Ordinance § 276-21.B(4)(a)**.

Although it does not give a ratio of workforce and market rate housing, Warner’s zoning ordinance also contemplates these workforce housing developments. *See* Article XIV-A, C-E. The developer of this workforce housing project, Comet LLC, is committed to providing 12 affordable workforce housing units out of 24 total

units, for a term of 30 years. In addition, for the first 10 years of the development, there will be three (3) additional units that meet the workforce housing requirements.

The Planning Board argues that the distinction in the Use Table of the Zoning Ordinance between “multi-family housing” and “multi-family workforce housing” creates the need for 100% workforce housing. However, this distinction does not necessitate this conclusion. Multi-family units containing workforce housing need to be distinct from other multi-family dwellings because of the specific restrictions that exist in a unit with workforce and market-rate units. Such developments still must comply with the restrictions of workforce housing and are thus not traditional multi-family developments. For example, Article XIV-A.D(1) requires that “dwelling units qualifying as workforce housing shall be made available for occupancy on approximately the same schedule as a project’s market rate housing units, except that the certificates of occupancy for the last 10 percent of the market rate units shall be withheld until certificates of occupancy have been issued for all the workforce housing units.” This section also acknowledges that “[t]he first third of the market rate housing units may be completed first to assist in the viability of the project.” To say that a development that is contemplated by that section is not workforce housing does not make sense in light of the ordinance as a whole because the development must comply with the Article XIV-A, and RSA 674:58 through RSA 674:61. Additionally, “Market Rate Housing” is defined as “any dwelling unit within a development, whether the unit is to be owner or renter occupied, this is intended to be available for sale or occupancy at the prevailing market rate without restriction.” Article XIV-A.B. This definition, which is included in the Workforce Housing section of the ordinance, does not specify that market rate housing cannot be part of a workforce housing development. Moreover, Article WZO XIV-A.C(3) states that in light of the density bonus, “[t]he combined total of all workforce housing types must equal a 15 percent designation of workforce dwelling units, at a minimum.” If the ordinance did not contemplate workforce multifamily housing to include market rate units, it would not specify what percentage of units would need to qualify as workforce housing.

Thus, in order to meet the mandatory standard of providing “reasonable and realistic opportunities” for the development of workforce housing, the planning board must consider the collective impact of all such regulations on the workforce development being proposed. Conditions imposed by the planning board that make construction unprofitable, or that result in considerable delay to the project’s development or completion may result in adding costs that make the development economically unviable. Such action by the planning board would be contrary to the express mandatory workforce housing statutory requirements. Likewise, so as not to be unduly burdensome, the workforce housing statute allows the zoning or planning board to waive certain requirements. Pursuant to Article XIV-A, it is recognized by the Town that there are situations in which normal Site Plan review “may be waived without sacrificing public health, safety and welfare so long as proper safeguards are maintained.” Article XIV-A pp 26-27.

If the Planning Board continues to articulate an interpretation of its ordinance that is patently unreasonable and against the express mandate of RSA 674:58 through RSA 674:61, I will have to discuss next steps with my client, including but not limited to appealing the Board’s decision.



Michael Courtney  
Town of Warner  
August 30, 2022  
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Thank you for your prompt attention to this matter. If possible, I would like to have a discussion with you before the board takes any action tomorrow night. Please let me know a good time to discuss this with you tomorrow.

Very truly yours,

RATH, YOUNG AND PIGNATELLI, P.C.  
ATTORNEYS-AT-LAW

By: Jamie N. Hage  
Jamie N. Hage, Esq.

cc. Comet LLC, Mike Quinn, Adam Quinn

# **Exhibit 2**

**Affidavit of Mike Quinn**

**AFFIDAVIT OF MIKE QUINN**

1. Mike Quinn, duly sworn states as follows.
2. I am the Manager of Comet LLC, a New Hampshire limited liability company.
3. Comet LLC is interested in constructing a 24-unit workforce housing development in Warner, New Hampshire that consists of 15 workforce housing rental units and 9 market rate rental units.
4. To require 24 workforce housing units in perpetuity is economically unviable and cannot be accomplished.
5. I have personal knowledge of the costs and expenses of this development, and based on that, the project must include a mix of workforce housing units and market rate units to be economically viable.
6. The total ongoing monthly projected cost for the project without a \$3 million grant from InvestNH would be \$63,578 per month. Exhibit A.
7. The total ongoing monthly projected cost for the project with a \$3 million grant from InvestNH would be \$47,473 per month. Exhibit B.
8. If all 24 units qualified as workforce housing as defined in RSA 674:58, IV and Warner Zoning Ordinance Article XIV-A.B(2), the total projected monthly rental income, including a \$200 monthly utility allowance, would be \$27,714. Exhibit C.
9. A workforce housing development with 24 workforce housing units would lead to a \$35,864 loss per month without an InvestNH grant for Comet LLC. With an InvestNH grant, a workforce housing development with 24 workforce housing units would lead to a \$19,759 monthly loss for Comet LLC. Exhibit C.
10. If 15 units qualified as workforce housing as defined in RSA 674:58, IV and Warner Zoning Ordinance Article XIV-A.B(2), the total projected monthly rental income,

including a \$200 monthly utility allowance for the workforce housing units, would be \$37,524.

Exhibit D.

11. A workforce housing development with 15 workforce housing units would lead to a \$26,054 loss per month without an InvestNH grant for Comet LLC. With an InvestNH grant, a workforce housing development with 24 workforce housing units would lead to a \$9,949 monthly loss for Comet LLC. Exhibit C.

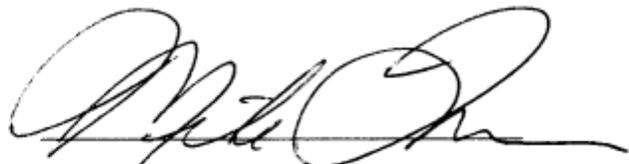
Further this affiant sayeth naught.

STATE OF NEW HAMPSHIRE

COUNTY OF MERRIMACK

I Mike Quinn, upon oath, depose and state, that I have read the contents of the foregoing Affidavit, and the contents thereof are true and correct to the best of my knowledge, information, and belief. Subscribed and sworn to under the pains and penalties of perjury.

Date: August 31<sup>st</sup>, 2022



Mike Quinn

# Exhibit A

## Warner NH Workforce Ongoing Projected Housing Expenses without InvestNH Grant

| Description        | Cost/Year | Cost/Month | Note              |
|--------------------|-----------|------------|-------------------|
| 1. R.E. Taxes:     | \$180,000 | \$15,000   | 6MM @\$30/1000    |
| 2. Bank Note:      | \$450,936 | \$37,578   | 7MM @5%/30 yrs.   |
| 3. Mgt. Fee        | \$50,000  | \$4,167    | admin/supervision |
| 4. Insurance       | \$30,000  | \$2,500    |                   |
| 5. Water/Sewer     | \$10,000  | \$833      |                   |
| 6. Snow Plowing    | \$20,000  | \$1,667    |                   |
| 7. Landscaping     | \$10,000  | \$833      |                   |
| 8. Maintenance     | \$10,000  | \$833      |                   |
| 9. Exterior Lights | \$2,000   | \$167      |                   |
| Total:             | \$762,936 | \$63,578   |                   |

# Exhibit B

## Warner NH Workforce Ongoing Projected Housing Expenses Including InvestNH 3MM Grant

| Description        | Cost/Year | Cost/Month | Note              |
|--------------------|-----------|------------|-------------------|
| 1. R.E. Taxes:     | \$180,000 | \$15,000   | 6MM @\$30/1000    |
| 2. Bank Note:      | \$257,676 | \$21,473   | 4MM @5%/30 yrs.   |
| 3. Mgt. Fee        | \$50,000  | \$4,167    | admin/supervision |
| 4. Insurance       | \$30,000  | \$2,500    |                   |
| 5. Water/Sewer     | \$10,000  | \$833      |                   |
| 6. Snow Plowing    | \$20,000  | \$1,667    |                   |
| 7. Landscaping     | \$10,000  | \$833      |                   |
| 8. Maintenance     | \$10,000  | \$833      |                   |
| 9. Exterior Lights | \$2,000   | \$167      |                   |
| Total:             | \$569,676 | \$47,473   |                   |

# Exhibit C

## Comet LLC Workforce Housing Monthly Income and Expenses with and without InvestNH Grant

### Monthly Expenses:

Monthly Expenses with InvestNH Grant: \$47,473.00/month

Monthly Expenses without InvestNH Grant: \$63,578.00/month

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### Income:

All 24 Units at 60% AMI (includes \$200 for utilities): \$27,714/month

15 Units at 60% AMI (includes \$200 for utilities)

And 9 Units at Market Rate: \$37,524/month

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# Exhibit D

## Warner NH Workforce Housing Projected Income

Merrimack County, NH

15 Units @ 60% AMI

9 Units @ 100% AMI (Market Rate)

24 Total Units.

Note: All affordable rents include an allowance of \$200 for Utilities.

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### # Units at

| <u>60% AMI</u> | <u>1 bed</u> | <u>2 bed</u> | <u>monthly rent</u> | <u>total monthly income</u> |
|----------------|--------------|--------------|---------------------|-----------------------------|
|----------------|--------------|--------------|---------------------|-----------------------------|

|   |   |  |       |         |
|---|---|--|-------|---------|
| 3 | X |  | \$977 | \$2,931 |
|---|---|--|-------|---------|

|    |  |   |         |          |
|----|--|---|---------|----------|
| 12 |  | X | \$1,214 | \$14,568 |
|----|--|---|---------|----------|

Total: 15 Units

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### # Units at

| <u>100% AMI</u> | <u>1 bed</u> | <u>2 bed</u> | <u>monthly rent</u> | <u>total monthly income</u> |
|-----------------|--------------|--------------|---------------------|-----------------------------|
|-----------------|--------------|--------------|---------------------|-----------------------------|

|   |   |  |         |         |
|---|---|--|---------|---------|
| 3 | X |  | \$1,963 | \$5,889 |
|---|---|--|---------|---------|

|   |  |   |         |          |
|---|--|---|---------|----------|
| 6 |  | X | \$2,356 | \$14,136 |
|---|--|---|---------|----------|

Total 9 Units

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|   |  |  |          |
|---|--|--|----------|
| Total Monthly Income from all 24 Units: |  |  | \$37,524 |
|---|--|--|----------|

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